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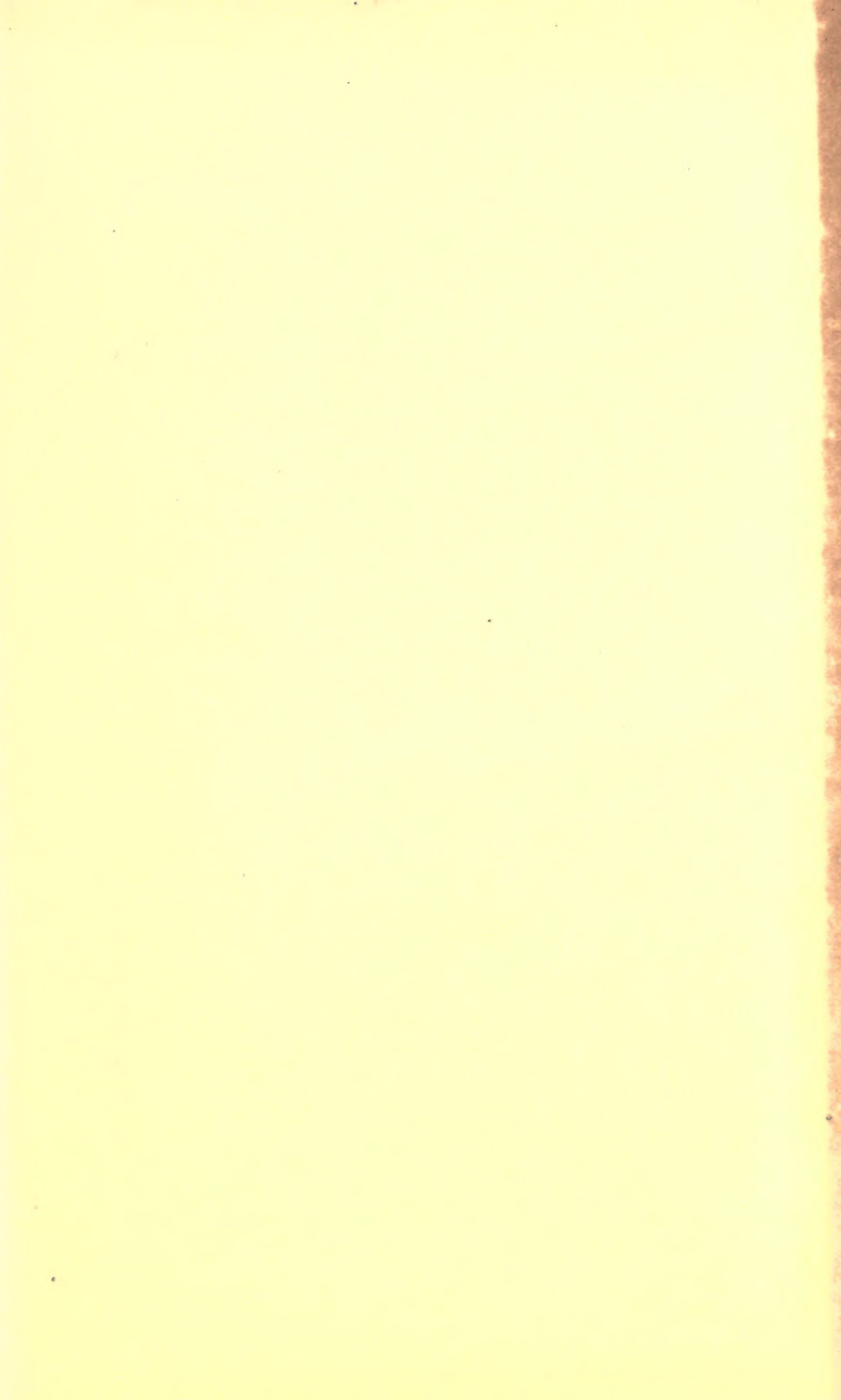
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THE  
**AMERICAN STATE REPORTS,**

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN  
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,  
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XXXIII.

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# AMERICAN STATE REPORTS.

VOL. XXXIII.

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VOL. XXXIII.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**WISCONSIN.**

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**VALIN v. MILWAUKEE AND NORTHERN R. R. Co.**

[82 WISCONSIN, 1.]

**CONTRIBUTORY NEGLIGENCE, QUESTION OF, SHOULD BE SUBMITTED TO JURY,**

**WHEN.** — The proof of contributory negligence must be clear and decisive, not leaving room for impartial and unbiased minds to arrive at any other conclusion, in order to warrant any absolute direction to the jury on that ground. When, therefore, plaintiff's intestate is killed at a crossing by a locomotive of the defendant under the following circumstances, the question of the contributory negligence of the deceased should be submitted to the jury, and it is error to direct a verdict for the defendant. The locomotive with only a tender and snow pilot attached was running north at a high rate of speed; there was no regular train due at the time; the deceased, having just unhitched his horses from a sled, at a point about thirty feet east of the crossing, was driving them westward across the track, his view to the south being greatly if not entirely obstructed by piles of logs and other obstructions, until he came within fifteen feet of the track, when the forefeet of his near horse were over the rail. The day was cold, windy, and blustery; it was snowing some and the snow was drifting, the wind blowing from the north-east; the locomotive approached with much less noise than an ordinary train would make, and those in charge of it gave no signal by bell or whistle; the deceased, when eight or nine feet from the track, saw the locomotive one hundred and sixty-four feet away, but had no time for deliberation or to observe its unusually high rate of speed, and was struck by it before he could get across the track.

**CONTRIBUTORY NEGLIGENCE NOT CHARGEABLE TO ONE CALLED TO ACT IN EMERGENCY, WHEN.** — Contributory negligence is not always chargeable upon the failure to exercise the greatest prudence or the best of judgment in cases where a person is required to act suddenly or in an emergency.

**NEGLECT OF DEFENDANT QUESTION FOR JURY, THOUGH CONTRIBUTORY NEGLIGENCE ON PLAINTIFF'S PART, WHEN.** — In an action against a railroad company to recover damages for the death of the plaintiff's intestate, the negligence of the deceased will not enable the company to escape  
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liability if the act which caused the injury was done by the defendant after it discovered his negligence, and it could have avoided the injury by the exercise of reasonable care and prudence; and if the deceased was not a trespasser, such supervening negligence need not be gross in order to authorize a recovery. When, therefore, the engineer of a locomotive by which the plaintiff's intestate was killed at a railroad crossing testifies that, when five hundred and forty feet from the crossing he saw the deceased and his team, the heads of the horses being then within eight or nine feet of the track; that they were headed as if they were going to cross, but he did not think they would cross; that they were then standing still, but when he got within a few yards of them the deceased made a dive to go across; that when he saw them he did not think it prudent to sound the whistle for fear it would frighten the horses onto the right of way; that after striking them he reversed the engine and stopped the locomotive within three hundred and fifty feet; and another intelligent witness, who was at the time standing near the scene of the accident, testifies that the deceased and his horses did not stop at any time after they started from a point about thirty feet from the track until they were struck by the locomotive, — the case should be submitted to the jury, and it is error to direct a verdict for the defendant.

ACTION brought by Louis Valin, as administrator of the estate of Narcisse Craite, to recover from the defendant damages for the killing of his intestate at a crossing by one of its locomotives. At the point where the accident happened the defendant's road runs due north and south. The crossing at which it occurred was constructed and maintained by the company, and was in general use by Craite and others at all hours in passing and repassing about their lawful business, with the knowledge and acquiescence of the defendant. The locomotive was going north at the time the accident happened. Other facts necessary to an understanding of the case are stated in the opinion.

*Ellis, Greene, and Merrill, and E. H. Ellis, for the appellant.*

*Charles E. Vroman, for the respondent.*

PINNEY, J. The evidence of negligence on the part of the company, to say the least, was quite sufficient to require that the case should be submitted to the jury, unless the alleged negligence of the deceased contributing to his death was so clearly and conclusively proved as to justify the court in taking the case from the jury and directing a verdict for the defendant; and the vital question is whether, under the peculiar circumstances of the case, the alleged negligence of the deceased is one of fact for the jury or of law for the court.

The rule is well settled that, in order to justify the court in



taking a case from the jury, the question must be wholly one of law; for if it depends upon controverted facts, upon what facts the testimony establishes, the credibility of witnesses, or what inferences or conclusions ought to be drawn from the testimony, then it is clearly a question to be submitted to the jury. If the jury arrive at a conclusion wholly unwarranted by the evidence, or which may be imputed to passion, sympathy, or prejudice, so that upon the whole case the court can see that justice has not been done, then for these or kindred reasons the court, in the exercise of sound discretion, may set aside the verdict and grant a new trial; but the giving of an absolute direction to the jury to find a verdict is a matter of legal right, founded on facts positively established. If the case involves a fair question of fact for argument, it is for the jury. Negligence is inferred as a conclusion from the facts and circumstances of the particular case, instead of being a fact in and of itself; and inasmuch as each case depends so much upon its peculiar combination of facts and circumstances, and the inferences to be drawn from them, a decision in it cannot be considered as a precedent binding or controlling in other cases. "Negligence is almost always to be deduced as an inference of fact from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their weight and force considered. In such cases, if unbiased men would differ as to such inferences, then they cannot be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement which is consistent throughout." Per Cassoday, J., in *Hill v. Fond du Lac*, 56 Wis. 242, cited and confirmed in *Nelson v. Chicago etc. R'y Co.*, 60 Wis. 323. In the case last mentioned it was held that "it is only when the inference of negligence, or the absence of it, from the undisputed facts proved, is inevitable, that the court will direct a verdict. In all cases in which such inference is in doubt, giving to the testimony the construction most favorable to the party charged therewith, the question of negligence is for the jury": *Langhoff v. Milwaukee etc. R'y Co.*, 19 Wis. 496; *Nelson v. Chicago etc. R'y Co.*, 60 Wis. 320, and cases there cited; *Kaples v. Orth*, 61 Wis. 533; *Hoye v. Chicago etc. R'y Co.*, 62 Wis. 666; *Hoye v. Chicago etc. R'y Co.*, 67 Wis. 14, 15; *Seefeld v. Chicago etc. R. R. Co.*, 70 Wis. 216; 5 Am. St. Rep. 168; *Winstanley v. Chicago etc. R'y Co.*, 72 Wis. 376; *Duams v. Chicago etc. R'y Co.*, 72 Wis.

523; 7 Am. St. Rep. 879; *Abbot v. Dwinnell*, 74 Wis. 525; and many other cases in this court might be cited to the same effect.

It is equally well settled by adjudicated cases that the burden of proof of contributory negligence is ordinarily on the defendant: *Randall v. North Western Tel. Co.*, 54 Wis. 147; 41 Am. Rep. 17; *Kelly v. Chicago etc. R'y Co.*, 60 Wis. 482; *Bessex v. Chicago etc. R'y Co.*, 45 Wis. 483; *Railroad Co. v. Gladmon*, 15 Wall. 401; and in any event, however it may appear, the proof of contributory negligence must be clear and decisive, not leaving room for impartial and unbiased minds to arrive at any other conclusion, in order to warrant any absolute direction to the jury on that ground.

In view of these well-established principles, we are to consider whether the facts and circumstances disclosed in the testimony warranted the direction in question.

The defendant in support of the ruling of the circuit court, relies: 1. Upon the general rule, often repeated in cases of this character, that one approaching a railroad crossing, who may by looking have a timely view of an approaching train, is bound to look and listen for its approach before attempting to cross the track, and that a failure to do so is negligence; 2. That immediately before the locomotive reached the crossing the deceased saw it, while yet in the position of safety, but rashly and recklessly rushed in before it, and in attempting to cross the track, lost his life.

The particular facts and circumstances of the cases seem to modify most materially the view taken by respondent of the conduct of the deceased. On the day in question the deceased was engaged in drawing logs with his team, and unloading them on the south side of the logging road, near the crossing, in piles extending along the bank of the railroad in a southern direction, as already mentioned. He had been for about three weeks similarly engaged, and was no doubt familiar with the time of passage of day trains during his usual working hours. The day was a cold, windy, blustering day. One witness describes it as a dark, cold day. It was snowing some, and the snow was drifting, the wind blowing, as one witness said, from the northeast; and this was calculated to take away from Craite the sound of an approaching train from the south, or any signal of such by bell or whistle. The size and height of the pile of logs and stumps was such as to intercept and shut off any view of the approaching loco-

tive from him after he had unloaded his logs and driven around to a point on the lumber road about twenty-five or thirty feet from the track he was to cross, where he unhitched his horses from the sled in order to go over the crossing to the barn on the west side of the railroad. There is no evidence to show what observations, by way of looking and listening, he had taken up to this time; and as the road ran due south for nearly two miles, it is but fair to assume, in view of what he afterwards did, that he did not discover any evidence of danger.

There was no regular train going north or south at or about that time of day. The locomotive and tender with a snow pilot was passing most unexpectedly for some special purpose, probably to drive the drifted snow from the track. It was running at a rapid and indeed high rate of speed, as some witnesses testified. It ran through Maple Valley in that manner, a place three miles to the south, without making any signal by bell or whistle, and it made none of its approach to the crossing, as witnesses testify. Its approach was quite noiseless as compared with that of an ordinary train. Netzer, the witness who saw more of this unfortunate occurrence than any one now living, and who was on the western side of the track, and in a more favorable position to hear, considering the direction of the wind, than the deceased, says he could not hear it until it came within seven or eight rods of the crossing, although he saw it when 120 rods down the road. About that distance or more south of the crossing, it ran through a swamp, where for some distance the grade was about four or five feet below that on either side of the swamp; that the grade was upward from the swamp to the top of a small hill, through which there was a cut three or four feet deep, and thence there was a slight down grade for a distance of 540 feet to the crossing in question, where the cut almost wholly ceased, and the crossing was nearly on a level with the adjacent ground.

What Craite did or saw or heard while at the log pile unloading his logs no one pretends to know. He was in a position to see and hear an approaching locomotive as well as wind and snow and intervening obstacles already described would admit. It is fair to assume that he was properly observant, and looked and listened, and saw nothing to admonish him against taking his team across the track. From this time there is no living witness to speak of his acts, or tell of

what occurred, until death closed his lips against any explanation on his part of his conduct, except the engineer and Netzer, who stood at the time about sixty feet west of the crossing on the lumber road, and about eighty-five feet from where the deceased unhitched his team from the sled, and from whence he at once proceeded to drive his team over the crossing, standing behind them with the lines in his hands, which brought the horses between the deceased and Netzer, and necessarily interfered with Netzer's ability to accurately observe all he did.

Netzer was asked whether there were logs or other things to obstruct the view from the place where Craite unhitched his horses till he got to the railroad track, and he answered: "Yes; there were some logs lying all along. There were some cedar logs right there for a distance of four or five logs, with the snow and all, six or seven feet high. He was about five feet ten inches. He could see down the track for a small distance, — three or four hundred feet, — but that would be all, because the logs were piled close to the stump, six or seven feet high. There is a stump right close to the road where it crosses the railroad track. The pile of cedar logs did not extend east and west over twenty or twenty-five feet. The teamsters drove in there and rolled off their logs, turned around, and went for more. As they rolled them off they drove up there tolerably near the ditch, say four or five feet, and they unloaded right south there for ten or twelve rods. They had them piled, with snow and all that was there, about five, six, or seven feet high." He also said: "There were some other obstructions, — old logs lying all along the track, and stumps turned up, for fifty or sixty rods south, that had been hauled there. Standing within ten or fifteen feet of the rail, I should say, all a man could see would be the smoke-stack and smoke when the locomotive was down in that swamp. He took the tugs off and the neck-yoke, and started across, — kept going on; didn't go very fast. Came to the bridge over the ditch near the east rail, and the off horse drew off into the snow to the north, and the near one was on the off track, and when I saw the nigh horse he was ahead of the other, and he had his forefeet on the railroad track, and that is the last I saw of them. A little before the engine came up to him the snow was flying so I could not see what struck him." This witness saw the approaching locomotive when it was quite a long way off, and observed its progress.



He testified that Craite did not look for it until the engine was fifty or sixty feet away. Being asked where Craite was when he looked to see the engine, he said: "Well, he was behind the horses. I can't say. I wasn't on his side. The team was between me and the man. When I first noticed that he looked at the engine it was about fifty or sixty feet away. It was at the switch [164 feet south of the crossing]. The near horse's feet were but just over the east rail. He seemed to urge his horses. Heard him say 'Get up, go on;' and saw him shaking the lines. One horse got across. The other was killed, and thrown off on the east side of the track. Craite looked when within eight or ten feet of the track. I did not say a word to him. I saw the smoke of the engine when it was 120 rods away. I did not say a word to him. I supposed he was going to get across before the engine came along." Being asked if, after he got west of the obstructions, there was anything to prevent his looking right down the track before his horses stepped over the rail, he answered "Well, I don't remember now. Can't tell how far south you could see when fifteen feet from the track." Another witness said: "The logs were piled within five or six feet of the bank of the railroad."

The engineer said: "I first saw them [Craite and the horses] when we were on the top of the little hill, about five hundred feet from the crossing. The heads of the horses seemed to be quite a way back from the rail, say about eight feet, facing a little north, I guess they were. The young man was standing with the horses; seemed to be behind them. When I got within a few yards of him he tried to cross the track, and that is all I can say about it. I had no reason to think he was going to cross when I first came in sight of him. It seemed to me as if he was looking towards me when I first saw him. I didn't see any motion he made at the time. Was at the switch, or a little north when he started to go across [164 feet from the crossing]. When I came onto the brow of the hill, there was no occasion for an alarm whistle. It would have been a bad thing to give an alarm whistle, because they seemed to be standing still, and if I had, perhaps I would have frightened those horses into that right of way. When they attempted to cross I tried my best to shut off and reverse the engine. I took it coolly. When I first saw them, they were headed as if they were going to cross. They seemed to be standing still. Their heads were about eight feet from the

track. The man was not walking. I am not sure of that. No, sir; I did not notice that any effect on the engine was caused by the collision, any more than if it had struck nothing. I went on about three hundred or three hundred and fifty feet, when the engine stopped. When I saw him attempt to cross I shut off my engine, applied the air, and reversed her. I had not anything of that accomplished when the engine struck; just as it struck I was trying to shut off. I guess we had struck the man and horse when we commenced to try to reverse the engine. I reversed it afterwards." The witness Netzer, standing about thirty or forty feet away, said: "After the horses were unhitched from the sleigh, and started from the tongue, they moved right along till they got on the track. This man did not stop, he kept on behind the horses. When I first saw the engine coming Craite was just going behind the horses, taking hold of the lines, getting ready to come across."

A topographical survey and diagram of the *locus in quo* was made by the defendant several months after the accident, but not until the snow to the depth of about two feet had gone off and the logs were removed, showing lines of vision south from the logging road, from which it appeared that, from a point twenty feet east of the track, one could see south along it 853 feet; that from a point fifteen feet east of the rail an engine was visible 1,300 feet.

The distance the deceased had to travel from where he unhitched from the sled was a short one, only about thirty feet. There is no reason to think that when he had started he had had any notice of the approach of the locomotive, nothing to show that he had not been vigilant and careful; for full half of the distance to the rail the evidence shows that his view at that time was greatly, if not entirely, obstructed. When he had reached a point fifteen feet east of the rail, a distance of six or seven feet more would bring him to the point where the forefeet of his near horse were over the rail, and where Netzer says he did look, and then the locomotive was at the switchpost, 160 feet south of the crossing. Having had no previous knowledge of its approach, owing to the failure of those in charge to give any signal, he had a right to assume there was until then no danger, and he was no doubt greatly confused and alarmed when he did look, was so far committed to his attempt to cross, with his team partly on the track, that he had to choose between two alternatives without the means of



forming a safe or prudent judgment. He had no time to observe the unusually high rate of speed of the locomotive, no time for deliberation, and although Netzer says Craite did not look before then, in view of the fact that the team, as he says, was between him and Craite, he could not have known that he did not look before and without making any discovery. The distance was so very short, the time so very brief, when a few seconds counted in fact for everything, that it is difficult to say that the facts and circumstances clearly and decisively established negligence on the part of the deceased. With the locomotive at ten rods' distance, he might from his standpoint have thought he could succeed in crossing in safety, and that such would be the better course. Netzer, an intelligent witness, observing the occurrence, thought he would get across and uttered no warning, and but for the high rate of speed he might have succeeded. It would be most unjust to hold that he was chargeable with knowledge of the unusual rate of speed of the locomotive with neither means nor opportunity to judge of the fact, when no notice whatever was given (as we must assume in view of the state of the record) of its approach until the noise of its ordinary motion, to be heard only eight or ten rods, announced the fact.

Contributory negligence is not always chargeable upon the failure to exercise the greatest prudence or the best of judgment, in cases where a person is required to act suddenly or in an emergency: *McClain v. Brooklyn City R. R. Co.*, 116 N. Y. 470; *Pennsylvania R. R. Co. v. Werner*, 89 Pa. St. 59; *Duame v. Chicago etc. R'y Co.*, 72 Wis. 530-534; 7 Am. St. Rep. 879; *Gumz v. Chicago etc. R'y Co.*, 52 Wis. 676, 677. As said by Orton, J., in *Duame v. Chicago etc. R'y Co.*, 72 Wis. 530-534; 7 Am. St. Rep. 879: "If, by the negligence or omission of those in charge of the train, the plaintiff's vigilance was allayed, they are not to impute the consequences of their acts to his want of vigilance, and, if their acts brought him within the boundaries of peril, they must answer for it": *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. St. 71, 72; 78 Am. Dec. 322; *Hahn v. Chicago etc. R'y Co.*, 78 Wis. 396; *Abbot v. Dwinell*, 74 Wis. 514; *Ernst v. Hudson Riv. R. R. Co.*, 35 N. Y. 35; 90 Am. Dec. 761. That the deceased was just entering upon the verge of manhood, with the instinct of self-preservation strong within him, and not likely rashly to encounter deadly peril or great personal danger, is a circumstance not without its weight, in such a combination of facts and circumstances,

to repel the imputation of negligence. The fact that he saw the locomotive when it was 164 feet distant from him, if considered by itself and not qualified by other circumstances, would have strongly tended to show negligence; but even then it would scarcely justify the court in saying that there was negligence as a matter of law, independent of proof of apparent rate of speed and opportunity to estimate it. Upon a careful consideration of the evidence, we think that the proof of contributory negligence is not so clear and decisive as to justify the absolute direction to the jury to find for the defendant. The following cases will be found to further support our conclusion: *Massoth v. Delaware etc. Canal Co.*, 64 N. Y. 529, 530; *French v. Taunton Br. R. R. Co.*, 116 Mass. 540; *Craig v. New York etc. R. R. Co.*, 118 Mass. 437; *Schum v. Pennsylvania R. R. Co.*, 107 Pa. St. 8, 13, 14; 52 Am. Rep. 468. The case of *Olson v. Chicago etc R'y Co.*, 81 Wis. 41, is clearly distinguishable. There the plaintiff had timely notice of the near approach of the train, and his course was taken with full knowledge of the fact.

There is, however, another aspect of the evidence which, we think, made it the duty of the court to submit the case to the jury, even conceding that the evidence showed clearly and decisively contributory negligence on the part of the deceased. The engineer saw the deceased and his team when he reached the top of the hill after coming up out of the swamp, 540 feet before he reached the crossing, and he says that the heads of the horses were within eight or nine feet of the track, and that they were headed as if they were going to cross, though he says he did not think they would cross; that they were standing still, the man behind his team; that when he got within a few yards of them the man made a dive to go across; that when he saw them he did not think it prudent to sound the whistle, for fear it would frighten the horses onto the right of way. They were already on the right of way, and it is understood that the whistle is to be blown and the bell sounded to warn men and frighten animals off the track or from going upon it. Netzer contradicts this witness squarely as to the man and horses standing still, and says that from the time they left the sled they moved steadily forward without stopping. The connection of the engineer with the fatal occurrence is such as to justly subject his testimony to criticism and to furnish reasons for doubting its candor and fairness. A jury might, perhaps, think his desire of self-vindication

stronger than his memory of facts. The reason he gives for not blowing the whistle is unworthy of a moment's consideration, and possibly suggestive of a consciousness that he did not in this emergency do his plain and obvious duty. Animals, and much less human beings, because they approach the track of a railway and indicate a purpose, or are about to cross under circumstances making it dangerous to do so and negligent as to human beings, are not outlawed; and those in charge of locomotives and passing trains must not neglect to act with the care, caution, and tenderness of human safety and life plainly required by the common dictates of humanity. It appears that the locomotive on this occasion was readily stopped within a distance of 300 or 350 feet, but the engine was not reversed until after the fatal shock. When the engineer discovered the situation of the man and the team, had he sounded the whistle, slowed up, or had instantly shut off and reversed his engine, the fatal occurrence probably would have been prevented. A jury might believe Netzer's testimony that the deceased was moving steadily and certainly forward to cross the track when the engineer first saw him with his team, headed, as he says, as if to cross the track, and that the facts were such as to fairly admonish him to take immediate and effective action to avert the danger; and that his failure to do so was negligence on his part, making the company liable for the fatal consequences which ensued. Here was a question of credibility of the testimony of the engineer, particularly when contradicted on a vital point, as we have seen he was, by Netzer.

The negligence of the deceased will not enable the company to escape liability if the act which caused the injury was done by the defendant after it discovered his negligence, and if the defendant could have avoided the injury in the exercise of reasonable care: *Morris v. Chicago etc. R'y Co.*, 45 Iowa, 32, and cases there cited. This rule is well sustained by numerous authorities; and such supervening negligence, as the deceased was not a trespasser, need not be gross negligence in order to authorize a recovery. In such a case, it is enough that the defendant, by the exercise of reasonable care and prudence, might have avoided the consequences of the plaintiff's negligence: *Inland etc. Co. v. Tolson*, 139 U. S. 551, 558; *Radley v. London etc. R'y Co.*, L. R. 1 App. C. 754-759; *Scott v. D. & W. R'y Co.*, 11 I. R. C. L. 377; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 82; 3 Am. Rep. 663. The evidence on this

point required the submission of the case to the jury, and for error in directing a verdict for the defendant there must be a new trial.

By the COURT. The judgment of the circuit court is reversed, and the case is remanded for a new trial.

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CONTRIBUTORY NEGLIGENCE, WHEN A QUESTION FOR THE JURY. — That the possibility of a difference of opinion is the proper test by which to determine whether the contributory negligence of the plaintiff should be submitted to the jury, see the cases from this series cited in the note to *Nesbitt v. City of Greenville*, 30 Am. St. Rep. 526; to the same effect see *W. C. De Pauw Co. v. Stubblefield*, 132 Ind. 182. The doctrine has been applied in actions for injuries received at railroad crossings in the following more recent cases: *Hinkle v. Richmond etc. R. R. Co.*, 109 N. C. 472; 26 Am. St. Rep. 582; *Geist v. Detroit etc. R'y Co.*, 91 Mich. 446; *Dixon v. Chicago etc. R. R. Co.*, 109 Mo. 413; *Cleveland etc. R'y Co. v. Harrington*, 131 Ind. 426; *York v. Maine Central R. R. Co.*, 84 Me. 117; *Sullivan v. New York etc. R'y Co.*, 154 Mass. 524; *Siegel v. Milwaukee etc. R. R. Co.*, 79 Wis. 404; *Marks v. Fitchburg R. R. Co.*, 155 Mass. 493; *Winchell v. Abbot*, 77 Wis. 371. On the other hand, if there is but one reasonable inference to the effect that the plaintiff's negligence proximately contributed to the injury, then a verdict may be directed for the defendant: *McDonald v. Long Island R. R. Co.*, 116 N. Y. 546; 15 Am. St. Rep. 437; *Weber v. Kansas City etc. R'y Co.*, 100 Mo. 194; 18 Am. St. Rep. 541; *Corcoran v. St. Louis etc. R'y Co.*, 105 Mo. 399; 24 Am. St. Rep. 394; *Rush v. Coal Bluff Mining Co.*, 131 Ind. 135; *State v. Grand Trunk Railway*, 65 N. H. 663; *Fulmer v. Illinois Central R. R. Co.*, 68 Miss. 355; *Jenkins v. Central R. R. etc. Co.*, 89 Ga. 756. Another form in which the rule has been stated is that the court will not grant a nonsuit, or direct a verdict in favor of a defendant, on the ground of the plaintiff's contributory negligence, unless the evidence, considered in the light most favorable to the plaintiff, shows that he has been guilty of negligence which contributed to the injury: *Moffatt v. Tenney*, 17 Col. 169.

CONTRIBUTORY NEGLIGENCE cannot, as a general rule, be predicated of acts done under the impulse of terror caused by the negligence of another: *Duane v. Chicago etc. R'y Co.*, 72 Wis. 523; 7 Am. St. Rep. 879; *Southwest Imp. Co. v. Smith*, 85 Va. 306; 17 Am. St. Rep. 59; *Marble Co. v. Black*, 89 Tenn. 119; *Baker v. North East Borough*, 151 Pa. St. 234; *Clark v. Pennsylvania Co.*, 132 Ind. 199; and notes to *Twomley v. Central Park etc. R. R. Co.*, 25 Am. Rep. 164, 165; *State v. Shannon*, 38 Am. Rep. 599; *Forney v. Geldmacher*, 42 Am. Rep. 391; but the rule is subject to the qualification that the plaintiff must not have got into danger by negligence of his own: *Aiken v. Pennsylvania R. R. Co.*, 130 Pa. St. 380; 17 Am. St. Rep. 775. That an injured party may recover, though guilty of contributory negligence, if the defendant could by the exercise of ordinary care have avoided the consequences of the negligence of the plaintiff, see *Hays v. Gainesville etc. R'y Co.*, 70 Tex. 602; 8 Am. St. Rep. 624; *Virginia Midland R'y Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874; *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902; *Railway Co. v. Wallace*, 90 Tenn. 53. Other cases confine the right of the plaintiff to recover in such cases to circumstances in which the defendant has been guilty of wilful or wanton disregard



of the safety of others or of gross negligence: *Brannen v. Kokomo etc. Co.*, 115 Ind. 115; 7 Am. St. Rep. 411, and note; *Georgia Pac. R'y v. Lee*, 92 Ala. 262; *Highland Ave. R'y Co. v. Winn*, 93 Ala. 306; *Louisville etc. R'y Co. v. Trammel*, 93 Ala. 351; *Korrady v. Lake Shore etc. R'y Co.*, 131 Ind. 261.

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## VANGINDERTAELEN v. PHENIX INSURANCE COMPANY OF BROOKLYN, N. Y.

[82 WISCONSIN, 112.]

**INSURANCE POLICY NOT FORFEITED BY FAILURE TO FURNISH PROOFS OF LOSS WITHIN TIME PRESCRIBED.** — Where a policy of insurance provides that notice of loss shall be given within six days, and that proofs of loss shall be furnished within thirty days after the notice of loss is given, and that the loss shall be payable sixty days after the proofs are received at the company's office, but nowhere provides that the failure to render such proofs within the time named shall operate as a forfeiture of the policy, a failure to furnish the proofs within the time prescribed merely postpones the maturity of the claim, but does not operate as a forfeiture of the policy.

**WAIVER OF DEFECTS IN PROOFS OF LOSS BY RECEIVING AND RETAINING WITHOUT OBJECTION.** — When an insurance company receives and retains proofs of loss without making any objections thereto, it will be deemed to have waived any defects therein.

**ARBITRATION CLAUSE IN INSURANCE POLICY NOT BAR TO ACTION, WHEN.** When a policy of insurance provides that if the company and the assured fail to agree as to the amount of the loss, the matter shall be submitted to arbitrators, and that no action under the policy shall be maintainable until an award is obtained, if the proofs of loss are furnished to the company and no objection is made to them, and no suggestion is made by the company that an arbitration be had, an action commenced three months after the proofs are furnished cannot be defeated on the ground that there has been no arbitration.

**ACTION on a policy of insurance.**

*Bardeen, Mylrea and Marchetti*, for the appellant.

*Greene and Vroman*, for the respondent.

CASSODAY, J. The fire occurred September 14, 1890. The notice of loss appears to have been given within six days thereafter, as required by the policy. The learned counsel for the defendant contends that the evidence fails to sustain the finding of the jury to the effect that the plaintiff sent to the defendant by mail, at Brooklyn, New York, proofs of loss, with the certificate of a magistrate annexed, September 28, 1890, and that the defendant received the same. For the purposes of this appeal, we shall assume that this contention is correct. The defendant admits in its answer that on or

about December 11, 1890, it received by mail, at its office in Chicago, what purported to be proofs of loss and a certificate of a notary public relative thereto; but alleges that such proofs and certificate were not furnished at its Chicago office within the time and in accordance with the terms and conditions prescribed in the policy. The policy required the plaintiff to render particular verified proofs of loss within thirty days after such notice of loss, that is to say, within thirty-six days after the fire; but the policy nowhere makes the failure to render such proofs within the time named operate as a forfeiture of the policy. To prevent such forfeitures, courts are bound to construe such contracts as strongly against the insurer, and as favorably for the insured, as their terms will reasonably permit: *Kircher v. Milwaukee etc. Ins. Co.*, 74 Wis. 473. The most that the policy did do in the regard mentioned was to provide that the loss should not be payable until sixty days after such proofs had been received at the defendant's Chicago office. The delay in furnishing the proofs at that office until December 11, 1890, therefore, merely operated to postpone the maturity of the claim until sixty days thereafter. The suit was not commenced until March 11, 1891, and hence no objection can be maintained for mere want of maturity.

But it is claimed that the proofs so conceded to have been furnished were defective and insufficient. The proofs and certificate so received at the defendant's Chicago office were retained by it without any objection until the trial of this action. This, upon well-settled principles of law, must be regarded as a waiver of such defect or insufficiency, if any existed: *Palmer v. St. Paul etc. Ins. Co.*, 44 Wis. 209; *Cannon v. Home Ins. Co.*, 53 Wis. 585; *Cayon v. Dwelling-house Ins. Co.*, 68 Wis. 510.

Error is assigned because the court did not direct a verdict in favor of the defendant, for the reason that no arbitration was ever had as required by a provision of the policy mentioned in the foregoing statement, nor any demand therefor ever made by the plaintiff. Counsel lays stress on the clause of the policy which made the loss payable sixty days after the proofs were received at the Chicago office and the loss had been ascertained by the arbitrators in accordance with the policy. The policy also provided that "the amount of sound value and of damage . . . may be determined by mutual agreement between the company and the assured, or, failing



to agree, the same shall then be" determined by arbitrators as prescribed. Manifestly, there was no intention of requiring a submission to arbitrators in case the parties agreed as to the amount of such loss. The presentation of proofs to the defendant, as indicated, was in effect a claim for the amount of loss therein specified. It was somewhat in the nature of a stated account. If the defendant deemed that amount too large, or otherwise unsatisfactory, it could easily have made the same manifest, or requested, or at least suggested, an arbitration, but the defendant silently acquiesced in the claim made for three months before the commencement of the action. It then sought to use the arbitration clause, not to reduce the amount of the claim, but to defeat the policy altogether. To allow the clause to have such an effect would be to use it as an instrument for alluring the unwary into a trap from which there could be no escape. Certainly, such a construction should not be given to the clause unless the language imperatively requires it, but the arbitration was only provided for in case the parties failed to agree. In case they disagreed, and the amount of loss was submitted to arbitrators, then the same was not to be payable until determined by their award, even though it should not be made until weeks, or even months, after the expiration of the sixty days; and the provision making such award a condition precedent to the commencement of a suit upon the policy presupposes such failure to agree and consequent arbitration. This is but another application of the rule already mentioned, requiring a strict construction to prevent a forfeiture. This court has frequently applied it to similar clauses in contracts for arbitration: *Phoenix Ins. Co. v. Budger*, 53 Wis. 283; *Canfield v. Watertown F. Ins. Co.*, 55 Wis. 419; *Oakwood Retreat Ass'n v. Rathborne*, 65 Wis. 177; *Bailey v. Aetna Ins. Co.*, 77 Wis. 336. See also *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233; *Randall v. Phoenix Ins. Co.*, 10 Mont. 362. This is certainly in harmony with the rulings of this court, whatever may be the adjudications in some other states.

By the COURT. The judgment of the circuit court is affirmed.

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INSURANCE — PROOFS OF LOSS — FAILURE TO FURNISH IN TIME. — A condition in a fire insurance policy that the proofs of loss must be furnished forthwith is to be liberally construed in favor of the assured and strictly against the insurer: *Central etc. Ins. Co. v. Oates*, 86 Ala. 558; 11 Am. St. Rep. 67, and note; *Pennypacker v. Capital Ins. Co.*, 30 Iowa, 56; 20 Am. St.

Rep. 395, and note. If an insurance policy requires that proof of loss must be made in thirty days thereafter, the insured must prove that such stipulation has been complied with or that it has been waived by the company, before a recovery can be had on the policy: *German Ins. Co. v. Fairbank*, 32 Neb. 750; 29 Am. St. Rep. 459; *Smith v. Haverhill etc. Ins. Co.*, 1 Allen, 297; 79 Am. Dec. 733, and note; *Northwestern Ins. Co. v. Atkins*, 3 Bush. 328; 96 Am. Dec. 239. The conditions in a policy as to proofs of loss must be complied with substantially, if not strictly, before the assured can recover: *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809, and note. An insured cannot recover for a loss if he has failed to give notice of it within the time required by the charter of the insurance company: *Patrick v. Farmer's etc. Ins. Co.*, 43 N. H. 621; 80 Am. Dec. 197, and note.

**INSURANCE — PROOFS OF LOSS — WAIVER OF DEFECTS BY RECEIVING AND RETAINING.** — An insurance company is estopped to object to the proofs of loss where it receives and retains them, and fails to notify the insured as to any objections thereto: *Welsh v. London Ass. Corp.*, 151 Pa. St. 607; 31 Am. St. Rep. 786, and note in which the cases discussing this subject are collected; note to *Farnum v. Phoenix Ins. Co.*, 17 Am. St. Rep. 247.

**INSURANCE. — WAIVER OF CONDITION AS TO ARBITRATION:** See *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233, and note. Where the policy provides that in case of loss the matter shall be left to arbitration at the written request of either party, and no action can be had until an award shall have been made, these provisions must be read together. The arbitration becomes imperative only after a demand, and a failure to make a request for such arbitration within five months of the loss, is deemed a waiver by both parties and an action to recover for the loss may be sustained: *Nurney v. Fireman's etc. Ins. Co.*, 63 Mich. 633; 6 Am. St. Rep. 338, and note. See notes to *Randall v. American etc. Ins. Co.*, 24 Am. St. Rep. 67; *Continental Ins. Co. v. Wilson*, 23 Am. St. Rep. 723; and *Utter v. Travelers' Ins. Co.*, 8 Am. St. Rep. 922, in all of which the questions as to the waiver of conditions as to arbitration, and the necessity for arbitration before an action to recover for the loss can be sustained, is discussed.

## GUNTHER v. ULLRICH.

[82 WISCONSIN, 222.]

**AMBIGUOUS FINDING IN SPECIAL VERDICT DISREGARDED.** — An affirmative answer in a special verdict to an alternative question, where such answer is ambiguous and hopelessly uncertain, will be disregarded.

**MISREPRESENTATION BY VENDOR OF LAND AS TO ITS LOCATION, LIABILITY FOR.** — Where the agent of the vendors of land makes a false statement as to its location and thereby induces the vendee to purchase it, both the vendors and the agent will be liable to the vendee for the difference in value between the land which he believed he was getting and that which he was actually purchasing, although neither the agent nor the vendors by any artifice prevented or dissuaded him from making inquiry in reference to the true location which he had present means of ascertaining.

**VENDEE OF LAND IGNORANT OF ITS LOCATION MAY RELY ON REPRESENTATIONS OF VENDOR.** — Where an intending purchaser of land is ignorant

of its true location, he has the right to rely upon a positive statement made by the vendor in that respect, and hold him responsible if it proves untrue, even though there was no intentional misrepresentation.

**RESCISSION OF CONTRACT, PERPETRATOR OF FRAUD HAS NO RIGHT TO.**—The perpetrator of a fraud by which a contract has been induced has no right to rescind the contract.

**RATIFICATION OF FRAUDULENT ACT, LIABILITY FOR.**—One who ratifies and makes his own the fraudulent act of another becomes liable therefor, although there was no combination or conspiracy between them.

ACTION to recover damages alleged to have been sustained by the plaintiff through the fraud and deceit of the defendants in respect to the location of certain lots of land. The defendant Ullrich was employed by the plaintiff for a commission to sell his stock of goods for five thousand dollars. The sixth question referred to in the opinion and the answer thereto were as follows: "Did Louis Abraham or other of the defendants aid, advise, counsel, or assist in any way the said Louis Ullrich in taking the plaintiff out to see the lots or in pointing out the wrong lots to the plaintiff? Answer. Yes."

*McKenney and Wambold*, for the appellant.

*Cox and Cox*, for the respondent Ullrich.

*Turner and Timlin*, for the respondents Bing and the Abrahams.

PINNEY, J. The finding in answer to the sixth question, owing to the manner in which the question was framed, is ambiguous and hopelessly uncertain. No force or effect can be given to this finding, if such it may be called, for it really finds nothing at all. The question being in the alternative, the affirmative answer may be applied as fairly to the innocent act of taking out the plaintiff to see the lots proposed to be conveyed as to the fraudulent and reprehensible act of knowingly pointing out to him the wrong lots. This question and answer must therefore be disregarded, and the question to be determined is whether, upon the facts found and the uncontradicted evidence, judgment ought to be given in favor of the plaintiff instead of against him: *Farwell v. Warren*, 76 Wis. 528-540, and cases cited.

The verdict finds that Ullrich knowingly showed the plaintiff other lots than those purchased; that before going out to see them, he represented to the plaintiff that the lots in question were within the city limits of Milwaukee; that the defendant Louis Abraham also represented to the plaintiff that

the lots were within the city limits of Milwaukee; and that the plaintiff parted with his stock of goods and fixtures relying upon the representations made by Ullrich before starting to see the lots, as well as upon the representations made by Louis Abraham; and that the latter heard Ullrich make the same representations to the plaintiff which he himself made. It is found that none of the defendants by any artifice prevented or dissuaded the plaintiff from making inquiry in reference to the true location of the lots, and the plaintiff had present means of information as to their location on or before October 1, 1889, the date of making the exchange; that after learning that the lots were not within the city limits of Milwaukee, he did not consummate or ratify the exchange of property, or accept said lots.

Under the undisputed evidence and the facts found by the jury, after excluding the defective question and answer, we think that the plaintiff is entitled to judgment for the difference in value between the lots pointed out to him on the extreme city limits in a northeast direction, and the lots the defendants Bing and Abraham and wife attempted to convey to him, which were about two miles and a half beyond the city limits, and that distance north of the lots so pointed out by Ullrich. The defendants knew very well where the lots they owned were situated; at least they are chargeable with such knowledge, and there is no pretense that they did not have it. They were worth only two hundred dollars each, and were two miles and a half beyond the city limits, instead of being in the city limits and worth seven hundred dollars each, as represented; the total difference in value being as one thousand dollars to three thousand five hundred dollars. The uncontradicted evidence shows that Louis Abraham was the agent of his codefendants Bing and Hannah Abraham, his wife, in negotiating the exchange of property in question, and they are liable to respond for any damages resulting from the fraudulent misrepresentations of their agent in respect to the situation of the lots to be conveyed to the plaintiff by them in exchange for the stock of goods. This is familiar doctrine: *McKinnon v. Vollmar*, 75 Wis. 82-90; 17 Am. St. Rep. 178; *Bennett v. Judson*, 21 N. Y. 238; *Mayer v. Dean*, 115 N. Y. 556, 561, and cases cited; and it matters not whether the misrepresentation was intentional or not: *Cotzhausen v. Simon*, 47 Wis. 106; *Davis v. Nuzum*, 72 Wis. 439; *Bird v. Kleiner*, 41 Wis. 134-138; *Middleton v. Jerdee*, 73 Wis. 39; *Montreal R. L. Co. v. Mihills*, 80 Wis. 541-



560. As was stated in *Cotzhausen v. Simon*, 47 Wis. 106, "It is immaterial whether the defendant made the representations willfully or intentionally or not, for he had no right to make even a mistake in facts so material to the contract, except under the penalty of responding in damages"; and in the case of an agent, if the principal is liable for such misrepresentations of his agent, very clearly the agent is also liable, and the same result follows in law as if there had been a fraudulent combination or conspiracy between the agent and his principals.

It was strongly contended, both on the part of Ullrich and of his codefendants, that under the decision of this court in *Mamlock v. Fairbanks*, 46 Wis. 415, 32 Am. Rep. 716, as applied in the subsequent case of *Conner v. Welch*, 51 Wis. 440, as the plaintiff had the present means of information as to the location of the lots, and the defendants did not by any artifice prevent or dissuade him from making inquiry in reference to the true location of them, they are therefore not liable. This contention entirely overlooks and ignores the obvious distinction between the case they rely on and the case of *Castenholz v. Heller*, 82 Wis. 30, and other like cases herein cited, in which it is held, in substance, that where the vendor undertakes to state or point out to a purchaser the boundaries or situation of the property he is selling, he is under obligations to state or point them out correctly, and has no right to make a mistake except upon the penalty of responding in damages. If there had been no positive statement made to the plaintiff as to the situation or location of the lots, and he had been left to his own devices to apply and act upon the means of knowledge he possessed, then the rule for which counsel contends might well be applied; but it is too well settled in this state to require discussion that where the proposed purchaser is ignorant of the location he has the right to rely upon a positive statement made by the vendor in that respect, and hold him responsible if it proves untrue, although there was no intentional misrepresentation.

It would seem that the liability of the codefendants of Ullrich may be properly rested as well upon the ground that, after the grossly fraudulent acts of Ullrich which induced the contract, and inhered in it, had become known, the advantages of which could inure only to his codefendants, they made his fraudulent acts their own by ratification and adoption. The defendants Bing and Abraham and wife,



nevertheless, insisted and still insist upon and retain the benefits and advantages of the transaction thus fraudulently induced, and sent to the plaintiff, by Ullrich, a corrected deed of the lots situated two and a half miles beyond the city limits, which, it is said he declined to accept, and the defendants procured it to be recorded on the 19th of October, 1889. It is found by the jury that the plaintiff refused to accept the lots. The former deed, it appears, was not signed by Hannah Abraham or Mrs. Bing in person, but by their respective husbands in their names, and there was no grantee named in it. It is found that Abraham tendered a rescission and return of the property before the action was brought, but at what particular time is not stated. We do not understand that it is the right of a party, by whose fraud a contract has been induced, to rescind it. The right of rescission is the right only of the victim, and not of the perpetrator, of the fraud. It is clear that the defendants Bing and Louis and Hannah Abraham have made the transaction in all its material features their own by ratification and adoption, and they are therefore bound by and answerable for the consequences of the misrepresentations made to the plaintiff as to the location and situation of the lots. It is now no answer for them to urge that the jury found that there was no combination, conspiracy, or agreement between them and the plaintiff's faithless agent, Ullrich. There is that in the case which, as a matter of law, supplies its place: *Mayer v. Dean*, 115 N. Y. 556, 561, and cases cited; but it is not necessary to rest the liability of the defendants on this ground.

The case, as against Ullrich, is too clear, in the light of well-settled rules, to require discussion.

For these reasons we must hold that the superior court should have rendered judgment upon the special verdict in favor of the plaintiff, and against the defendants, for two thousand five hundred dollars and the costs of the action.

By the COURT. The judgment of the superior court of Milwaukee County is reversed, and the cause is remanded to that court to render judgment accordingly.

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**VENDOR AND PURCHASER — MISREPRESENTATIONS AS TO LOCATION OF LAND.** — If the agent of the vendor of land causes a wrong tract to be pointed out to intending purchasers, and a purchase is thereby induced, the vendees have the right to rescind the sale and recover the purchase-money: *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178, and note. See extended note to *Cottrill v. Krum*, 18 Am. St. Rep. 556, for a discussion as to the liability of the vendor of land for misrepresentations concerning it.

**FRAUD — RIGHTS OF PERPETRATOR.** — An instrument fraudulent *ab initio* is void for all purposes of protection to the fraudulent actor: *Goodwin v. Hammond*, 13 Cal. 163; 73 Am. Dec. 574, and note. No one will be permitted in a court of justice to take advantage of, or claim protection by means alone of his own fraud: *Munson v. Hallowell*, 26 Tex. 475; 84 Am. Dec. 582; note to *Reid v. Cowdroy*, 18 Am. St. Rep. 363. The rescission of a contract cannot be sought in equity by a party whose own default caused the only obstacle to its completion, and the other party is without blame: *Salmon v. Hoffman*, 2 Cal. 138; 56 Am. Dec. 322.

**RATIFICATION OF FRAUDULENT ACTS OF ANOTHER — LIABILITY FOR.** — If a party adopts the contract of a self constituted agent, he is liable for the frauds and misrepresentations of the agent committed while acting within the scope of the real or assumed authority: *Busch v. Wilcox*, 82 Mich. 336; 21 Am. St. Rep. 563, and note; *Johnson Harvester Co. v. Miller*, 72 Mich. 265; 16 Am. St. Rep. 536. One adopting and receiving the benefits of the representations of another must accept their burdens: *Eastman v. Provident etc. Relief Ass'n*, 65 N. H. 176; 23 Am. St. Rep. 29, and note.

## LIERMANN v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

[82 WISCONSIN, 286.]

**RAILROAD CROSSING, DUTY OF PERSON APPROACHING.** — The rule that a person suddenly put in a position of great peril by the negligence of another is not responsible for an unwise choice of a mode of escape, is not applicable to the case of a traveler approaching a railroad track where he knows trains are frequent, and where his view is unobstructed. He is bound to the exercise of ordinary care, and if he fails in this, and is injured in consequence thereof, he cannot recover. It is, therefore, error to instruct the jury that when a person approaches a railway track, and sees a train coming, he may attempt to cross in advance of it or not, as he pleases, and is not chargeable with negligence, however rash his act, because he acted on his judgment.

**MEASURE OF DAMAGES FOR DEATH OF MARRIED MAN.** — In an action to recover damages for the death of a married man, the measure of damages is the pecuniary loss of the widow alone.

**ACTION** to recover damages for the death of the plaintiff's intestate, caused by the alleged negligence of the defendant. The deceased was killed at or near the crossing of Muskego Avenue in the city of Milwaukee, by being struck by a locomotive attached to a passenger train of the defendant. Verdict and judgment for the plaintiff, and the defendant appealed.

*John T. Fish and Burton Hanson*, for the appellant.

*Austin and Hamilton*, for the respondent.

**WINSLOW, J.** The circuit judge, in his charge to the jury, gave them the following instruction: "Generally, it is the

duty of any man who is crossing a railroad track to look and listen carefully for approaching trains, and to keep off the track if there is any appearance of danger in crossing. On the other hand, it is the right and duty of every man who comes into a dangerous place of any kind to exercise his own best judgment as to what he shall do. It is for him to determine for himself whether or not a train is so distant that it is perfectly safe to cross the track in advance of it, or whether it is so near as to make it dangerous to attempt to cross the track in advance. It is for him, when he finds himself upon a track where there is an approaching train bearing down upon him, to determine for himself whether it would be safest for him to go forward or to go back; and if he exercises his judgment to the best of his ability he is not chargeable with negligence if it afterwards turns out that his judgment was wrong. If it afterwards turns out that he might have escaped by going back when he went forward, or that he might have escaped by going forward when he went back, if he acted upon his best judgment under the circumstances, that is all that is required of him; and his mistake, if he commits a mistake under such circumstances, is not to be imputed to him as negligence." The obvious effect of the instruction is to inform the jury that when a person approaches a railway track, and sees a train coming, he may attempt to cross in advance of it or not, just as he pleases, and he is not chargeable with negligence, however rash his act, because he has acted on his judgment. This was error. The rule that a person suddenly put in a position of great peril by the negligence of another, is not responsible for an unwise choice of a mode of escape, is manifestly not applicable to the case of a traveler approaching a railroad track where he knows trains are frequent, and where his view is unobstructed. He is bound to the exercise of ordinary care, and if he fails in this, and is injured in consequence thereof, he cannot recover. Although this rule was practically stated to the jury in another part of the charge, it seems plain that the instruction first herein quoted would thoroughly destroy its force.

The court also charged that the damages would be what the intestate's life would have been worth, had he lived, to his widow and children. This was incorrect. It is the pecuniary loss of the widow alone which is recoverable: *Abbot v. McCadden*, 81 Wis. 563; 29 Am. St. Rep. 910. Other ques-

tions are presented, but as there must be a reversal, and the testimony upon another trial may present other or different facts, they are not passed upon.

By the COURT. Judgment reversed and cause remanded for a new trial.

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**NEGLIGENCE — DAMAGES FOR CAUSING DEATH OF MARRIED MAN.** — In an action for negligence, whereby the death of plaintiff's intestate was caused, damages based upon the value of decedent's life to his wife and children should not be assessed: *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181, and note. The damages recoverable in such a case are limited to those which the widow has suffered alone, and not such as may have been suffered by "her and her children": *Abbot v. McCadden*, 81 Wis. 563; 29 Am. St. Rep. 910, and note.

**RAILROADS — DUTY OF PERSONS CROSSING TRACK.** — When a person voluntarily attempts to cross a track in front of a moving train which he sees not far distant, he is guilty of contributory negligence and cannot recover for any injuries he may receive thereby: *Korraday v. Lake Shore etc. R'y Co.*, 131 Ind. 261; *Railway Co. v. Cullen*, 54 Ark. 431; *Myers v. Baltimore etc. R. R. Co.*, 150 Pa. St. 386; *Studley v. St. Paul etc. R'y Co.*, 48 Minn. 249; *Aiken v. Pennsylvania R. R. Co.*, 130 Pa. St. 380; 17 Am. St. Rep. 775, and note; *Martland v. Pittsburgh etc. R. R. Co.*, 123 Pa. St. 487; 10 Am. St. Rep. 541, and note. See also notes to *Tolman v. Syracuse etc. R. R. Co.*, 50 Am. Rep. 653; *O'Connor v. Missouri Pac. R'y Co.*, 4 Am. St. Rep. 368, and *Dyson v. New York etc. R. R. Co.*, 14 Am. St. Rep. 87.

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## MEIER v. MORGAN.

[82 WISCONSIN, 239.]

### MASTER LIABLE FOR INJURIES TO SERVANT CAUSED BY FALL OF DEFECTIVE

**BUILDING, WHEN.** — If the collapse of a building by reason of which a servant is injured is the direct or proximate result of the negligence of his master, the latter is liable for the injury, in the absence of contributory negligence on the part of the servant; and therefore in an action to recover for personal injuries caused by the fall of the side of defendant's ice-house while plaintiff was working for them near it, and which had been recently filled with ice under the direct supervision of one of the defendants, it is proper to instruct the jury that if they find from the preponderance of the evidence that in filling the ice-house the defendants carelessly permitted cakes of ice to run violently against the side of the building, thus weakening it and tending to shove it outward, and that this was the proximate cause of the accident, the plaintiff, if in the exercise of ordinary care, is entitled to recover.

**OWNER OF DEFECTIVE BUILDING LIABLE FOR INJURY RESULTING FROM ITS FALL, THOUGH BUILT BY INDEPENDENT CONTRACTOR.** — The owner of a building cannot dictate that it be constructed of improper materials or upon an unsafe plan, and escape liability for injuries caused thereby because he made a contract with a third person to build it; nor can he,



with knowledge of a weakness or defect threatening the strength of the building, set a man at work immediately under it, and shift all responsibility upon the builder.

**MASTER BOUND TO FURNISH SERVANT REASONABLY SAFE PLACE TO WORK.**

A master is under obligation to furnish his servant a reasonably safe place in which to work, or to explain to him the dangers which he knows or ought to have known, and of which the servant is not chargeable with notice or knowledge.

**LIMITATION OF NUMBER OF WITNESSES IN DISCRETION OF COURT, WHEN. —** A reasonable limitation of the number of witnesses upon a single fact is within the discretion of the trial court, and an objection or exception to such a limitation should be made, when the court first rules upon the matter.

**FURTHER INSTRUCTIONS TO JURY, PRESENCE OF COUNSEL NOT NECESSARY WHEN GIVEN. —** Although it is the better practice to procure the attendance of counsel for both parties when the jury return into court for further instructions, there is no rule which requires the court in a civil case to do so, and its failure to do so in the absence of anything to show that the party complaining was prejudiced, is not error.

**ACTION** to recover for personal injuries sustained by the plaintiff by the falling of the side of the ice-house of the defendants, while he was working near it. The building was built by one Frederickson under oral contracts with the defendants. The plaintiff was set to work without warning as to any possible danger. There was a verdict and judgment for the plaintiff for five hundred dollars damages, and the defendant's appealed. Other facts appear from the opinion.

*H. W. Chynoweth and R. M. La Follette*, for the appellants.

*Olin and Butler*, for the respondent.

**WINSLOW, J.** The building in question was very hastily constructed just as the ice season was closing, and was evidently filled with equal or greater haste. The evidence shows very clearly that the collapse of the side of the building might have resulted from one of three causes, or from two or all of them combined, viz.: 1. Insufficiency of the single top-plate; 2. Insufficiency of the tie-beams; 3. Negligence in allowing the cakes of ice to run violently against the side of the building while it was being filled, thus weakening the side, and tending to shove it outward.

The legal principal is, that if the collapse was wholly or partially the direct or proximate result of the negligence of the defendants, they are liable for the plaintiff's injuries resulting therefrom, in the absence of contributory negligence on his part. The defendants were also under obligation when they set plaintiff to work to furnish to him a reasonably safe



place to work, or to explain to him the dangers which they knew, or ought to have known, and of which he was not chargeable with notice or knowledge. If there was sufficient evidence in the case upon which it was properly a question for the jury as to whether the defendants were negligent in the three particulars first named, and such questions were fairly submitted without error prejudicial to the defendants, it is apparent that the verdict is final, in the absence of error elsewhere in the case.

As to the third ground of negligence, to wit, the alleged careless handling of ice in filling the building, there was sufficient evidence tending to show that ice frequently ran with force against the side of the building, and that this would tend to weaken it. The filling was done under direct supervision of the defendant, Behrend, who had had much experience in building and filling ice-houses. The circuit judge correctly charged the jury that if the preponderance of evidence showed that the defendants carelessly permitted ice to be pushed against the side of the building, and thus weakened it, and that this was the proximate cause of the accident, the plaintiff, if in the exercise of ordinary care, was entitled to recover.

As to the first and second grounds of negligence, to wit, the insufficiency of the top-plate and tie-beams, it is strongly urged that the evidence conclusively shows Frederickson to have been an independent contractor, and that the defects named are defects for which the contractor was solely liable. It seems quite clear from the evidence that the defendants reserved no control over the erection of the building after they let the contract, and to this extent Frederickson was an independent contractor; but this fact does not of itself relieve the defendants from all liability. There was ample evidence tending to show that the defendants consulted with the builder, and determined on the materials and plan of construction before the contract was let, especially as to the single top-plate, the builder's testimony being that the defendants said: "Single top-plates, we guess, will do." There was also evidence tending to show that the defendant, Behrend, the active partner, was around the premises constantly, and Behrend himself testifies that there were but four or five tie-beams on the section which fell when they began to put ice in, and that no more were put in up to the time when the filling with ice was completed. The testimony

shows that work was begun on the roof immediately after the ice was put in. There was therefore ground for the jury to say that the defendants themselves dictated and are responsible for the weakness resulting from the single top-plate, and that they actually knew of the insufficient tie-beams when they set the plaintiff at work; and if these be the facts, the circumstance that they may have reserved to themselves no control over Frederickson's work cuts little figure. The owner cannot dictate that his building be constructed of improper materials or upon an unsafe plan, and escape liability for injuries caused thereby because he made a contract with a third person to build it; nor can he, with knowledge of a weakness or defect threatening the strength of the building, set a man at work immediately under it, and shift all responsibility upon the builder; and the circuit judge substantially charged the jury in accordance with these views: 14 Am. & Eng. Ency. of Law, 835, and cases cited; *Whitney v. Clifford*, 46 Wis. 138; 32 Am. Rep. 703; *Trainor v. Philadelphia etc. R. R. Co.*, 137 Pa. St. 148. The court properly instructed the jury as to the care required of the plaintiff, and that if he could with ordinary care have readily seen the defect which caused the collapse, he could not recover. We believe these remarks dispose of the questions raised by the appellants as to the charge and instructions refused.

During the trial, after the defendants had been examined as to the manner in which the ice was packed in the ice-house, the defendants called other witnesses to establish the fact that the ice was properly packed; and at the close of the testimony of the second witness the court ruled that he would only allow three more witnesses as to that particular fact, making eight witnesses in all, including the defendants themselves. No objection or exception was taken at the time to this ruling, but at a later stage of the trial, after the number allowed by the court had been examined, the defendants offered another witness on the point, and his testimony was ruled out, and defendants except. We think the proper time to take the exception was when the original ruling was made. The ruling seems to have been practically assented to when originally made; certainly it was without objection: *McConnell v. Osage*, 80 Iowa, 296. A reasonable limitation of the number of witnesses upon a single fact is within the discretion of the trial court: 1 Thompson on Trials, sec. 353, and cases cited.

After the jury had been deliberating some time, they returned into court in the absence of counsel (apparently at their own request), and received some further instructions as to the law of the case, and heard a part of the testimony of two of the defendants read. The judge carefully refrained from stating any matters of fact to them, and no exception is taken to his additional instructions upon the law of the case. The entire proceeding is now assigned as error. We know of no rule which requires the court, in a civil case, to send for counsel when a jury desires further instructions. It is the better practice to procure the attendance of both counsel, but, in the absence of anything to show that defendants were prejudiced by it, we see no room for a claim of error.

Some objection is made to that part of the charge which relates to the subject of damages. We perceive no error. The damages awarded were certainly moderate, in view of the testimony.

By the COURT. Judgment affirmed.

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**MASTER AND SERVANT—MASTER'S DUTY TO WARN SERVANT.**—A master must warn his servants of all dangers to which they will be exposed in the course of their employment, except those which the employees may be deemed to have foreseen as necessarily incidental to the employment: *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475; 30 Am. St. Rep. 745, and note with cases on this subject collected.

**MASTER AND SERVANT—MASTER'S DUTY TO FURNISH SAFE PLACE FOR SERVANT TO WORK.**—It is a master's duty to exercise reasonable care to furnish a reasonably safe place for the servant to work: *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181; *Ell v. Northern Pac. R. R. Co.*, 1 N. D. 336; 26 Am. St. Rep. 621; *Johnson v. First Nat. Bank*, 79 Wis. 414; 24 Am. St. Rep. 722, and note; *Dayharsh v. Hannibal etc. R. R. Co.*, 103 Mo. 570; 23 Am. St. Rep. 900, and note with cases collected.

**MASTER AND SERVANT—LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR.**—This question is discussed in *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161; 27 Am. St. Rep. 231, and note.

**REAL PROPERTY—LIABILITY OF OWNER FOR DEFECTIVE CONSTRUCTION OF BUILDING.**—The owner of property upon which a building is being erected is not generally liable for the negligence of the contractor causing injury, but if the injury was caused or contributed to by the fact that the plans for the building were essentially defective, the owner as well as the contractor is liable: *Schwartz v. Gilmore*, 45 Ill. 454; 92 Am. Dec. 227, and note. See also *Sessengut v. Posey*, 67 Ind. 403; 33 Am. Rep. 98, and note.

**TRIAL—FURTHER INSTRUCTIONS IN ABSENCE OF COUNSEL.**—It is not error for the judge, when the jury have retired, and come again into open court, at their request to give them further instructions, though one of the parties and his counsel were absent: *Chapman v. Chicago etc. R'y Co.*, 28

Wis. 295; 7 Am. Rep. 81; *Preston v. Bowers*, 13 Ohio St. 1; 82 Am. Dec. 430, and note; *Leighton v. Sargent*, 31 N. H. 119; 64 Am. Dec. 323. *Contra*, see *Hopkins v. Bishop*, 91 Mich. 328; 30 Am. St. Rep. 480, and *Davis v. Fish*, 1 G. Greene, 406; 48 Am. Dec. 387.

## DWYER v. AMERICAN EXPRESS COMPANY.

[82 WISCONSIN, 307.]

**MASTER NOT LIABLE TO SERVANT FOR INJURY CAUSED BY NEGLIGENCE OF VICE-PRINCIPAL, WHEN.** — The liability of a master who has not been guilty of any negligence or breach of duty in the employment of his servants, for an injury to one of such servants caused by the negligence of another engaged in the same business, depends not upon the rank or grade of either servant but upon the character of the act in the performance of which the injury is inflicted; and he is not liable unless the negligent act pertained to a matter in relation to which he owed a duty to the servant injured.

**ACTION** to recover damages for personal injuries alleged to have been received by the plaintiff in the year 1881, through the negligence of one Colvin alleged to have been the agent and manager of the defendant's office at Oshkosh. The complaint alleged that on a certain day Colvin drove one of defendant's teams, which was hauling a load of goods, so negligently that the plaintiff, who in the course of his employment was riding on the load, was injured. Other facts appear from the opinion.

*Miller, Noyes, and Miller*, for the appellant.

*John Harrington and W. W. Quartermass*, for the respondent.

**LYON, C. J.** The complaint contains no averment that Colvin was an incompetent person to drive the team in question, or that there was any defect in the teams, wagons, or appliances for making shipments of goods. It is alleged in the complaint that the driving of the team was a duty of servants employed by the express company, and it is conceded that, were Colvin an ordinary hired servant of the company, the complaint would be defective in that it fails to charge the company with any negligence or breach of duty to plaintiff in employing him. So we have for determination the single question whether the mere fact that Colvin was the vice-principal of the express company in the transaction of its general business at Oshkosh makes the company liable for his negli-



gent driving of the team, when, were he not such vice-principal, the company would not be thus liable, as was ruled on the appeal in the former action.

This question has been determined both ways. The courts of some states hold that if an employer put one servant under the control of another, such servants are not fellow-servants, and the master is liable if the subordinate servant is injured by the negligence of the other, without regard to the nature of the work or business in which they were engaged at the time. The circuit court applied this rule when it overruled the demurrer to the complaint.

Other courts adhere to the doctrine that whether the relation of co-employee or fellow-servant exists between different employees engaged in the same business for the same employer is not to be determined by the rank or grade of either servant, but by the character of the act being performed by them. "If it is an act that the law implies a contract duty on the part of the employer to perform, then the offending employee is not a servant, but an agent, but as to all other acts they are fellow-servants": 7 Am. & Eng. Ency. of Law, 834, and cases cited.

This court is unmistakably committed to the latter rule, to wit, that the liability of the master depends upon the nature of the act in the performance of which the injury is inflicted, without regard to the rank of the offending employee. In *Brabbits v. Chicago etc. Ry Co.*, 38 Wis. 289, the company was held liable to an employee for injuries caused by the use of an engine out of repair, which it was the duty of the foreman of defendant's shops to repair, but which he negligently omitted to do. It was not determined that the foreman was a vice-principal, but the company was held liable on the express ground that it owed a duty to plaintiff to repair the engine within a reasonable time after it became defective, and hence that it was liable for the negligent failure of any of its servants or employees to whom that duty was intrusted to repair the defective engine, without regard to the rank or subordination of the negligent servant.

In *Howland v. Milwaukee etc. Ry Co.*, 54 Wis. 226, the plaintiff was employed as a shoveler to aid in removing snow from the railway track. He was in a car drawn by an engine, and the work of clearing the track was in charge of a conductor, to whose orders the plaintiff was subject. At a certain point the conductor directed plaintiff to remain in the car,



and, as it was alleged, negligently attempted to run the engine and car through a snowdrift on the track. In so doing the car was overturned and the plaintiff injured. It was held that the conductor and plaintiff were fellow-servants in the common business of clearing the track, and that the railway company was not liable for the negligence of the conductor.

The above cases fairly illustrate the doctrine of this court on the subject under consideration. In the Brabbitts case the company was held, on the principle that it is liable to one of its servants for the negligence of another in respect to any duty intrusted to the latter to perform, which at the same time is a duty the company owes to the injured servant, no matter how humble or subordinate the employment of the offending servant may be. The real effect of the rule is to make any servant of the company who is charged with the performance of any duty which the company owes its servants a vice-principal in respect to such duty. The case of *Schultz v. Chicago etc. R'y Co.*, 48 Wis. 375, affords an apt illustration of an application of this rule.

In the Howland case the company was held not liable for the negligence of the conductor, who for many purposes is held to stand for the company, and who had control of the plaintiff, because the alleged negligent act did not pertain to a matter in respect to which the company owed a direct duty to plaintiff. For that reason the conductor and his subordinate employee, the plaintiff, were held to be fellow-servants engaged in a common undertaking, and the company was held not liable for the negligence of the former which resulted in injury to the latter. The same doctrine is adhered to in *Toner v. Chicago etc. R'y Co.*, 69 Wis. 188, and in numerous other cases in this court, some of which are cited in the opinion in the Toner case. Whatever may be thought of the reason or justice of the rule, it is now too deeply imbedded in our jurisprudence to be repudiated or shaken by judicial determination. If any change of the rule is desirable, it should be made by the legislature, not by the courts.

The question here under consideration was not reached on the appeal in the first action for the alleged injury, and there is no significance in the circumstance that the court there gave no opinion upon it, but expressly declined to do so. In this case there is no direct averment in the complaint that the express company was negligent, or that Colvin was incom-

petent to drive the team, or that the company failed in any duty it owed plaintiff. It simply alleges facts which show that Colvin chose to drive the team, as he had undoubted authority to do, instead of allowing plaintiff or some other employee of the company to drive it, and that he drove it so negligently that the plaintiff was thereby injured. Under the above rule, these averments show that Colvin and plaintiff were fellow-servants in the particular business in which they were engaged, and hence that the company is not liable for the negligence of Colvin.

It results from the foregoing views that the complaint fails to state a cause of action against the express company, and that the demurrer thereto should have been sustained.

By the COURT. The order overruling the demurrer to the complaint is reversed, and the circuit court directed to sustain such demurrer.

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**MASTER AND SERVANT — VICE-PRINCIPAL — MASTER'S LIABILITY FOR. —** The mere fact that the servant whose negligence produces the injury is superior in rank to the servant injured does not alone fix the liability of the master. If the negligent servant can fairly be said to take the place of the master and represent him, so as to become in reality a vice-principal, and the negligence occurs in the discharge of his representative duties, the master is liable: *Colorado etc. R'y Co. v. Naylor*, 17 Col. 501; 31 Am. St. Rep. 335, and note; *Louisville etc. R'y Co. v. Hanning*, 131 Ind. 528; 31 Am. St. Rep. 443, and note; *Orman v. Mannix*, 17 Col. 564; 31 Am. St. Rep. 340, and note; *Sweeney v. Gulf etc. R'y Co.*, 84 Tex. 433; 31 Am. St. Rep. 71, and note.

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## GAYNOR v. BLEWETT.

[82 WISCONSIN, 313.]

**MORTGAGE, RECEIVER IN SUIT TO FORECLOSE ENTITLED TO RENTS FROM DATE OF HIS APPOINTMENT. —** A tenant who takes a lease of mortgaged land after the filing of a notice of *lis pendens* in a suit to foreclose the mortgage, takes the land subject to whatever order or decree the court may make affecting the title or possession; and, if the court appoints a receiver, such tenant must either surrender or attorn to him, or pay to him a reasonable rent for the use of the premises from the date of the appointment, notwithstanding he has paid to the mortgagor a year's rent in advance.

**ACTION to foreclose a mortgage.** Notice of the pendency of the suit was filed May 26, 1887. On May 5, 1891, an order was made appointing a receiver of the mortgaged premises. The defendant Smith held possession of the premises as tenant

of the mortgagor from January 1, 1891. The receiver exhibited the order of his appointment to Smith and demanded possession, but the latter refused to surrender possession, or to pay rent, or to recognize his rights in the premises. Application was then made to the court for an order directing the receiver to take possession or secure the rent. Smith resisted the application, alleging that soon after April 1, 1891, he rented the premises from the mortgagor for one year, and paid the rent in advance, and that, at the time of the execution of the lease and of the payment of the rent, he had no notice of any intention to apply for a receiver in the suit. The court ordered Smith to forthwith deliver possession to the receiver, or that he pay the rent and attorn to the receiver. Blewett and Smith jointly and severally appealed from the order.

*Edward S. Bragg*, for the appellants.

*George E. Sutherland*, for the respondent.

PINNEY, J. The rents and profits of lands are not pledged by a mortgage of the lands merely, but belong to the owner of the equity of redemption until the court, for equitable reasons, shall appoint a receiver to collect them for the benefit of the mortgagee, or directs the receiver to take possession of the mortgaged premises and the rents and profits of the same, to the end that the rents realized may be applied to the payment of any deficiency that may remain unpaid after applying the proceeds of the sale of the mortgaged premises; and whatever is not needed for that purpose is to be paid to the mortgagor or other person entitled thereto. The appointment of a receiver for that purpose is a matter resting in the sound discretion of the court, and gives the plaintiff in the foreclosure suit an equitable lien upon the accrued and unpaid rents: *Kerr on Receivers*, 177; *Rider v. Bagley*, 84 N. Y. 461, 465, and cases there cited; *Howell v. Ripley*, 10 Paige, 43. The appointment of a receiver is equivalent to a sequestration of the rents and profits accruing after the date of the order, and as to all which have previously accrued and which remain unpaid: *Syracuse City Bank v. Tallman*, 31 Barb. 201, 212; *Lofsky v. Maufer*, 3 Sand. Ch. 69, 71; *Johnston v. Riddle*, 70 Ala. 219, 225; *Argall v. Pitts*, 78 N. Y. 242; *Thornton v. Washington Sav. Bank*, 76 Va. 432. Rents accrued are rents earned, within the sense and meaning of this rule. The mortgagor cannot evade the rule by anticipating the appointment of a receiver in a suit pending to foreclose the mortgage, and

leasing the premises for one or more years, and taking, as in this case, payment of the rent in advance.

The tenant, Smith, one of the appellants, stands in the position of a purchaser or lessee *pendente lite* from the mortgagor defendant, and had constructive notice of the action to foreclose by the filing of the notice of *lis pendens*, and took subject to whatever order or decree the court might lawfully make affecting either the title or possession. He could not get any better right than his lessor, the mortgagor defendant, had. It matters not that he did not know, as he says, that there was any intention to apply for the appointment of a receiver. He knew, or is chargeable with knowledge, that the court might make such an appointment, and that whatever interest he might acquire in the possession and use of the premises might thereby be cut off, unless he should elect to attorn to the receiver, and pay to him all rents for the use of the premises after the date of the appointment. So far as the possession of the premises is concerned, the appointment of the receiver had the effect of an equitable ejectment. Were this otherwise, the beneficial results of a receivership could be easily defeated by giving a lease of the premises in question long enough to last during the probable duration of the litigation, and by collecting the rent in advance. The receiver, on his appointment, became entitled, as against the appellants, to the possession and use of the premises, and his rights are in no way affected by the provisions of the lease and payment in advance of rent to thereafter accrue under it. As the order appointing the receiver has not been appealed from, we must presume that there was sufficient ground for making the appointment. Unless the tenant, Smith, attorns to the receiver and pays rent for the use of the premises from and after the date of the order appointing the receiver, he must surrender possession. The order of the circuit court was correct and must be affirmed.

By the COURT. The order of the circuit court is affirmed.

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LIS PENDENS — RIGHTS OF PURCHASERS. — A purchaser of realty *pendente lite* takes subject to any title or interest adverse to that of his grantor recognized in the pending litigation: *Cheever v. Minton*, 12 Col. 557; 13 Am. St. Rep. 258, and note; *Murray v. Blatchford*, 1 Wend. 583; 19 Am. Dec. 537; *Ray v. Roe*, 2 Blackf. 258; 18 Am. Dec. 159; extended note to *Newman v. Chapman*, 14 Am. Dec. 766; *Stenson v. Edwards*, 98 Mo. 622. See also *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401.



**MORTGAGES — RIGHTS OF PARTIES — RENTS AND PROFITS.** — The mortgagee is not entitled to the rents and profits of the mortgaged premises until he or some one in his behalf takes actual possession: *Killebrew v. Hines*, 104 N. C. 182; 17 Am. St. Rep. 672; note to *Seignious v. Pate*, 17 Am. St. Rep. 849; see also note to *Caldwell v. Hall*, 4 Am. St. Rep. 70.

**MORTGAGES — APPOINTMENT OF RECEIVER PENDING FORECLOSURE.** — A receiver of the rents and profits of mortgaged premises cannot be appointed pending foreclosure: *Hardin v. Hardin*, 34 S. C. 77; 27 Am. St. Rep. 786, and extended note fully discussing this subject.

## ST. SURE v. LINDSFELT.

[82 WISCONSIN, 346.]

**RECORD OF FOREIGN JUDGMENT RENDERED WITHOUT JURISDICTION REGARDED AS NULLITY.** — The record of a judgment rendered in a foreign country, where it appears, either from the face of the record or from other admissible evidence, that the court which rendered it had no jurisdiction of the parties or of the subject matter, will be regarded as a nullity.

**DIVORCE GRANTED IN FOREIGN COUNTRY TO PARTIES RESIDENT HERE, VOID.** The courts of a foreign country have no jurisdiction or power to dissolve the marriage relation between persons resident in this state. Every country has the power to absolutely fix, regulate, and control the marriage status of its own citizens; but no country or state has any power to fix, regulate, or control such status as to the citizens of any other country or state.

**PRESUMPTIONS AS TO FOREIGN LAWS NOT EXTENDED TO PENAL STATUTES.** Presumptions as to foreign laws are generally confined to those states and countries in which the common law is the law of the land, but even then they do not extend to such statutory enactments as are penal in their nature. The courts of Wisconsin will not presume the existence in Sweden of a statute, law, or custom authorizing a divorce upon the ground of the husband's conviction and sentence for an offense, where such conviction and sentence were without notice or hearing and two years after the husband and his wife and family had left that country and become permanent residents of the United States.

**DIVORCE WITHOUT APPEARANCE OR SERVICE OF PROCESS, VOID.** — A decree of divorce rendered against a non-resident defendant without any appearance or service of process, is a nullity.

ADOLPH ST. SURE LINDSFELT married Elise Concordia Von Krassow at Rostoop in Sweden on the 27th of May, 1835. Eight children were born of this marriage. In 1842 Adolph and wife came to America and settled in the state of New York, where the plaintiff, William O. St. Sure, was born. Adolph and his family afterwards came to Wisconsin. About 1852, Elise with their four daughters returned to Sweden, and on the 1st of March, 1853, filed a petition for divorce there, on the ground that Adolph had absconded and been sentenced



as a cheater, December 11, 1844. In November, 1858, she returned to Wisconsin, and again lived with Adolph as his wife until he went to the war about 1863. About 1863, Elise went to live with a man named Smith, whom she is said to have married. On January, 1864, Adolph went through the form of marrying Elizabeth Sabine, at Cincinnati, Ohio. On February 3, 1864, at a meeting of the consistory under the presidency of the bishop and commander, in Sweden, a decree of divorce was entered upon the petition of Elise filed in 1853. About 1868, Elizabeth died while living with Adolph as his wife at Sheboygan. On August 30, 1883, Adolph went through the form of marrying the defendant, Olive St. Sure Lindsfelt, at Portage. Elise died March 18, 1886. In May, 1887, Adolph died at Sheboygan, intestate, leaving estate real and personal. On June 21, 1887, the plaintiff petitioned for letters of administration upon the estate, and thereupon Frederick Hoppe was appointed and qualified as such administrator. Hoppe, as administrator, delivered to the defendant as the widow of Adolph personal property of the value of about two hundred dollars. Hoppe having refused to take any steps to compel her to return this property, the plaintiff, on March 28, 1888, as heir at law of said Adolph, filed this bill to compel the defendant to return said property to said administrator, and other moneys which it was alleged she owed to the estate. The defendant answered denying that Elise was the wife of Adolph until her death in 1886, and claiming the property as the rightful widow of said Adolph. The trial court found that the divorce in Sweden was valid, and that the defendant was the lawful widow of said Adolph, and as such, entitled to the property in question, and entered judgment accordingly. The plaintiff appealed.

*G. W. Foster*, for the appellant.

*A. C. Prescott*, for the respondent.

CASSODAY, J. The record of the divorce granted by the ecclesiastical court in Sweden, February 3, 1864, mentioned in the foregoing statement, appears to be sufficiently authenticated to be admissible in evidence under our statute: Rev. Stats. sec. 4139. It is conceded by both parties that the only question for determination is whether that decree of divorce is valid and operated as a legal separation of Adolph and Elise at the time it was rendered.

In this country it is prescribed by constitutional compact

that full faith and credit must be given in each state to the public acts, records, and judicial proceedings of every other state; and yet it is well settled that the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and if want of jurisdiction appear upon the face of the record, or is shown either as to the subject-matter or the person, or in proceedings *in rem*, as to the thing, the record will be regarded as a nullity: *Thompson v. Whitman*, 18 Wall. 457; *Pennoyer v. Neff*, 95 U. S. 714; *Simmons v. Saul*, 138 U. S. 439; *Bartlet v. Knight*, 1 Mass. 401; 2 Am. Dec. 36; *Starbuck v. Murray*, 5 Wend. 148; 21 Am. Dec. 172; *Taylor v. Barron*, 30 N. H. 78; 64 Am. Dec. 281; *Rape v. Heaton*, 9 Wis. 328; 76 Am. Dec. 269; *Renier v. Hurlbut*, 81 Wis. 24; 29 Am. St. Rep. 850. The rule is certainly as strong, if not stronger, when applied to a judgment rendered in a court of a foreign country, towards which no such duty is enjoined, and especially where the jurisprudence of such foreign country is in no sense based upon the common law.

Adolph and Elise were married in Sweden in 1835. After remaining there seven years, they both came, with their children, to the United States, and for a time resided in New York, and then came to and continued to reside in this state during the remainder of their respective lives, as mentioned in the foregoing statement. The divorce proceedings were not instituted until eleven years after they had departed from Sweden and taken up their residence in the United States. Such proceedings were pending for eleven years before the decree of divorce was entered. It is true, Elise had returned to Sweden a few months before she filed her petition for such divorce, March 1, 1853; but she came back to Adolph in Wisconsin, and continued to live with him as his wife for five years, and until he went to the war, which was about a year prior to the rendition of the decree of divorce. It is possible, if not probable, that at the time she filed that petition she intended to remain in Sweden and obtain a divorce. Had she so remained there until after that decree, the divorce would perhaps have been regarded as valid by the laws of Sweden. Undoubtedly every country has the power to absolutely fix, regulate, and control the marriage status of each and all of its own citizens; but no country or state has any power to fix, regulate, or control such status as to the citizens of any other country or state: *Cook v. Cook*, 56 Wis. 208; 43 Am. Rep. 706; *Roth v. Roth*,

104 Ill. 35; 44 Am. Rep. 81. It logically follows that the Sweden court had no jurisdiction or power to dissolve the marriage relation between Adolph and Elise, twenty-two years after they had both abandoned that country and taken up their residence in this, and six years after Elise had abandoned her temporary visit or residence there and returned to Adolph as his wife. In speaking of the residence in this state essential to give the court jurisdiction, Ryan, C. J., aptly said: "No mere pretense of residence, no passing visit, no temporary presence, no assumption of residence here *pro hac vice* only, nothing short of actual abode here, with intention of permanent residence, will fill the letter or the spirit of the statute": *Dutcher v. Dutcher*, 39 Wis. 658; *Cook v. Cook*, 56 Wis. 206; 43 Am. Rep. 706. "The legislature was legislating for the citizens of this state, not for others": *Dutcher v. Dutcher*, 39 Wis. 658. These propositions are still more significant when applied to any statute, law, or custom of any foreign country like Sweden.

Again, the only ground for the divorce stated in the record is that Adolph had absconded from the kingdom, and had been, December 11, 1844, by a judgment of a district court, "sentenced as a cheater, . . . to stand at the pillory at a public place, for his shame, during two hours, and then to suffer penal servitude for five years in any of the fortresses of the realm." This presupposes such conviction and sentence without notice or hearing two years after Adolph and his wife and family had left Sweden and become permanent residents of the United States. No statute, law, or custom has been alleged or proved authorizing a divorce on such a conviction and sentence procured in such a way; and the courts of this state are not authorized to presume the existence of any so repugnant to our own laws: *Walsh v. Dart*, 12 Wis. 635; *Kellam v. Toms*, 38 Wis. 592; *Osborn v. Blackburn*, 78 Wis. 209; 23 Am. St. Rep. 400; 1 Greenleaf on Evidence, secs. 5, 43, 486, and notes. Presumptions as to foreign laws are generally confined to those states and countries in which the common law is the law of the land, as in the several states of this country and Great Britain; and even then they do not extend to such statutory exactments as are penal in their nature: *Hull v. Augustine*, 23 Wis. 383; *Murphy v. Collins*, 121 Mass. 6; *Cutler v. Wright*, 22 N. Y. 472; *Leonard v. Columbia S. N. Co.*, 84 N. Y. 48; 38 Am. Rep. 491; *Smith v. Whitaker*, 23 Ill. 367;

*Gunn v. Howell*, 27 Ala. 663; 62 Am. Dec. 785; 1 Greenleaf on Evidence, sec. 43, and note.

Besides, in the record of the divorce in question it does not appear that any notice was ever served or attempted to be served on Adolph by publication or otherwise, notwithstanding he had been outside of the jurisdiction of the realm for many years; nor is there anything in that record showing or tending to show any appearance by him or in his behalf therein; nor are there any facts recited or mentioned therein which, according to our laws, could give jurisdiction.

For the reasons stated, we must hold that the divorce was a nullity. This being so, it is manifest that Elise continued to be the wife of Adolph until her death, March 18, 1886. It necessarily follows that the marriage of the defendant, Olive to Adolph, August 30, 1883, was an absolute nullity, and gave her no rights whatever as his widow. *Williams v. Williams*, 63 Wis. 58; 53 Am. Rep. 253, and cases there cited.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

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JUDGMENTS — EFFECT OF FOREIGN JUDGMENTS AS EVIDENCE. — No presumption in favor of the validity of a judgment of another state exists where it appears from the record that the defendant was a non-resident, and it does not appear affirmatively that service of process was made on him in that state: *Rand v. Hanson*, 154 Mass. 87; 26 Am. St. Rep. 210, and note. See also *Hull v. Hull*, 35 W. Va. 155; 29 Am. St. Rep. 800, and note.

MARRIAGE AND DIVORCE. — DECREE OF DIVORCE VOID WHERE NEITHER PARTY RESIDES IN JURISDICTION: See *Watkins v. Watkins*, 125 Ind. 163; 21 Am. St. Rep. 217, and note; *Gettys v. Gettys*, 3 Lea, 260; 31 Am. Rep. 637, and note; *Hood v. State*, 56 Ind. 263; 26 Am. Rep. 21, and extended note; *Harrison v. Harrison*, 20 Ala. 629; 56 Am. Dec. 227. As to the effect of foreign divorces see extended note to *Tolen v. Tolen*, 21 Am. Dec. 747. See also extended note to *Hanover v. Turner*, 7 Am. Dec. 206. A decree of divorce granted in a foreign country, in which the defendant did not reside, in an action to which he did not appear and in which process was not personally served on him within such country, is void: *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652, and note.

PRESUMPTIONS AS TO FOREIGN LAWS: See *Malpica v. McKown*, 1 La. 248; 20 Am. Dec. 279; and *Owen v. Boyle*, 15 Me. 147; 32 Am. Dec. 143.



## SIZER v. QUINLAN.

[82 WISCONSIN, 390.]

**EASEMENT OF RIGHT OF WAY, RESERVATION OF GIVES NO RIGHT TO FENCE.**

A reservation in a conveyance of a reasonable right of way across the land conveyed gives the owner of the dominant estate no right to inclose such right of way with fences.

**INJUNCTION.** The plaintiff owned two tracts of land separated by a tract of land owned by the defendant, lying immediately between them. Both parties claimed through the same grantor, who in conveying to the defendant, reserved "a reasonable right of way across the land" so conveyed, between the tracts retained by him and now owned by the plaintiff. The plaintiff fenced in this right of way, and the defendant cut and broke down a part of the fence and threatened to cut, tear down, and destroy the remainder. The plaintiff thereupon brought this action to enjoin and restrain the defendant. The defendant denied that plaintiff had any right to fence the right of way. The circuit court dismissed the complaint, and the plaintiff appealed.

*Duffy and McCrory*, for the appellant.

*Colman, Sutherland and Hiner*, for the respondent.

**PINNEY, J.** The right of way reserved by the defendant's grantor, and afterwards conveyed by him to the plaintiff with the lands to which it was appurtenant, created a mere easement. The language of the deed reserving it is "a reasonable right of way," and the common grantor of both parties conveyed it subsequently with the lands to which it was appurtenant as "the right of way across P. Quinlan's land." The plaintiff thus became the owner of the dominant estate for the benefit of which the easement existed, and the defendant's was the servient estate, burdened with the easement in question.

It is argued that because the right granted is "a reasonable right of way," and it is necessary to as full and perfect enjoyment of it as is desirable, that therefore the plaintiff, for his greater convenience and safety in its use, has a right to fence it in; but we do not think the language in question warrants any such conclusion. The lateral boundaries and width of the way are not specified. The word "reasonable" obviously has reference to the width and limits of the way to be enjoyed, but still it is a mere right of way, a mere ease-



ment and no more, and, though a burden, is not an estate or interest in lands, and does not confer on the plaintiff any exclusive or permanent right of occupancy, but merely a transitory use. The defendant, as the owner of the servient estate, is circumstanced in respect to this easement substantially as the owner of an estate along or over which a highway passes is at common law in respect to fencing the highway. He may fence along the highway or not, as his convenience may dictate, but he is not bound to fence it, or to permit any one else to do so. If the plaintiff is allowed to fence in his right of way it will work, it is manifest, an exclusion of the defendant from the land over which it passes, the full legal title to which still remains in him, which was not contemplated by the language used in the deed reserving the right of way or by the deed conveying it to the plaintiff, and would permit the plaintiff to exercise rights and avail himself of methods of use and enjoyment of the defendant's estate of a more permanent character than a mere right of way over his lands, and not essentially pertaining to or resulting from a mere easement over them.

The owner of the soil of a way, whether public or private, may make any and all uses of it to which the land can be applied, and take all profits which can be derived from it consistently with the enjoyment of the easement: Washburn on Easements, \*264 et seq. All rights which are consistent with the reasonable exercise of the easement remain with the grantor, because they are not granted. In this case the lands were conveyed by the common grantor to the defendant, and the mere easement was reserved and conveyed to the plaintiff. He is entitled only to a reasonable and usual enjoyment and use of the easement: *Bakeman v. Talbot*, 31 N. Y. 366, 371; 88 Am. Dec. 275; *Baker v. Frick*, 45 Md. 337; 24 Am. Rep. 506. In *Brill v. Brill*, 108 N. Y. 511, 517, similar views are expressed, and it is there laid down that "the owner of the soil has all the rights and benefits of ownership consistent with such easement. Among others must be the right to have his lands fenced or unfenced at his pleasure. In the absence of fences, his horses and cattle must not obstruct the way, and the owner of the way is bound to the exercise of due and reasonable care by his own methods to prevent his cattle or other animals from trespassing. An inclosed road might be a convenience, but its creation is not imposed upon the owner of the soil by the terms of the reservation; it is not an actual

or direct necessity to the full enjoyment of the privilege reserved, and it cannot be implied as incident thereto."

Testimony was given to show that the defendant consented to the erection of the fence, but this was no more than a parol license, which was revocable, and was in fact revoked by the acts and conduct of the defendant.

The judgment of the circuit court is correct and must be affirmed.

By the COURT. The judgment of the circuit court is affirmed.

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**PRIVATE WAYS. — RIGHTS AND REMEDIES OF PARTIES ENTITLED THERETO:** See extended note to *Welch v. Wilcox*, 100 Am. Dec. 115; also extended note to *Bakeman v. Talbot*, 88 Am. Dec. 279. The grantee of a private way may enter upon the land and construct such roadway as he desires and keep it in repair: *Herman v. Roberts*, 119 N. Y. 37; 16 Am. St. Rep. 800, and note; but in so doing he must make no material change in the condition of the way or interfere with the estates of others therein: *Brown v. Stone*, 10 Gray, 61; 69 Am. Dec. 303, and note. For a further discussion of the rights of grantees of private ways, see *Grafton v. Moir*, 130 N. Y. 465; 27 Am. St. Rep. 533, and note.

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## NORTH HUDSON MUTUAL BUILDING AND LOAN ASSOCIATION v. CHILDS.

[82 WISCONSIN, 460.]

**CORPORATION, REMEDY OF AGAINST ITS DIRECTORS AND OFFICERS FOR NEGLIGENCE, FRAUD, OR UNAUTHORIZED ACTS. —** A corporation has a remedy against its directors and officers for negligence, fraud, breaches of trust, or for acts done in excess of their authority, and the case against each is distinct, depending upon the evidence against him, unless two or more have joined or participated in the wrongful act, in which case all participants may be joined in the suit.

**ACTION BY CORPORATION AGAINST ITS OFFICERS TO BE TREATED AS EQUITABLE ACTION, WHEN. —** An action by a corporation against its president and treasurer for negligence and misconduct in the discharge of the duties of their respective offices, and also as *ex officio* members of the board of directors, where the gravamen of the complaint is that the defendants have exceeded their respective powers as such president and treasurer in dealing with the property and property rights of the corporation, and have usurped the powers of the board of directors without the knowledge, consent, or approval of such board or of the stockholders, should be treated as an equitable action.

**MINORITY OF BOARD OF DIRECTORS OF CORPORATION NOT LIABLE AT LAW FOR MISCONDUCT OR NEGLIGENCE. —** No recovery can be had at law against a minority of the board of directors of a corporation for misconduct or negligence, inasmuch as they can act only when lawfully assembled, and their duties are devolved on them as a board and not individually.

**LIABILITY OF OFFICERS OF CORPORATION FOR NEGLIGENCE OR UNAUTHORIZED ACTS, BASIS OF.** — The liability of corporate officers to the corporation for damages caused by negligent or unauthorized acts rests upon the common-law rule which renders every agent liable, who violates his authority or neglects his duty to the damage of his principal.

**DEGREE OF CARE, SKILL, AND JUDGMENT REQUIRED OF OFFICER OF CORPORATION.** — Where it is sought to hold an officer of a corporation liable for non-feasance, negligence, or misjudgment in respect to matters within the scope of his proper powers, he will be held responsible only for a failure to bring to the discharge of his duties such degree of attention, care, skill, and judgment as is ordinarily used and practiced in the discharge of such duties or employments, the degree of care, skill, and judgment depending upon the subject to which it is to be applied, the particular circumstances of the case, and the usages of business.

**DIRECTORS OF CORPORATION, DEGREE OF CARE REQUIRED OF.** — Directors of corporations, or those acting *ex officio* as such, are bound to exercise that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances in respect to a like gratuitous employment, regard being had to the usages of business and the circumstances of each particular case; but they are not, in the absence of any element of positive misfeasance, and solely on the ground of passive negligence, to be held liable, unless their negligence is gross or they are fairly subject to the imputation of a want of good faith.

**OFFICERS OF CORPORATION NOT CHARGEABLE AS EX OFFICIO DIRECTORS, WHEN.**

Where the directors of a corporation hold no meetings, give no attention to the performance of their duties, but leave the entire management of the corporate business to the president, secretary, and treasurer, who conduct its affairs negligently, and in the exercise of powers belonging solely to the board of directors, but in entire good faith and without deriving any improper personal gain or profit or improperly appropriating to themselves any of its property or funds, such officers cannot be charged as *ex officio* members of the board, and neither of them is liable to the corporation for the negligent or unauthorized acts of the others in which he did not participate.

**NEW TRIAL, MOTION FOR NOT NECESSARY, WHEN CASE TRIED BY COURT WITHOUT JURY.** — When a trial is had by a court without a jury, the question whether the finding of the court is contrary to the evidence may be reviewed on appeal, although no motion for a new trial was made before judgment.

**MERE PROOF OF FAILURE TO COLLECT MONEYS NOT PROOF OF THEIR LOSS.** — Mere proof of the failure to collect moneys due to a corporation is not proof that they were lost to it.

**REPORT OF SECRETARY OF CORPORATION NOT COMPETENT EVIDENCE AGAINST PRESIDENT AND TREASURER.** — A report of the secretary of a corporation is not competent evidence to charge the president and treasurer with losses alleged to have been sustained by the corporation by reason of insufficient payments to it on certain accounts, or to show that no more was paid to him than he reported.

**REPORT OF EXPERT SHOULD NOT BE ADOPTED BY TRIAL COURT WITHOUT JUDICIAL EXAMINATION.** — In an action by a corporation against its president and treasurer to recover for losses alleged to have been sustained through their negligent and unauthorized acts, it is error for the trial court, without judicial examination as to its accuracy and justice,

to adopt as a basis of judicial action against the defendants, the report of an expert accountant employed by the plaintiff to examine into its accounts and ascertain the extent of such alleged losses.

**DUTY OF TRIAL COURT TO EXAMINE AND PASS UPON ISSUES IN FIRST INSTANCE.** — It is the duty of the trial court to judicially investigate and pass upon questions raised on the trial, and the supreme court will not assume the burden of that duty in the first instance.

**ACTION** brought to recover from the defendants, Childs and Denniston, losses alleged to have been sustained by the corporation plaintiff by reason of their gross neglect, mismanagement, and inattention to their duties, while they were respectively president and treasurer of the plaintiff, and as such *ex officio* members of its board of directors. The five items referred to in the opinion were for fines, charges, dues, and interest not collected, as follows: —

1. From March, 1883, to March, 1884 . . . . .	\$550.55
Failure to collect interest on notes during same time . . . . .	203.98
2. From March, 1884, to March, 1885, failure to col- lect dues . . . . .	688.88
Failure to collect notes and bills, with interest .	555.33
3. From March, 1885, to March, 1886, failure to col- lect dues, etc. . . . .	53.40
4. Failure to collect interest . . . . .	201.50
5. From March, 1886, to March, 1887, failure to col- lect proper charges from shareholders . . . .	436.85

Other facts necessary to an understanding of the points decided are stated in the opinion.

*Ray S. Reid and C. D. O'Brien*, for appellant Childs.

*H. L. Humphrey and Baker and Helms*, for appellant Denniston.

*Bashford and Disney, R. H. Start, and Bashford, O'Connor, and Polleys*, for the respondent.

**PINNEY, J.** 1. The corporation plaintiff has a remedy against its directors and officers for negligence, fraud, breaches of trust, or for acts done in excess of their authority, and the case against each is distinct, depending upon the evidence against him, unless two or more have joined or participated in the wrongful act, in which case all participants may be joined in the suit; and where the act is illegal or in violation of some positive law, the authorities indicate that there is no right of contribution where one only is sued and charged;



and therefore it is held in many cases that it is not necessary to make all the directors parties who have more or less joined in the act complained of: Thompson on Liability of Officers of Corporations, in notes 352, 353, 411, and cases cited. A different rule is maintained in the modern cases in England and America, in cases where the wrongful act is the result of negligence or gross misjudgment and is not, in and of itself, illegal or a violation of some positive law, as will be shown hereafter; and there exists high authority in such cases for holding that in all cases where contribution would be allowed in equity, there those who are liable to contribute are necessary parties to a suit in equity to obtain redress for the loss which the corporation has suffered. The remedy of the corporation for the wrong done is either at law or in equity according to the nature of the case. Hence, in every such case as the present it is important to determine at the outset whether the action shall be or is a legal or equitable one, and, if the latter, whether the necessary parties are before the court to enable it to make a proper and complete determination of the controversy. This action has been treated throughout by the plaintiff and by the circuit court as a legal action, both in the demand for judgment and in the course taken at the trial, a trial by jury having been waived, and the court ruling that no evidence of liability was competent that did not equally affect both defendants; and, after judgment, by the remission of damages for the periods mentioned, on the ground that for these sums the defendants were not jointly liable, though this fact was either overlooked or was not regarded in the decision of the case.

2. The complaint is not entirely definite and clear in the allegations upon which the liability of the defendants is rested, but groups together grounds not entirely congruous when stated in the same cause of action, as the charge against them is gross neglect, mismanagement, and inattention of the defendants "to the duties of their said offices," and they are, to some extent at least, attempted to be charged for negligence or misconduct in their respective offices of president and treasurer, and also as members of the board of directors, the by-laws making them *ex officio* such. Some of the acts as to which negligence and misconduct are predicated lie wholly outside the scope of the duties of either one or both the president and treasurer. In the main, the gravamen of the case seems to be that the defendants have exceeded their

respective powers as such president and treasurer in dealing with the property and property rights of the plaintiff, and have usurped the powers of the board of directors in these respects; and it is expressly charged in the seventh, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth causes of action (so designated) that they did the acts complained of "without the knowledge, consent, and approval of the board of directors"; and the last of these causes of action grouping the plaintiff's losses in one aggregate sum of twenty-two thousand dollars charges "that between the 1st of March, 1882, and the 1st of September, 1887, the plaintiff, through the gross neglect, mismanagement, and inattention of the defendants to the duties of their said offices, has lost in dues, interest, and charges on stocks and loans, and on loans made by defendants, and in the wrongful cancellation of stock by the defendants, and paying thereon more than the holders thereof were entitled to receive and be paid by said corporation, and without the knowledge, consent, or authority of the board of directors of said corporation, and without the knowledge, consent, or authority of the stockholders thereof, to the amount of twenty-two thousand dollars." The first five causes of action (so designated) proceed entirely upon the ground of gross neglect and mismanagement of the defendants, and there are items also in the other causes of action based on that ground. The circuit court based the finding against the defendants on the ground "of gross negligence and usurpation of authority not given them by the by-laws, but reserved to the board of directors."

These different allegations thus blended in the several so-called causes of action, which are in fact but enumerations of items of liability under what is really but one general count, require different answers and different evidence to meet them, creating difficulties of procedure which can be best dealt with and overcome in an equitable action. We think that the case made by the pleadings and proofs is not one where an adequate and proper remedy by legal action can be obtained, but the action must be treated as an equitable one, and that the circuit court erred in dealing with it on any other basis. As a recovery in a legal action, the judgment must stand or fall on the liability of the defendants as president and treasurer, for no recovery can be had at law against a minority of the board of directors for misconduct or negligence, inasmuch as they can act only when lawfully as-

sembled, and their duties as such are devolved on them as a board, and not individually: *Franklin Ins. Co. v. Jenkins*, 3 Wend. 134; *Gaffney v. Colvill*, 6 Hill, 572, 573.

3. Much argument was had upon the rule of liability of corporate officers in cases such as this, presenting for consideration some questions in respect to which a considerable difference of opinion has prevailed. The liability of officers to the corporation for damages caused by negligent or unauthorized acts rests upon the common-law rule which renders every agent liable who violates his authority or neglects his duty to the damage of his principal. It seems to be now universally agreed that, no matter whether the act is prohibited by the charter or by-laws, the liability is on the ground of violation of authority or neglect of duty: *Thompson on Liability of Officers of Corporations*, 357; *Briggs v. Spaulding*, 141 U. S. 146.

There can be no doubt that if the directors or officers of a company do acts clearly beyond their power, whereby loss ensues to the company, or dispose of its property or pay away its money without authority, they will be required to make good the loss out of their private estates: *Thompson on Liability of Officers of Corporations*, 375; *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381; *Flitcroft's Case*, L. R. 21 Ch. Div. 519; *Franklin Ins. Co. v. Jenkins*, 3 Wend. 130; and many other authorities to this effect were cited by the respondent's counsel. This is the rule where the disposition made of money or property of the corporation is one either not within the lawful power of the corporation, or if within the power of the corporation, is not within the power or authority of the particular officer or officers. Where the ground of liability is for nonfeasance, negligence, or misjudgment in respect to matters within the scope of the proper powers of the officer, he will be held responsible only for a failure to bring to the discharge of his duties such degree of attention, care, skill, and judgment as are ordinarily used and practiced in the discharge of such duties or employments; the degree of care, skill, and judgment depending upon the subject to which it is to be applied, the particular circumstances of the case, and the usages of business.

In respect to directors or those acting *ex officio* as such, the rule of liability has been the subject of much discussion in the recent case of *Briggs v. Spaulding*, 141 U. S. 132, in which although there was a strong dissent, the rule may be regarded

as settled, in the federal courts at least, and in the courts of several of the states, as there laid down, and to the effect that directors, although often called "trustees," are not such in any technical sense, but that they are mandataries, the relation between them and the corporation being rather that of principal and agent, but under circumstances they may be treated as occupying, in consequence of the powers conferred on them, the position of trustees to *cestuis que trust*; that the degree of care required of them depends upon the subject to which it is to be applied, and each case is to be determined upon its own circumstances; that as they render their services gratuitously, they are not to be held to the degree of responsibility of bailees for hire, or expected to devote their whole time and attention to their duties; that they are not, in the absence of any element of positive misfeasance, and solely on the ground of passive negligence, to be held liable, unless their negligence is gross, or they are fairly subject to the imputation of a want of good faith. It is to be remembered that they have the same interests to protect and subserve as other stockholders, and self-interest naturally prompts them to look after their own, and the degree of care they are bound to exercise is that which ordinarily prudent and diligent men would exercise under similar circumstances, in respect to a like gratuitous employment, regard being had to the usages of business and the circumstances of each particular case; that they are not liable, in the absence of fraud or intentional breach of trust, for negligence, mistakes of judgment, and bad management in making investments on doubtful or insufficient security. Where they have not profited personally by their bad management, or appropriated any of the property of the corporation to their own use, courts of equity treat them with indulgence. Were a more rigid rule to be applied, it would be difficult to get men of character and pecuniary responsibility to fill such positions: Thompson on Liability of Officers of Corporations, 357; Beach on Corporations, sec. 249. These views are sustained in *Briggs v. Spaulding*, 141 U. S. 130; *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *Citizen's etc. Ass'n v. Coriell*, 34 N. J. Eq. 383, 392; *Swentzel v. Penn Bank*, 147 Pa. St. 140; 30 Am. St. Rep. 718; *In re Forest of Dean Coal Min. Co.*, L. R. 10 Ch. Div. 450; *Ackerman v. Halsey*, 37 N. J. Eq. 363; *Hun v. Cary*, 82 N. Y. 65; 37 Am. Rep. 546; *In re Denham & Co.*, L. R. 25 Ch. Div. 752; *Watt's Appeal*, 78 Pa. St. 391. These views are applicable,



we think, to the case of all officers serving and acting within the scope of their authority gratuitously or practically so. The rule of liability in case of service for reward is well understood and need not be repeated.

It has been thought best to indicate the rules we think applicable to the liability of directors and other officers of corporations, as these questions were fully discussed at the argument, and in view of the probable importance of these questions in the future disposition of this cause.

The finding of the circuit court that no directors' meetings were held within the period mentioned, and that the business of the corporation, consisting of issuing stock, making loans, accepting prepayment of loans, and in fact all the business of the corporation, was transacted without any direction of the board of directors by the defendants and Harvey, the secretary, since deceased, is, we think, sustained by the evidence, although stoutly denied by the defendants. There is not only no record of any such meetings, but those who are said to have been directors during the period all deny attending any such meetings or transacting any such business, and the defendants themselves are wholly unable to name a single director who was present at any such meeting. While the absence of a record of proceedings, due to the negligence of the secretary, would not defeat the action of the directors, we are satisfied no such meetings were held, and that the alleged want of authority in respect to many matters transacted by the defendants, or one of them, and Harvey was not supplied at any of the stockholders' meetings, and unless ratified subsequently they were without requisite authority. During a period of about five years the regularly chosen directors of the corporation wholly abdicated their functions as such, and gave no attention whatever to their duties, and left everything connected with the affairs of the corporation to the management of the president, secretary, and treasurer, by virtue of their several offices, and, beyond this, to take their own unheeded course. At the annual meetings of stockholders, officers and directors were regularly elected, and reports were made by the secretary and treasurer, but the directors elected utterly neglected their duties as before. The death of Harvey caused investigation, when the entire absence of proper entries on the ledger and record during all this period was discovered, as well as the fact that there was a shortage in the funds of the corporation. The defendants during all this

time had proceeded to discharge the duties of their respective offices, and looked after and conducted the affairs of the corporation in connection with Harvey, the secretary, in entire good faith, not deriving any improper personal gain or profit, and without improperly appropriating to themselves any of its property or funds. They may have made mistakes and misjudged as to their powers and duties. They were not guilty of intentional wrong. The defendant Denniston, the treasurer, whose functions were purely ministerial, and extended only to receiving the moneys of the plaintiff and paying them out, and to the safe-keeping of its securities and keeping a correct account, has accounted for and paid over every cent he received, and yet he was charged by the circuit court with losses of the corporation by the judgment in this case to the amount of over twenty-one thousand dollars.

We are unable to see how the defendants are to be thus charged as *ex officio* members of the board. They were not technically directors, and neither of them had it in his power to call a meeting of the board. They could act as *ex officio* members only at a meeting regularly convened, and no meetings were held. Directors cannot act in any other manner: Cook on Stockholders, sec. 592, and cases in note. This is so well settled that citation of authority would be superfluous. Stated monthly meetings of the board were required to be held on the next Tuesday after the monthly stockholders' meetings, but the directors came not. Special meetings might be called on the written request of two directors, but no such request appears to have been made, and none are willing to own, now that misfortune has overtaken the company, that he ever acted as a director during the period in question. All have been eager to take the benefits, whatever they were, of the management of the defendants, and accept their share of the money disbursed in paying off the first series of stock at a figure amounting to nearly eight thousand dollars more than was due on it, as it is now claimed. None but the president, treasurer, and secretary appear to have been willing to give the affairs of the corporation any particular attention; and at least five of the directors are understood to have received, and still hold, their shares of this amount, and now all appear to be demanding that these defendants shall put back that amount of money from their own funds into the treasury of the plaintiff to make good the alleged loss on this and other accounts, arising out of their attempt to manage the

affairs of the plaintiff without the aid or authority of the board of directors. Such a claim, when well founded in law, ought to be established by entirely satisfactory evidence.

Regarding the case now presented by the record as one where a recovery must depend upon the liability of the defendants disconnected with their *ex officio* membership of the board, it is plain that Childs and Denniston, in their respective capacities as president and treasurer, are not responsible for the nonfeasance, negligence, or misfeasance of Harvey as secretary; nor is either of these liable for the nonfeasance, negligence, or misfeasance of the other in his official relations to the plaintiff. Their liability is several and separate. They cannot be held jointly liable for any act in excess of the authority of either or both of them, without proof of joint participation, to be proved in each instance and not presumed; and here we have neither finding nor proof of improper combination or intentional wrong. If Childs and Harvey, as president and secretary, exceeded their powers in any given instance to the loss or damage of the plaintiff, Denniston is not chargeable with it, without proof that he intermeddled with it and in excess of his authority. If Denniston and Harvey, as treasurer and secretary, exceeded their powers in any case to the loss or damage of the plaintiff, Childs is not liable without proof that he intermeddled or participated in the wrong.

While these rules are obviously correct, and so clearly so that citation of authority is not needed to vindicate them, in view of the finding and the evidence upon which it was based we have felt it proper to state them at length and with some particularity, as bearing upon the correctness of the judgment of the circuit court.

4. It is contended by the respondent that as no motion for a new trial was made before judgment the question whether the finding is contrary to evidence is not open to review. As the trial was by the court without a jury, no such motion was necessary. Where there are exceptions to the finding, this court must review the case on the facts: *Garbutt v. Bank of Prairie du Chien*, 22 Wis. 384.

5. The extent of loss or damages the plaintiff had sustained formed a very important part of the controversy, and upon this branch of the case we regret to say that we are without the assistance and benefit of an examination and determination of the circuit court. As early as September, 1887, the

plaintiff employed a Mr. Somers, of St. Paul, as an expert accountant, who had had considerable experience in the management of the affairs of building associations, to examine the books and papers of the plaintiff, ascertain its financial condition, the extent of its losses, and how they had been occasioned. His examination extended from February, 1882, to September, 1887. He made a report upon these matters, which was put in evidence on the trial, or the substance of it, and this report, with a set of books compiled by him, and his testimony, constitute almost the entire basis on which the finding against the defendants for \$21,407.05 rests. This report was adopted as an entirety by the circuit court, and the question of the extent of loss or damages, as well as legal questions in respect to liability, were, in effect, determined by the hired expert of the plaintiff instead of the court; and we have been urged to accept it here in like manner as final and conclusive. If we were willing to do so, and should accordingly affirm this judgment, it would transpire that the plaintiff's expert had practically decided this important cause in both courts on several vital and important questions of law as well as fact. We cannot suppose that the circuit court, if it had examined the report, would have rendered the judgment found in the record.

It was not the duty of the defendant Denniston, as treasurer, to collect the first five items in the foregoing statement, amounting to nearly three thousand dollars; nor was it the duty of Childs, as president, so far as we are able to understand it. The treasurer is only "to receive all moneys as soon as paid into the association." The secretary has custody of the accounts, books, and papers of the corporation, except deeds, bonds, mortgages, etc., kept by the treasurer, and is, it would seem, the executive manager of the financial business of the corporation. The testimony to show that any loss had been actually sustained while these defendants were in office is too vague and uncertain to justify the rendition of a judgment for these amounts. Mere proof of failure to collect these items is far from showing that they were lost. Besides, as to many of them, their collection might have been enforced by forfeiture and sale of the stock. These defendants did not possess that power. It was lodged with the board of directors, and in some instances at least the security for loans is security for fines, dues, and interest. The collection of these items was a part of the business of the corporation in charge of its



board of directors, and they might devolve it on the secretary if it was not one of the duties of his office, as we understand it was. It is quite as consistent with the evidence that these losses, if such there were, occurred after the defendants resigned as before.

There is nothing in the by-laws nor in the evidence to show that it was the duty of the treasurer to do anything in relation to issuing stock beyond caring for the money paid for it after it was "paid into the association." His duties were purely ministerial, and he had nothing to do, as treasurer, with determining or computing the amount to be paid on the issue of stock, nor is there any testimony showing or tending to show that he ever assumed to interfere with any such matter. It was error, therefore, to include in a judgment against him the sum of \$112.06 for losses on shares issued for too little money. Nor is there, so far as we can discover, any proof tending to show that this loss was the fault of the president, whose duty it is to sign stock certificates.

There is embraced in the judgment items to the amount of about six thousand eight hundred dollars for losses by cancellation of loans, on the ground that there was not money enough paid on them to satisfy them. These items appear from Mr. Somers's testimony to have been arrived at by ascertaining the amount of securities canceled each year during the period in question, and by deducting therefrom the amount that "appears to have been paid on that account as per secretary's report," and the difference is charged up as a loss for which the defendants are held liable. The secretary's report is not competent evidence against these defendants to charge them with this supposed loss. It is not evidence that no more was paid to him than he reported. Which of these defendants, if either, attended to the matter of settling up the loans upon which the alleged losses occurred, we are unable to ascertain from the evidence; and if in some cases Denniston did, and in others Childs, we have no *data* upon which to ascertain the amount for which either ought to be charged. An exhibit annexed to the bill of exceptions would seem to show that in some instances releases of mortgage loans were executed and acknowledged by Childs as president, and in some cases by Denniston as treasurer, but in all cases by Harvey as secretary. If loss occurred as charged, the evidence is not sufficient to show it, much less to show what sum should be charged to Childs, and what to Denniston. It seems to have

been assumed throughout that if either Childs, Harvey, or Denniston exceeded his authority as an officer, and loss ensued, the other two would necessarily be liable for it by reason of the assumption by the one of authority lodged only in the board of directors. Each of these parties, in the absence of participation of one or both the others, would alone be liable for exceeding his authority.

The testimony as to items amounting to three thousand five hundred dollars or thereabouts for losses by reason of money having been paid for cancellation of stock in excess of its value seems to rest upon some method of ascertaining its supposed value adopted by Somers, which we do not fully understand; and the same is true as to cancellation of loans. He seems to have adopted some rule differing from the by-law of the company on that subject. He testified that the different parts of the rule, which is quite obscure, "don't hang together." But in view of the result at which we have arrived, it is not necessary to carefully examine this matter.

6. Stock was issued by the corporation in five series: First series, March 28, 1877, 500 shares; second series, March, 1879, 172 shares; third series, March, 1880, 76 shares; fourth series, March, 1883, 116 shares; and fifth series, February, 1886, 125 shares. It was generally supposed that the first series had matured so as to be payable at twice its nominal value in September, 1885; and the officers Childs, Denniston, and Harvey proceeded to make quite a large loan of the First National Bank of Hudson to raise money to pay off that series accordingly, and pledged to the bank a large amount of the plaintiff's securities; the defendant Denniston indorsing the note given for the loan. There was a general understanding that the first series was to be paid off, and the stockholders were anxious and ready to receive their money. Payments were accordingly made by the treasurer on orders drawn by Harvey as secretary, and signed by Childs, from time to time, until Harvey's death in March, 1887, no one making any objection or supposing, so far as the evidence shows, that there was any apprehension of any shortage in the funds of the corporation, or any irregularity in the management of its affairs. The defendants up to this time supposed Harvey had kept the books and records properly. Investigation ensued, and suit was brought against the bank by the plaintiff to recover its securities pledged for the loan. In the meantime a board of directors and other officers had been chosen, and the corpo-

ration had been rehabilitated and restored to its normal action, and payments had been ordered to be made, and were in fact, paid on this loan. The plaintiff was unsuccessful in its suit against the bank, and it finally paid the loan. The new board had voted to pay six per cent interest in May, 1887, on all unpaid claims under the first series of stock, and directed the issue of orders to pay some of the claimants under this series, on the basis that it had matured in September, 1885, and as late as January 11, 1888, two orders were directed to be issued for the payment of some shares on the same basis. The question had been mooted in the previous summer and fall whether the first series had matured, and whether the shortage in the funds was not caused by paying off that series at much more than its actual value. The result was, that as early, probably, as September, 1887, and soon as Somers had made his report, the plaintiff set up the claim that at the time the first series of stock was paid off it was in fact worth only \$1.49, instead of \$2, as had been supposed, basing the claim on such report. The item included in the judgment on this account is a large one, and is sustained only by the report or opinion of Mr. Somers, and the argument made upon the *data* furnished by his report and the evidence tends strongly to show that the stock was worth much more than the estimate made by him. The accuracy and justice of his report as a basis of judicial action against these defendants have been found so seriously at fault, and as it was not made the subject of judicial examination and consideration in the circuit court, as it ought to have been, we cannot accept and act on his conclusions in respect to the claim that the first series of stock was worth only \$1.49 when paid off. It is not within our province or duty to enter upon this inquiry until it has been examined and passed on by the circuit court.

We think that inasmuch as the action was treated as a legal, and not an equitable one by the circuit court, and as the correctness of the report or statement of the expert, Somers, was not judicially investigated and passed on, there was practically a mistrial of the action, and that the judgment should be reversed on that ground, if for no other reason. "A trial is the judicial examination of the issues between the parties": Rev. Stats., sec. 2842. We have bestowed an unusual amount of care and labor upon this important case, and have been desirous, if possible, to arrive at some conclusion upon which we might direct such judgment to be entered, as we might

feel confident would do substantial justice to the parties, and avoid the delay and cost of further litigation, but we have been unable to do so with the material before us.

The functions of this court, with few exceptions, are appellate only. We cannot permit the burden of the duty of trial courts to examine and pass upon cases before them to be cast upon us in the first instance, without proper opportunity for such examination, burdened as we are with a constantly increasing number of appeals. We cannot stop, if we were disposed to do so, to enter into elaborate computations and comparisons, and examine critically voluminous bills of exceptions, with numerous manuscript exhibits, sometimes supplemented with a box filled with books and papers. All this great bulk of matter should be reduced to reasonable compass, and arranged in proper order, before being brought to this court.

As the judgment of the circuit court must be reversed for the errors already noticed, we think it is but justice to both parties to order a new trial, and to direct that the cause be referred upon all the issues therein, upon the proofs already taken, and such as may be produced hereafter, to some attorney being a competent accountant, to report special findings upon all the issues, and to take and state an account of the transactions in question, and report the same to the court, to the end that such judgment may be rendered thereon as shall be just and proper. The action must be regarded as an equitable one, and other necessary or proper parties may be brought in, if it is deemed necessary by the plaintiff or by the court, in order to secure a just and proper determination of the entire controversy.

If it shall be thought proper to amend the pleadings so as to charge these defendants in equity as *ex officio* members of the board of directors, it may be that all the directors during the period in question will be necessary parties (*Sherman v. Parish*, 53 N. Y. 483), on the ground that the defendants, if chargeable as such, are entitled to have contribution of and from such directors: *Nickerson v. Wheeler*, 118 Mass. 295; *Baynard v. Woolley*, 20 Beav. 584; *Ashurst v. Mason*, L. R. 20 Eq. 225, 236. There are authorities which take a contrary view, and as these questions thus suggested were not argued at the hearing we do not express any opinion in respect to them.

The question whether the corporation plaintiff has not so far taken and enjoyed the benefits of the transactions con-



plained of, and ratified them, that it has lost the right to complain of them, was ably and vigorously pressed upon our attention, but we express no opinion on this point, as additional evidence may be produced materially affecting the rights of the parties in respect to it.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded for a new trial and for further proceedings in accordance with the opinion of this court.

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**CORPORATIONS — LIABILITY OF DIRECTORS FOR NEGLIGENCE OR UNAUTHORIZED ACTS.** — This question is discussed at length in a monographic note to *Marshall v. Farmers' etc. Bank*, 17 Am. St. Rep. 95-101, and extended note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 639. The directors of a corporation are liable to the corporation for fraud or misconduct: *Smith v. Poor*, 40 Me. 415; 63 Am. Dec. 672, and note; and for neglect of their official business: *Bank v. Hill*, 56 Me. 385; 96 Am. Dec. 470, and note.

**CORPORATIONS — DEGREE OF CARE REQUIRED OF DIRECTORS.** — The diligence required of directors of corporations in the discharge of their duty is that exercised by prudent men in their own affairs, being that degree of diligence characterized as ordinary: *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; 24 Am. St. Rep. 625, and note; *Marshall v. Farmers' etc. Bank*, 85 Va. 676; 17 Am. St. Rep. 84, and note. The directors of a corporation are required to exercise the utmost good faith, and in accepting the trust they impliedly undertake to give to the enterprise the benefit of their best care and judgment: *Ten Eyck v. Pontiac etc. R. R. Co.*, 74 Mich. 226; 16 Am. St. Rep. 633, and note. See also note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 639.

**NEW TRIAL — APPEAL WITHOUT MOVING FOR.** — An appeal may be taken to a higher court without moving for a new trial in the court below: *Innis v Steamer Senator*, 1 Cal. 459; 54 Am. Dec. 305; but see *Harlan v. Bernie*, 22 Ark. 217; 76 Am. Dec. 428, where the contrary is held.

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## FISH BROTHERS WAGON COMPANY v. LA BELLE WAGON WORKS.

[82 WISCONSIN, 546.]

**TRADE-MARK, RIGHT OF ASSIGNEE OR PURCHASER TO USE.** — When a manufactory of wagons in which the names of the founders of the business and a rebus to represent their surname have been used as trade-marks, is sold and assigned to a corporation, the corporation acquires by the sale and assignment the good will of the original business, and the right to use such names and rebus as trade-marks, although they were not specifically mentioned in any of the transfers of the business to the corporation. But if there has been no agreement to give to the corporation, the exclusive right to use such names and rebus as trade-marks, a new firm composed of such original founders of the business transferred to the

corporation may use the same names and rebus in advertising wagons made by them, provided they do not use them in a way calculated to induce persons to buy the same as and for those manufactured by the corporation. The new firm, however, has no right to represent that their business is the same as that originally conducted by them.

**PICTURE OF FISH USED IN TRADE-MARK, MEANING OF.** — The picture of a fish used in a trade-mark before the words, "Brothers" "Brothers and Co.," or "Wagon," is to be regarded as simply another way of designating the surname "Fish" as the founder and originator of the particular make of wagons manufactured and sold by him.

IN 1863, Titus G. Fish and one Bull commenced to manufacture wagons in the city of Racine, under the firm name of Fish and Bull. About 1864 Bull left the firm, and Abner C. Fish, a brother of Titus G., came into the firm, the title of which was then changed to Fish Brothers. About 1868, Edwin B. Fish, another brother became a member of the firm. About that time the firm became embarrassed, and made an agreement with one Case, who advanced money for carrying on the business, whereby they agreed to carry on the business as his agents. The business was thereupon conducted under the name of "Fish Brothers, Agents." About 1872 or 1873, J. C. Huggins became a member of the firm, which then became known as "Fish Brothers & Co., Agents." In 1878, the catalogue used by this firm had on it a picture of Titus G. Fish, under which were the words: "Titus G. Fish, founder of the firm of Fish Brothers and Company, 1864." There was also a picture of a fish on the catalogue. These pictures and statements were continued on subsequent catalogues down to the time of the incorporation of the plaintiff. In 1880, a disagreement arose between Case and the firm, and a suit was brought by him against the firm. In 1882 or 1883, Abner C. Fish dropped out of the firm, and D. J. Morey and S. S. Lyon came into it. On October 16, 1883, Case was appointed a receiver, and took possession of all the property of the firm, and excluded the members therefrom otherwise than as employees. Case resigned as receiver September 26, 1885, and A. W. Hall was appointed in his place. The business was thereafter advertised as "Fish Brothers and Company; A. W. Hall, Receiver; T. G. Fish, Superintendent." And there were placed on the wagons and catalogues, "Fish Brothers," "Fish Wagons," "Fish Brothers, Agents," "Fish Brothers and Company, Agents," and the picture of a fish with "Bros." on it, or "Bros. & Co." Titus G. Fish continued in the employ of Hall during his entire connection with the business. In January, 1887, one John-

son purchased from the receiver the property of the business of Fish Brothers & Co., and on the 28th of that month the plaintiff became incorporated, and Johnson conveyed the property to it. Titus G. Fish became vice-president and manager, and Edwin B. Fish, superintendent of the company. Titus G. Fish, as such manager, made an illustrated catalogue, having thereon the words and pictures mentioned above. He was also one of the directors of the company. At a meeting of the stockholders of the company held January 21, 1889, Fish was elected a director for another year and the directors elected him secretary of the company, which office he held until he resigned as director and secretary, March 30, 1889. Edwin B. Fish remained in the employ of the company until June 17, 1890. On June 17, 1890, Titus G. Fish, Edwin B. Fish, and Fred C. Fish, a son of Titus G. Fish, entered into a copartnership to manufacture and sell wagons and other vehicles, under the name of Fish Brothers & Co. On the same day this new firm entered into an agreement with the corporation defendant, by which it agreed to manufacture for the firm wagons to be made of material and pattern selected by them and under their supervision and direction. The wagons were to be known and marked as Fish Brothers & Co., wagons. The firm were to receive two and one half per cent of the proceeds of their sale, and the corporation the balance. All the members of the firm received salaries from the company, and Titus G. Fish was employed as superintendent of sales and collection. The members of the firm thereupon issued the circular referred to in the opinion. After the commencement of this suit, the court on August 17, 1891, granted a preliminary injunction upon the application of the plaintiff, ordering in effect, that the defendants be enjoined and restrained until the further action of the court from using the words "Fish Brothers," "Fish Brothers Wagons," or the trade-mark or device consisting of the picture of a fish with the words "Bros." or "Brothers" or "Bros. & Co." printed thereon, or from in any wise using said words, phrases, or devices, or any of them, in any way designating any wagons or vehicles, or printing, publishing, circulating, or distributing catalogues containing such words in imitation of the plaintiff, or in any way giving out that the defendants, or any of them, are the manufacturers of, or dealers in, or authorized to manufacture or deal in, Fish Brothers wagons, or to use the words "Fish Brothers" or "Fish Brothers Wagons" in designation of their manufacture. So much of

this injunction as enjoined the defendants from using in their business the words "Fish Brothers and Company," "Fish Bros. & Co.," or either of them was dissolved on September 13, 1891, upon giving the requisite bond. The defendants thereupon asked a counter injunction restraining the plaintiff from using the words "Fish Brothers," "Fish Bros." or "Fish Brothers' Wagons," or the picture of a fish with the words "Fish Brothers," or "Bros." or "Fish Brothers and Company" stamped thereon. On November 12, 1891, the defendants moved for an order setting aside the injunction entered on the plaintiff's application, and for a temporary restraining order in favor of the defendants. From an order denying that motion the defendants appealed. Other facts are stated in the opinion.

*Turner and Timlin, and Ross, Dwyer and Smith*, for the appellants.

*Quarles, Spence, Hoyt and Quarles*, for the respondent.

CASSODAY, J. The plaintiff, Fish Brothers Wagon Company, was incorporated in January, 1887, and since that time has been engaged in the manufacture of wagons at Racine, and selling the same throughout the country. The defendant La Belle Wagon Works and the other defendants have since June 17, 1890, been engaged in the manufacture of wagons at South Superior, and selling the same in different parts of the country. This suit was commenced in July last to restrain the defendants from using the words "Fish Brothers," "Fish Brothers & Co.," "Fish Brothers Wagons," and the picture of a fish as trade-marks on the wagons and in the advertisements of the defendants, on the ground that the plaintiff has the exclusive right to the same. The defendants, insisting upon the right to use such words, counterclaim an exclusive right to the same, and ask for an injunction accordingly. The history of the use of those words by the firm of Fish Brothers and Fish Brothers & Co. as copartners at Racine up to the time when Mr. Case became the ostensible owner or mortgagee, and from that time down to October 16, 1883, in connection with the word "Agents," when he was appointed receiver of all the property and assets connected with that business, and from that time down to September 26, 1885, when he was superseded by Mr. Hall as such receiver, and from that time down to 1887, when all the property and assets connected with the business were sold by the receiver and the parties interested to the plaintiff company, is sufficiently set forth in the foregoing statement.



The first question presented is whether the plaintiff, by such purchase and subsequent use, acquired the right to continue the use of such words and pictures on their wagons and in their advertisements, as trade-marks, as indicated. Two of the Fish Brothers, Titus G. and Edwin B., and Huggins, of the firm of Fish Brothers & Co., remained in the business as managers under such receivers, not only down to such transfer of the property and assets to the plaintiff company, but for more than two years thereafter, acting as directors and officers of the plaintiff company. Such conduct on their part was a continued sanction of the use of such words and symbols as trade-marks on the plaintiff's wagons sold during the time throughout the country, and advertisements of the same. It is conceded that the office of a trade-mark is to point out the true source, origin, or ownership of the goods to which the mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers: *Marshall v. Pinkham*, 52 Wis. 578; 38 Am. Rep. 756; *Gessler v. Grieb*, 80 Wis. 24; 27 Am. St. Rep. 20. "Such trade-mark usually includes the name of the manufacturer or dealer as the best designation of such source, origin, ownership, or place of business. Sometimes, however, it consists of some novel device, arbitrary character, or fancy word, applied without special meaning, and which, by use and reputation, comes to serve the same purpose": *Gessler v. Grieb*, 80 Wis. 25; 27 Am. St. Rep. 20, and cases there cited. From these several authorities it is obvious that a trade-mark may perform one or more of three several functions, depending upon what it is and its manner of use. One of these is to point out the true source or origin of the goods to which the mark is applied. Manifestly, the words "Fish Brothers" and "Fish Brothers & Co.," as used, pointed out Titus G. as the founder, and him and his brothers and other members of the firm as originators of the particular make and style of wagon and vehicle first manufactured by them, and afterwards by them as agents, and subsequently by receivers and the plaintiff, under their supervision or with their acquiescence, at Racine. The mere fact that each and all of the Fishes withdrew from that business did not prevent the words mentioned from continuing to point to the old place of business and the old firm of Fish Brothers and Fish Brothers & Co., at Racine, as the true source and origin of their particular make and style of wagon

and vehicle to which the plaintiff company succeeded, and continued to manufacture at Racine.

It is true that one of the functions of a trade-mark is to point out the true ownership of the goods or articles to which it is applied, and that the words "Fish Brothers" and "Fish Brothers & Co." partially ceased to perform that office when Mr. Case became the ostensible owner or mortgagee, and still more so when the legal title passed to the receivers, respectively, and finally became extinct when the property and assets became vested in the plaintiff; but such extinction did not prevent those words from performing the two other functions of a trade-mark mentioned. As indicated, one of these is to point out and designate the dealer's place of business, distinguishing it from the business locality of other dealers. Such trade-mark is, in effect, an extension or perambulation of the dealer's trade sign. It advertises the home business to all who may observe the article on sale or in use in other parts of the country. It attaches to every such article on sale or in use the reputation it has acquired with the trade, and informs all observers desiring a like article where the manufacturer or dealer may be found. The picture of a fish and the manner of its use, as well as the words mentioned, designated not only the plaintiff's place of business at Racine, but also the true source and origin of the make and style of the wagons and vehicles so previously made by Fish Brothers and Fish Brothers & Co., as agents, and under the receivers at Racine, and hence may fairly be regarded as trade-marks for the plaintiff, even after all the Fishes had withdrawn from that business.

Upon the facts in this case, as found in the foregoing statement, and the law applicable, we are constrained to hold that the plaintiff acquired the good will of the business, including the right to use the picture and words mentioned as trade-marks, notwithstanding they were not specifically named in any of the transfers or conveyances to the plaintiff. Thus in *Menendez v. Holt*, 128 U. S. 514, it was in effect held that when a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of the old place of business and the future conduct of the business by them under the old firm name, the good will of the business including the trade-marks remain with the latter, as of course. To the same effect, *Merry v. Hoopes*, 111 N. Y. 415; *In re Wellcome's Trade-Mark*, 32 Ch. Div. 213; *Hoxie v. Chaney*, 143

Mass. 592; 58 Am. Rep. 149; *Witthaus v. Braun*, 44 Md. 303; 22 Am. Rep. 44; *Morgan v. Rogers*, 19 Fed. Rep. 596.

In quoting from Lord Cranworth it was said in *Marshall v. Pinkham*, 52 Wis. 581, 38 Am. Rep. 756, that "difficulties, however, may arise where the trade-mark consists merely of the name of the manufacturer. When he dies, those who succeed him (grandchildren, or married daughters, for instance), though they may not bear the same name, yet ordinarily continue to use the original name as a trade-mark, and they would be protected against any infringement of the exclusive right to that mark. They would be so protected, because, according to the ways of the trade, they would be understood as meaning no more, by the use of their grandfather's or father's name, than that they were carrying on the manufacture formerly carried on by him. Nor would the case be necessarily different if, instead of passing into other hands by devolution of law, the manufactory were sold and assigned to a purchaser. The question in every such case must be whether the purchaser, in continuing the use of the original trade-mark, would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade-mark": *Leather Cloth Co. v. American Leather Cloth Co.*, 11 Jur., N. S. 513; *Hazard v. Caswell*, 93 N. Y. 259; 45 Am. Rep. 198.

2. But the more serious question is whether such right is exclusive. Notwithstanding the good will of an established and successful business may be sold in connection with the property and assets, so as to entitle the purchaser thereof to a certain limited protection, yet such transfer will not of itself alone be sufficient to preclude the seller from engaging in a separate and independent business of the same kind, and to solicit the customers of the old business, even in the same city or village, much less in a city or village two hundred miles or more distant. "In order to preclude the seller from engaging in such separate and independent business, there must be an agreement to that effect, based upon a good and valuable consideration, and not contrary to law or public policy": *Washburn v. Dosch*, 68 Wis. 439; 60 Am. Rep. 873, and cases there cited; *Williams v. Farrand*, 88 Mich. 473; *Vernon v. Hullam*, 34 Ch. Div. 748. True, the transfer of the good will to the plaintiff included the trade-marks; but it is to be remembered that a trade-mark gives no exclusive right to the

device or article to which it is applied. It is in no sense a patent, and gives the proprietor thereof no exclusive right or monopoly of the thing manufactured and sold. The theory upon which actions for the infringement of trade-marks are maintained is that the law will not allow one person to sell his own goods as and for the goods of another: *Marshall v. Pinkham*, 52 Wis. 580; 38 Am. Rep. 756. To the same effect is *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537; *Jay v. Ladler*, 40 Ch. Div. 649. It is only the dealer's own trade and his own business which are thus to be protected by his own trade-mark: *Gessler v. Grieb*, 80 Wis. 25; 27 Am. St. Rep. 20. It does not relate to the nature, quality, or mode of operation of the thing sold, but merely to the designation, name, or mark by which it is sold. Such being the functions of a trade-mark, it is obvious that the plaintiff's right to the marks in question would not be infringed by the manufacture and sale of wagons and vehicles of similar make and style by any person, even in Racine, much less by the Fish Brothers themselves at South Superior.

The right of the defendants to manufacture and sell similar wagons and vehicles being admitted, as it must, the question remains whether they also had the right to affix thereto the words "Fish Brothers," "Fish Brothers & Co.," and the picture of a fish. The picture of a fish, as used, must be regarded simply as another way of designating the surname "Fish" as the founder and originator of the particular make of wagons and vehicles thus manufactured and sold. In *Burgess v. Burgess*, 17 Eng. L. & Eq. 257, 17 Jur. 292, John Burgess and his son William R., as partners under the firm name of "John Burgess and Son," sold "Burgess's Essence of Anchovies" at No. 107 Strand. The father died, and the son, William R., continued the same business, selling the same article at the same place, in the name of the old firm. William R. had a son William H., whom he employed in the business on a salary. Subsequently William H. left the employ of his father, and went into the same business for himself, selling the same article under the same name, but at a lower price, and advertised the same as "Late of 107 Strand." The father filed a bill in equity to restrain the son from conducting that business in that way, and in giving the opinion of the court Knight Bruce, L. J., said: "All the queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the



queen's subjects have a right to sell them in their own name, and not the less so that they bear the same name as their fathers; and nothing else has been done in that which is the question before us. . . . He [the defendant] carries on business under his own name, and sells essence of anchovy as 'Burgess's Essence of Anchovy,' which it is. . . . The only ground of complaint is the great celebrity which, during many years, has been possessed by the elder Mr. Burgess's essence of anchovy. That does not give him such exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovy and selling it under his own name." The court did, however, restrain the son from advertising as "Late of 107 Strand." See *Marshall v. Pinkham*, 52 Wis. 583-586; 38 Am. Rep. 756, and other cases there cited. In *Brown Chemical Co. v. Meyer*, 139 U. S. 540, it was held that "an ordinary surname cannot be appropriated as a trade-mark by any one person as against others of the same name who are using it for a legitimate purpose; although cases are not wanting of injunctions issued to restrain the use even of one's own name, where a fraud upon another is manifestly intended, or where he has assigned or parted with his right to use it. The owner of a trade-mark, bearing his own name, which is affixed to articles manufactured at a particular establishment, may in selling the latter confer upon the purchaser exclusive authority to use the trade-mark." In the case at bar there is no agreement giving such exclusive right to the plaintiff, and hence we must conclude that the defendants are at liberty in good faith to apply to the wagons and other vehicles manufactured by them the words "Fish Brothers," or "Fish Brothers & Co.," or the picture of a fish, provided they do it in a way not calculated to induce persons to buy the same as and for those manufactured by the plaintiff at Racine.

3. The defendants ask to enjoin the plaintiff from the use of those words and that device as a trade-mark in their business at Racine. In *Thynne v. Shove*, L. R. 45 Ch. Div. 577, the plaintiff, A. Thynne, sold his stock in trade and business of a baker, and the good will thereof, including trade-cards bearing the name of "A. Thynne, Baker," to the defendant. The deed and transfer contained an assignment of "all the beneficial interest and good will of the said Arthur Thynne in the said trade or business," but contained no express assignment of the right to use the plaintiff's name. After the

purchase the defendant used the trade-cards bearing the plaintiff's name until they were exhausted, and then printed further trade-cards bearing the plaintiff's name as before. In an action to restrain the defendant from printing or publishing any such cards, or otherwise trading in the name of the plaintiff, it was held that the defendant, "by virtue of the assignment to him of the good will of the business, was entitled to use the name of the plaintiff for the purpose of showing that the business was that formerly carried on by the plaintiff, but must not so exercise that right as to expose the plaintiff to liability, and held that, under the circumstances, an injunction must be granted to restrain the defendant from using the plaintiff's name in such a way as to expose him to any liability." In the case at bar we discover nothing to indicate that the plaintiff is using the words "Fish Brothers" or "Fish Brothers & Co." in the manner to expose any of the defendants to liability. In fact, no claim of that kind is made; and hence, so long as the plaintiff uses those words honestly and truthfully, and for the legitimate purpose designed, the defendants have no ground for complaint. On the authorities cited, and others which might be cited, we are constrained to hold that the defendants are not entitled to an injunction against the plaintiff.

On the same theory, the defendants have the lawful right to honestly and truthfully state where they formerly resided, the experience they have respectively had, and the skill they respectively possess in the manufacture of wagons and other vehicles; but they have no right to represent their present business as the same which they formerly conducted at Racine. The circular addressed "To our old customers and the implement trade," issued by Fish Brothers & Co., and mentioned in the complaint and the foregoing statement, is, to a limited extent, objectionable on this ground; as for instance where it speaks of their "change of location" and "firm name," Fish Brothers, "formerly of Racine, Wisconsin," and for the "first time since 1883, we shall be able to furnish our patrons with the genuine Fish Brothers & Co. wagon, fully up to our old standard of that date"; but the defendants may truthfully and in good faith publish the good qualities and material of the wagons and vehicles manufactured by them, and their superior facilities for the manufacture of the same at South Superior. In other words, their advertisements and marks must truthfully and in good faith

refer to their own manufactures, trade, and business, and not to those of the plaintiff.

By the COURT. The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

WINSLOW, J. I agree that the words "Fish Brothers Wagon" and the rebus of the fish were trade names or labels appertaining to the business transacted at the Racine factory, and that the right to use such names or labels upon wagons was acquired by the plaintiff by its purchase of that business.

Such a right is, in its very nature, exclusive, and if the plaintiff owns it the defendants manifestly do not own it. In my judgment, the defendants have no right to mark their wagons with either the words or the rebus.

Probably they have the right to use the firm name "Fish Brothers & Co.," if they do not use it in such a way as to mislead the public, but this would not give them the right to use a trade name or label on their wagons which is the distinctive mark of the product of the Racine factory, and the right to use which has passed from the defendants T. G. and E. B. Fish to that concern.

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TRADE-MARKS, SALES OF. — A trade-mark affixed to articles manufactured at a particular place may be lawfully sold and transferred with the establishment: *Dant v. Head*, 90 Ky. 255; 29 Am. St. Rep. 369, and note; and if the party so selling a trade-mark which consists of his name or a part of it is employed as manager of the establishment to which it is sold, he cannot, upon being discharged, enter into business on his own account and use the trade-mark therein: *Symonds v. Jones*, 82 Me. 302; 17 Am. St. Rep. 485; and see also extended note to the same case, discussing the assignment of trade-marks of which the assignor's name is a part. The assignment of the effects of a business or the exclusive right to manufacture a given article, carries with it the exclusive right to use a fictitious name in which such business has been carried on: *Williams v. Farrand*, 88 Mich. 473; *Vonderbank v. Schmidt*, 44 La. Ann. 264; 32 Am. St. Rep. 336.

# CASES

IN THE

# SUPREME COURT

OF

# ALABAMA.

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## ASKEW v. STATE.

[94 ALABAMA, 4.]

**HOMICIDE — SELF-DEFENSE. — WHEN A PERSON IS ATTACKED IN HIS DWELLING HOUSE OR PLACE OF BUSINESS,** it is his duty to refrain from taking life, unless there is an imminent and pressing necessity, real or apparent, to do so, and he must use care to employ no more force than is sufficient to repel the danger to his life, or the apprehended grievous injury to his person.

**HOMICIDE — SELF-DEFENSE — INTOXICATION OF ASSAILANT, EFFECT OF. —** The conduct of a person in a state of voluntary intoxication is, in criminal cases, subject to the same rules and principles as the conduct of a sober person. Therefore, the voluntary intoxication of an assailant does not modify the right of one assaulted in his dwelling or business house, to defend himself against a violent attack; but, if in repelling the attack, the person so assaulted takes the life of his assailant, the intoxication of the latter may be a circumstance to be considered by the jury in determining whether there was apparently a present pressing necessity for defendant to take the life of the deceased, in order to protect his own, or to prevent great bodily harm.

**HOMICIDE — SELF-DEFENSE — DEFECTIVE INSTRUCTIONS REGARDING INTOXICATION OF ASSAILANT. —** When a person takes the life of his assailant, while defending himself against an attack, and it appears from the evidence that the attack was made in his dwelling or place of business, the court in charging the jury as to the duty of the person assaulted when the assailant is intoxicated should not ignore such evidence, nor assume that if the deceased was so intoxicated that he was less prudent, and on account of the impairment of his physical faculties, less dangerous, it was the duty of the defendant to retreat, as a mode of exercising reasonable care to avert the difficulty and avoid the necessity of taking life. Such an instruction is fatally defective.

**HOMICIDE — INSTRUCTIONS AS TO DEFENDANT'S BELIEF OF THE NECESSITY FOR KILLING HIS ASSAILANT. —** An instruction is properly refused, which would permit a jury to acquit a person accused of the homicide of his assailant, if they were "reasonably satisfied from the evidence



that the defendant, when he shot the deceased, did it believing that, unless he did so, the deceased would have cut him." That the defendant entertained such a belief is not sufficient. The jury must also be convinced that the circumstances were such as to create in the mind of a reasonably prudent man the belief that such necessity existed.

**READING LAW REPORTS IN THE PRESENCE OF THE JURY.** — When the defendant's attorney, in discussing the legal questions involved in a criminal case, reads to the court certain portions of the opinions in previous decisions of the supreme court, it is not error to allow the prosecuting attorney to read to the court, in the presence of the jury, the reported facts upon which those decisions were based, provided the jury are instructed not to consider those facts.

**INDICTMENT** of Thomas C. Askew for the murder of Ned Grice. Decedent and the defendant were personal friends. They met on the street while decedent was in an intoxicated condition and he was conveyed by defendant, with the assistance of a bystander, to a livery stable; after a time the deceased pulled a pistol out of his hip pocket. The defendant, with the assistance of some of the persons present, took the pistol away and walked to the rear of the stable; the deceased followed him, and drawing a knife, caught him by the collar, and demanded the pistol. The deceased was pulled away by a bystander, but again advanced towards the defendant, holding the knife in his hand, and was warned several times to stop. The defendant fired above his head as decedent again advanced, but at the second shot struck and killed him. The defendant excepted to the refusal of the court to give an instruction, the essential portion of which is the following sentence: "If the jury are reasonably satisfied from the evidence that Askew, when he shot Grice, did it believing that unless he did so Grice would cut him, then they will find the defendant not guilty; unless they further believe from the evidence that Askew brought on the difficulty."

*Roberts and Martin*, for the appellant.

*William L. Martin*, attorney-general, for the state.

**PER CURIAM.** The evidence showing without dispute that the killing occurred in a livery stable of which the defendant was proprietor, and that the deceased was intoxicated at the time, the court, after stating the general proposition, that if the defendant was in his own place of business, he was under no obligation or duty to retreat therefrom to avoid a difficulty, proceeded to further instruct the jury, in substance as follows: But, if the deceased was intoxicated, and in con-

sequence thereof was less prudent, and his power of locomotion and action was so impaired as to render him less dangerous than he otherwise would have been, and this was known to defendant, "then it was his duty to exercise reasonable care to avert a difficulty with the deceased, unless by the exercise of such care he would have apparently increased his danger; and if the defendant failed to exercise such reasonable care, and if it could have been done without increasing his danger, then the defendant is not without guilt, if he shot and killed the deceased."

The ascertainment of the proper construction and legal effect of the charge, when referred to the evidence, is preliminary and essential to determining its correctness. The first inquiry is, what is meant by the expression that it was the duty of defendant "to exercise reasonable care to avert a difficulty," and to avoid the necessity of killing, unless by the exercise thereof he would have apparently increased his danger, in the manner and connection in which it is employed in the charge? When a person is assailed without the precincts of his dwelling or place of business, it is his unquestionable duty to use all the means in his power to avert the difficulty, and to avoid the necessity of taking life, if there be any mode of escape or retreat with reasonable safety. Also, notwithstanding he may be attacked in his dwelling or business house, it is his duty to refrain from taking life unless there is imminent and pressing necessity, real or apparent; he must take care to employ no more force than is sufficient to repel the danger to his life, or the apprehended grievous injury to his person. In these two respects alone can the duty to exercise reasonable care arise in cases of voluntary homicide, not the consequence of criminal negligence, when the accused is without fault in bringing on or provoking the difficulty. The expression therefore, "to exercise reasonable care," though not strictly accurate, must have been employed with reference to one or both of these respects. There being no evidence tending to show that defendant was at fault, and the evidence showing that the deceased was the assailant, whether there existed a real or apparent necessity, and a reasonable mode of escape, were the only issues involved and tried. In view of these issues, the charge was intended to assert the principles on which the defendant could set up the excuse of self-defense, when he was assailed in his own place of business by a drunken man.

The precise subject of the charge is the duty to retreat; this is apparent from the fact that it begins with a statement of the general rule as to the duty of defendant to retreat from his place of business. After stating this general rule, the charge proceeds to lay down, by way of distinction, as it were, a rule in respect to the duty of exercising reasonable care to avert the difficulty, as specially applicable when the assailant is intoxicated to the degree hypothesized. When the charge is construed as an entirety, and in reference to the evidence — when the different parts are considered in connection, and in relation to each other — the legal effect of the latter part is to limit, or modify, when the assailant is intoxicated, the application of the general rule stated in the first clause; otherwise the qualifying phrase, “unless by the exercise of such care he would have apparently increased his danger,” is without meaning and effect. Such may not have been the intention of the court, but it was probably so understood by the jury. A similar charge was so construed in *Brinkley v. State*, 89 Ala. 34, 18 Am. St. Rep. 87. In that case the killing occurred in the house of defendant. The court gave the following charge: “That if the defendant could have avoided the difficulty without danger to himself, he should have done so.” This charge was held to be erroneous for the reason that it assumed that the defendant was bound to retreat from his house, and also to yield the right to order the deceased from his premises on account of profanity and indecent behavior as a mode of avoiding apprehended violence. Though differing in phraseology, there is no difference in principle between the charge in that case and the charge under consideration. Unless the meaning and legal effect of the charge is to constitute the drunken condition of the deceased an exception to the general rule in regard to the duty to retreat from one’s dwelling or business house, it is intrinsically inconsistent; the charge making no allusion to any other mode of exercising reasonable care.

It may be that the intoxication of the deceased was a circumstance to be considered by the jury in determining whether there was apparently a present pressing necessity for defendant to take the life of the deceased to protect his own, or to prevent great bodily harm; but voluntary intoxication did not deprive defendant of the right to defend himself against violent assault. The conduct of a person in a state of voluntary intoxication is subject to the same rules and principles

as the conduct of a sober man: *Nichols v. Winfrey*, 90 Mo. 403.

The charge is defective in that it ignores the evidence showing that the killing occurred in the defendant's place of business, and assumes that if the deceased was intoxicated to a degree rendering him less prudent, and so impairing his physical faculties as to render him less dangerous, it was the duty of defendant to retreat therefrom, as a mode of exercising reasonable care to avert the difficulty and avoid the necessity of taking his life, if his danger would not be apparently increased thereby.

The charge requested by the defendant was properly refused because it bases the right to kill the deceased upon his mere belief that unless he did so the deceased would cut him, without the predicate of reasonable grounds for the belief. The circumstances must be such as would create in the mind of a reasonably prudent man the belief that such necessity existed.

The defendant also excepted to the court permitting the solicitor to read the facts in certain reported cases. It appears that the defendant's attorney, in discussing the legal questions, read to the court certain portions of the opinions rendered in those cases; and thereupon the solicitor read to the court the facts as reported. The solicitor may have deemed this necessary to show that the principles of law announced in the opinions were not applicable to this case. The court stated to the jury that they should not consider the facts read from the cases referred to. Under the circumstances we cannot say there was error in this. It does not come within the principle declared in *Williams v. State*, 83 Ala. 68.

Reversed and remanded.

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RIGHT OF SELF-DEFENSE, HOW FAR MODIFIED BY THE CHARACTER OF THE ASSAILANT. — In *Perry v. State*, 94 Ala. 25, the same court was called upon to consider this question under a state of facts precisely the opposite of those in the principal case. It appeared from the testimony that the defendant, Perry, was a man of violent and dangerous character, and the rule applicable to such circumstances was thus laid down: "While that fact did not of itself justify the taking of his life, or even palliate the offense, yet it was permissible to make proof of it, and such proof should be weighed by the jury in determining the extent of danger, if any, to which the defendant was exposed, and his means and opportunity of safe escape therefrom by flight: 'A demonstration or overt act of attack made by such a one may avoid much stronger evidence that the life and limb of the person assailed was in imminent peril, than if performed or made by one of an opposite character or disposition. Hence it would reasonably justify a resort to m...'"



prompt measures of self-preservation:’ *Roberts v. State*, 68 Ala. 156.” The same case may also be consulted for a further discussion of the duty of a person who is assaulted in his dwelling or business house.

**HOMICIDE — SELF-DEFENSE — REASONABLE FEAR.** — Instructions upon self-defense in murder cases should give the accused the benefit of a reasonable fear of death or great bodily harm from the deceased: *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 233, and note with cases collected. In such cases the question is, did the accused, under the circumstances as they appeared to him, honestly believe that his life was in danger, and that it was necessary for him to do as he did in order to protect himself? If so, he is excused: *People v. Lennon*, 71 Mich. 298; 15 Am. St. Rep. 259, and note.

**CRIMINAL TRIALS — READING LAW-BOOKS TO JURY:** See note to *Sullivan v. Royer*, 1 Am. St. Rep. 51; *Dempsey v. State*, 3 Tex. App. 429; 30 Am. Rep. 148; *State v. Whit*, 5 Jones L. 224; 72 Am. Dec. 533, and note at page 549.

**HOMICIDE — SELF-DEFENSE, WHERE PERSON IS ATTACKED IN HIS OWN DWELLING.** — One has a right to defend himself in his own dwelling house when assaulted therein, if he believes and has reasonable grounds to believe that his life is in immediate danger: *Estep v. Commonwealth*, 86 Ky. 39; 9 Am. St. Rep. 261, and note; *Martin v. State*, 90 Ala. 602; 24 Am. St. Rep. 844, and note; note to *Jones v. State*, 8 Am. St. Rep. 458; see also *Lee v. State*, 92 Ala. 15; 25 Am. St. Rep. 17.

**CRIMINAL LAW — INTOXICATION — RULE WITH REGARD TO.** — The rule is, that one in a state of voluntary intoxication is subject to the same rule of conduct and to the same rules and principles of law that a sober man is: *Shannahan v. Commonwealth*, 8 Bush, 463; 8 Am. Rep. 465. See extended note to *Flanigan v. People*, 40 Am. Rep. 560.

## BIBB v. STATE.

[94 ALABAMA, 31.]

**CRIMINAL LAW — RESPONSIBILITY OF A MARRIED WOMAN FOR CRIMES COMMITTED IN HER HUSBAND’S PRESENCE.** — The presumption of the common law that when the wife acts with her husband in the commission of a crime she acts under his coercion is not allowed in all offenses, and a wife is answerable for murder, though committed in the presence of or in company with her husband.

**INDICTMENT** of Joe Bibb and Judy Bibb for the murder of Ed. Stark. She held down the deceased while her husband cut him in the head with an axe. While so engaged, the husband told her with an oath to “hold him up.” Defendant requested the following instruction: “Unless the jury believe that the defendant acted willingly and voluntarily, they must acquit her.” The court refused, and the defendant excepted to the refusal.

*B. C. Tarver and Gordon Macdonald*, for the appellant.

*William L. Martin*, attorney-general, for the state.

CLOPTON, J. On the trial of defendant for murder, the court instructed the jury: "In the trial of this case, on the issue of guilty or not guilty, the jury should not consider the defendant otherwise than as a *feme sole*." There is no error in this charge. The presumption of the common law that when the wife acts with her husband in the commission of a crime, she acts under his coercion, and consequently without guilty intent, is not allowed in all offenses, in the administration of the criminal law. "It may not be positively settled," as has been well observed, "where the line of separation is; but for certain crimes the wife is responsible, although committed under the compulsion of her husband": 1 Bennett and Heard's Criminal Cases, 85. The exceptions ingrafted on the general rule are based on the nature, grade, and heinousness of the felony; and among these is murder. The rule that the law holds the wife answerable for murder, though committed in the presence of, or in company with her husband, without any presumption that she acted under his coercion, and that she is punishable as much as if sole, is sustained by the great weight of authority: 1 Hale's P. C. 45; 1 Hawk. P. C. 4; 1 Cooley's Blackstone's Commentaries, 444; 1 Bishop's Criminal Law, 361; 14 Am. & Eng. Ency. of Law, 649.

On the same principles the charge asked by defendant was properly refused.

Affirmed.

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LIABILITY OF A MARRIED WOMAN FOR CRIMES COMMITTED IN HER HUSBAND'S PRESENCE. — The partial exemption of a wife from liability for crimes committed under the actual or presumed coercion of her husband is an anomaly in our jurisprudence for which it is not easy to offer a perfectly satisfactory explanation. The fact that this privilege is peculiar to the common law (Bishop's Criminal Law, sec. 357) indicates very strongly that the origin of the rule should be sought for rather in the early social conditions of the races, upon whose customs that law is founded, than in any considerations of expediency or public policy. Blackstone, who is usually adept in finding some reason in the nature of things for the existence even of the harshest and most perplexing doctrines of the older jurisprudence of the mother country, seems, in this instance, rather disposed to resort to a historical solution of the problem, and points out that married women had occupied this favored position in England for at least a thousand years, and that among the northern nations of the continent of Europe, a similar privilege extended to any woman transgressing in company with a man, and to any servant committing an offense jointly with a freeman: See 4 Com. B., 29. It is to be observed, however, that the facts here mentioned merely throw the difficulty somewhat further back. The reason for the privilege in all three cases may possibly have been the same, but when the exceptional cruelty with which the ancient law treated the servile classes is remembered, it seems extremely

doubtful whether the supposed constraint of a master would, by itself, have been regarded as a sufficient reason for exempting a slave from punishment. If, therefore, the commentator intends to suggest, by his allusion to the extension of the principle of non-liability, that married women were, in this respect, exempted from responsibility because they were deemed to be on the same footing as slaves, the theory seems hardly tenable. Equally unsatisfactory is the explanation offered by Mr. Lewin in his note to *Rex v. Hughes*, 2 Lew. C. C. 225, that as the husband could plead his clergy and the wife could not, it was deemed unjust to inflict a severe punishment on the wife, while the husband was allowed to escape with a slight one, or with none at all. Nor is it easy to agree with those who would found the rule upon the fact, "that in most cases the husband has actually an influence and authority over the wife which the law sanctions, or at least recognizes": *State v. Williams*, 65 N. C. 400, citing 1 Hawks, c. 1, sec. 9; or upon the ground that "much consideration is due to the great principle of confidence which a *feme covert* may properly place in her husband, as well as the duty of obedience to the commands of the husband, by which some *femes covert* may reasonably be deemed to be influenced in those cases." Explanations of this character cannot be reconciled with the general principles of law in accordance with which duress is admitted as an excuse for crime only in the extremely rare instances mentioned by 4 Blackstone's Commentaries, p. 30, and in particular with the fact that the coercion of a parent will not relieve a child from liability for a crime: 4 Blackstone's Commentaries, p. 28. In this case, it surely cannot be asserted that the influence exerted and the duty of obedience are not fully as strong as where a husband and wife are concerned.

If we might venture to put forward another possible explanation, we should be rather inclined to ascribe the existence of the rule to the circumstance that among the Germanic races who peopled England, all those offenses which are now termed crimes might be atoned for by the payment of a sum of money to the injured person, or in the case of murder, to his family. In other words those offenses were regarded, for purposes of punishment, merely as torts. The exemption of a wife from responsibility for acts of this character in cases in which marital coercion was proved or might reasonably be presumed to exist would, under such circumstances, not have been such an anomalous privilege as it now seems, when the same acts are punished as injuries to the community as a whole. When the state began to monopolize the function of inflicting punishment for all the graver offenses, the reason of the rule ceased to exist, but no one who is at all familiar with the evolution of English jurisprudence will see anything remarkable in the fact that the rule itself remained unaltered. The explanation here offered has the advantage of harmonizing the conflicting views as to the wife's liability for treason and murder. The only offense which the ancient Germans deemed inexpiable by a money payment was cowardice in battle, and this the state itself punished by death. Even the life of the king himself was valued at a certain price (Hume's History of England, Vol. I. App. I.), and one who killed or conspired against him was allowed to go free upon payment of the required sum. Since the guilt of cowardice in battle could never have been incurred by the non-belligerent sex, it seems plain that, under the social system then prevailing, the state would never have taken jurisdiction over any offense which a married woman could have committed. The "weregild" or money payment was admitted as an atonement not merely for the murder of a private person, but also for the murder of the chief magistrate of the commun-

ity, an act which at a subsequent period fell under the denomination of treason. These considerations point to the conclusion that there was originally no exception to the rule that marital coercion was a valid excuse for the crimes of a married woman, and this is precisely the conclusion which has been reached by the most recent inquirers, who have investigated the subject from the standpoint of authority and precedent.

Whether the ancient custom involved the further result that the husband was responsible for the offenses of his wife in each and every case, though she was not under his coercion, is perhaps deserving of consideration. Such a state of things, though shocking to modern ideas, would not have seemed very anomalous among races who, before adopting this system of commuting for injuries by a money payment, had regularly indulged in the much more barbarous practice of private retaliation. The essential point being the exaction of the fine, it would perhaps have seemed immaterial whether the wife or her husband paid it, and, as the husband would as a general rule be alone capable of discharging the obligation, a custom might easily have grown up of looking exclusively to him whenever the wife had committed an offense. The subsequent limitation of his responsibility to cases in which the wife acted under his actual or presumed coercion might, in this point of view, be regarded as the result of a compromise between the old and the new systems; but whatever may be the origin of this curious privilege, we think that few persons will dissent from the views which Sir J. F. Stephen has thus expressed in a note to article 30 of his Digest of Criminal Law: "Surely as matters now stand and have stood for a great length of time, married women ought, as regards the commission of crime to stand exactly on the same footing as other people. But owing partly to the harshness of the law in ancient times, and partly to its uncertain and fragmentary condition, it is disfigured by a rule which is tolerable only because it is practically evaded on every occasion where it ought to be applied."

THE RULE AS TO THE WIFE'S LIABILITY FOR CRIMES COMMITTED IN HER HUSBAND'S PRESENCE includes a number of subsidiary propositions to which the several branches of our discussion of the subject may be conveniently referred:—

1. *A Wife is not Liable for Any Criminal Act (except, as is Maintained by Some Authorities, Treason, Murder, or Robbery) where the Act is done under the Actual Coercion of the Husband.* — It has already been stated that the weight of modern authority is opposed to the view that there is any exception to the rule that marital coercion is a good defense for a married woman who is accused of crime: See the note of Mr. Greave's to the last edition of Russell on Crimes, 25, cited at length in Bishop's Criminal Law, sec. 362. The conclusions there reached are accepted as correct, both by Bishop (Criminal Law, sec. 362) and Wharton (Criminal Law, sec. 78). It has, however, been laid down by many authorities that marital coercion is not a defense to a charge either of murder or treason: Bacon's Maxims, 57; 1 Hale P. C. 45, 47; 1 Hawk. P. C., c. 1, sec. 11; 4 Bla. Com. 29; and as regards murder, the principal case has, it seems, settled the law on this basis in Alabama. In Arkansas, the coercion, if shown to have been actually exercised, is a sufficient defense for all crimes without exception. Blackstone attempts to justify this qualification of the general rule by referring to a supposed distinction between *mala in se* and *mala prohibita*; but such a distinction is somewhat too shadowy to form the basis of a legal rule, and the two most eminent American commentators on criminal law refuse to accept it: See Bishop's Criminal Law, sec. 358; Wharton's Criminal Law, sec. 78. In



*State v. Kelly*, 74 Iowa, 589, a case in which a married woman was indicted jointly with her husband for murder, and convicted of manslaughter, it was held that the conviction could not be sustained in the absence of evidence that she was exercising a free volition. This opinion, however, in so far as it countenances the doctrine that, in a case of homicide, the mere presence of the husband raises the presumption of coercion, is certainly opposed to the current of authority: See proposition 3 below. As regards robbery, the third exception usually mentioned, it seems to be now generally agreed that it falls under the general rule. In *Regina v. Cruse*, 8 Car. & P. 541, a case was cited in which it had been held that the rule extended to robbery; and *Regina v. Torpey*, 12 Cox. C. C. 45, is to the same effect. In regard to all crimes of a less serious nature than treason, murder, and robbery there is no difference of opinion. Thus the conviction of a wife cannot be sustained, where marital coercion is proved, in a case of arson: *Davis v. State*, 15 Ohio 72; 45 Am. Dec. 559; or of feloniously wounding with intent to disfigure: *Regina v. Smith*, Dears & B. 553; or of larceny: *Anon.*, 2 East P. C. 559; *Commonwealth v. Trimmer*, 1 Mass. 476. See also, generally, *Rex v. Stapleton*, Jebb C. C. 93; *Rex v. Chadwick*, 1 Keb. 585; *Rex v. Thomas*, 1 Ld. Raym. 711; *Rex v. Ingram*, 1 Salk. 384; *Mulvey v. State*, 43 Ala. 316; 94 Am. Dec. 684.

2. *Coercion is Presumed from the Husband's Presence* in the case of all minor felonies and misdemeanors: *Regina v. Torpey*, 12 Cox C. C. 45. Thus a conviction against a husband and wife for jointly receiving stolen goods cannot be sustained as respects the wife: *Rex v. Hammond*, 1 Leach, 499; *Rex v. Matthews*, 1 Den. C. C. 596; 14 Jur. 513; and *a fortiori*, a wife cannot be convicted for feloniously receiving stolen goods from her husband: *Regina v. Brooks*, 14 Eng. L. & Eq. 580; 17 Jur. 400. So, also, where husband and wife are jointly indicted for uttering counterfeit money, and it appears that the wife uttered it in her husband's presence, she is entitled to an acquittal: *Regina v. Price*, 8 Car. & P. 19. The rule is also applicable in cases of larceny: *Rex v. Knight*, 1 Car. & P. 116; of assault: *Commonwealth v. Eagin*, 103 Mass. 71; *State v. Williams*, 65 N. C. 398; of unlawful sales of liquor: *Commonwealth v. Burk*, 11 Gray, 437; *Commonwealth v. Pratt*, 126 Mass. 462; *State v. Cleaves*, 69 Me. 302; 8 Am. Rep. 422; *Hensly v. State*, 52 Ala. 10. The presumption was originally one in favor of the wife, but now avails against the husband also: *Commonwealth v. Gannon*, 97 Mass. 547; *Commonwealth v. Hill*, 145 Mass. 307; *State v. Boyle*, 13 R. I. 537; *Geuing v. State*, 1 McCord, 573. In some cases this principle of marital responsibility has been extended still further, and it has been held that if the husband has knowledge of the illegal business which is being carried on by the wife, and especially if he lives in the house in which she conducts it, he will be liable for her acts, on the ground that, as the head of the household, he was charged with the duty of controlling her actions: *Commonwealth v. Carroll*, 124 Mass. 30; *Commonwealth v. Kennedy*, 119 Mass. 211. *Commonwealth v. Hill*, 145 Mass. 308, however, questioned the soundness of this view, and considered that the husband's whole conduct, including what he said and did, and also what he could reasonably have done or did not do, is admitted as evidence only for the purpose of proving or disproving his consent in fact to the acts of his wife. In *Williamson v. State*, 16 Ala. 431, also, the rule is laid down more guardedly, to the effect that there must be not merely privity, but concurrence, on the part of the husband to render him liable. Considering the narrow limits within which the doctrine that a mere omission to perform a duty is criminal has so far been confined (see Whurton's

Criminal Law, sec. 130ff), it certainly seems safer to follow the authority of the two latter cases. It is the right of the wife to have the principles of law regarding this presumption stated to the jury: *Commonwealth v. Egan*, 103 Mass. 71; and also to have them pass upon the question whether she committed the crime of which she is accused in the presence or in the absence of her husband: *Rex v. Archer*, 1 Moody C. C. 143; *Regina v. Wardroper*, 8 Cox C. C. 28. The principle illustrated in the above cases involves the corollary that in joint proceedings against a husband and wife, the wife cannot be convicted unless the husband is also: *Rather v. State*, 1 Port. 132. In *Regina v. Laughler*, 2 Car. & K. 225, the analogies of the doctrine of marital coercion were applied to a case where stolen goods were found in a man's house, and his wife, in his presence, made a statement exonerating him and criminating herself, and the court, without expressly deciding the point, expressed the belief that the statement was not admissible.

3. *The Presumption of Marital Coercion does not Arise in the Case of Graver Felonies.* — The offenses to which this proposition is generally said to be applicable, are treason, murder, and robbery: *Regina v. Manning*, 2 Car. & K. 903; *Miller v. State*, 25 Wis. 384; Bishop's Criminal Law, sec. 363; but the last-named authority expresses a doubt whether the list should not be extended, citing *Regina v. Cruse*, 2 Moody, 53; 8 Car. & P. 541; *Rex v. Stapleton*, Jebb C. C. 93; *Rex v. Knight*, 1 Car. & P. 116; *Commonwealth v. Neal*, 10 Mass. 152; 6 Am. Dec. 105; *Regina v. Manning*, 2 Car. & K. 887, 903. In some states the presumption of coercion has been abolished by statute; e. g. in New York (Penal Code, sec. 24), and Arkansas: See *Freel v. State*, 21 Ark. 212; *Edwards v. State*, 27 Ark. 493; while in some others married women are declared incapable of committing crimes, except felonies, when acting under the "threats, command, or coercion of their husbands": Penal Code of California, subd. 7, sec. 26.

4. *Nor in Cases where the Wife is Indicted for Keeping a Disorderly House.* Blackstone thus accounts for the exception to the rule: "This is an offense touching the domestic economy or government of the house, in which the wife has a principal share, and is also such an offense as the law presumes to be generally conducted by the intrigues of the sex." The rationale of the doctrine may possibly be that owing to the peculiar character of the crime, it has been considered that there was a greater probability that the wife, in committing it, exercised a free volition than that she was acting under her husband's control, and that the law has converted this preponderance of probability into a presumption against the wife. In this class of cases, accordingly, it is well settled that the wife must prove that she was actually coerced by her husband in order to escape punishment: *Rex v. Dixon*, 10 Mod. 335; *Regina v. Williams*, 10 Mod. 63; *State v. Bentz*, 11 Mo. 27. The mere fact of her husband's residing in the house and taking part in the business will not excuse her: *Commonwealth v. Cheney*, 114 Mass. 281. Of course, if the evidence shows that she was acting of her own free will, without any coercion by her husband, she may, as in the case of any other crime, be convicted: *Commonwealth v. Hopkins*, 133 Mass. 381; 43 Am. Rep. 527. Nevertheless, if the husband lives in a house which his wife keeps as a brothel and exercises acts of control over it, the fact that it is owned by his wife, and that she also lives there, and receives all the profits, is no defense to an indictment against him: *Commonwealth v. Wood*, 97 Mass. 225.

5. *The Presumption of Marital Coercion is Merely Prima Facie and May be Rebutted:* See *Rex v. Torpey*, 12 Cox C. C. 45; *Rex v. Hughes*, 2 Lew. C. C. 229; *State v. Ma Foo*, 110 Mo. 7; 33 Am. St. Rep. post; *State v. Parkerson*

1 Strob. 169; *State v. Cleaves*, 69 Me. 302; 8 Am. Rep. 422; *State v. Williams*, 65 N. C. 398; *Uhl v. Commonwealth*, 6 Gratt. 706; Wharton's Criminal Law, sec. 79; Bishop's Criminal Law, sec. 362; and the cases cited in the following section.

6. *A Married Woman who Acts Independently in the Commission of a Crime May be Convicted as if She Were a Feme Sole.*—The fact that the wife is an independent agent may be established in various ways. Thus the evidence may show that she acted voluntarily and without constraint, even though her husband was present: *State v. Williams*, 65 N. C. 398; *Rex v. Dicks*, 1 Russ. C. & M. 16 (where a married woman who procured administration by falsely swearing herself to be next of kin was convicted of perjury, though her husband was present when she took the oath); *Uhl v. Commonwealth*, 6 Gratt. 706; *Goldstein v. People*, 82 N. Y. 231; *Seiler v. People*, 77 N. Y. 411; *State v. Nelson*, 29 Me. 329; *Wagener v. Bill*, 19 Barb. 321; *United States v. Terry*, 42 Fed. Rep. 317; *Regina v. Cohen*, 11 Cox C. C. 99; *Regina v. Robson*, 9 Cox C. C. 29. *A fortiori* will the wife be held liable if she is proved to have been an active participant in the offense, as where she choked a man and told him to keep still while her husband picked his pocket: *People v. Wright*, 38 Mich. 744; 31 Am. Rep. 331; or where she is one of the originators of the crime: *People v. Ryland*, 97 N. Y. 126; or has incited her husband to commit the crime: *Seiler v. People*, 77 N. Y. 411. But the mere fact that the wife has been the more active participant in the crime is not conclusive proof of her guilt, since that greater activity may have been due to actual coercion: *State v. Houston*, 29 S. C. 108. Independent action on her part may also be shown by evidence that her husband was not actually or constructively present at the time the crime was committed by her, there being no legal presumption under such circumstances that she is acting under his coercion or control: *Commonwealth v. Butler*, 1 Allen, 4; *Commonwealth v. Murphy*, 2 Gray, 513; *Rex v. Morris*, Russ. & R. C. C. 270; *Rex v. John*, 13 Cox C. C. 100; *Regina v. Robson*, 9 Cox C. C. 29. Nor will the fact that she has committed the crime by her husband's command or procurement excuse her, if he was absent: *Commonwealth v. Butler*, 1 Allen, 4; *Commonwealth v. Murphy*, 2 Gray, 513; *Commonwealth v. Gannon*, 97 Mass. 547; *Seiler v. People*, 77 N. Y. 411; *State v. Potter*, 42 Vt. 495; *Anon*, 2 P. C. 559; *Hughes's Case*, 2 Lew. C. C. 231; *Rex v. Morris*, Russ. & R. C. C. 270. This principle is well illustrated in the case last cited. A wife by her husband's order and procurement, but in his absence, knowingly uttered a forged paper and certificate for the payment of prize money, and it was held that the presumption at the time of uttering did not arise, since the husband was absent, and that the wife might therefore be convicted of the uttering, and her husband of the procuring. In this country the presence or absence of the husband has most frequently been applied as a test of the wife's liability in the cases relating to the illegal sale of intoxicating liquors. The rule is clearly established that, if she makes such sales in her husband's absence, she may be convicted: *Commonwealth v. Butler*, 1 Allen, 4; *Commonwealth v. Murphy*, 2 Gray, 513; *Commonwealth v. Gannon*, 97 Mass. 547; *Commonwealth v. Roberts*, 132 Mass. 267; *State v. Potter*, 42 Vt. 495; *State v. Haines*, 35 N. H. 207; *Pennybacker v. State*, 2 Blackf. 484. The mere fact that the husband provided the liquor which was sold by the wife is no defense: *Commonwealth v. Welch*, 97 Mass. 593. Nor can she excuse herself by showing that the sale was in pursuance of a contract made by her husband: *Commonwealth v. Whalen*, 16 Gray, 25; or that the building in which the sale was made is kept as an inn by him and used for illegal sales: *Commonwealth v. Tryon*, 99 Mass. 442. The rule is of course



applicable still more strongly where the wife is living apart from her husband: *State v. Collins*, 1 McCord, 355; or, where the sale is made not only in his absence, but contrary to his orders: *State v. Baker*, 71 Mo. 475. In *Regina v. Dring*, 7 Cox C. C. 382, husband and wife were jointly convicted for receiving stolen goods, knowing them to have been stolen. The jury found them both guilty, and that the wife received the goods without the knowledge or control of her husband, and that he afterwards adopted his wife's receipt. It was held that the conviction of the husband could not be sustained. In all cases where a *feme covert* is liable in the same manner as if sole, it is not necessary to allege in the indictment that she did not act under the control or coercion of the husband. Such a fact is matter of defense: *State v. Nelson*, 29 Me. 329.

7. *The Presence of the Husband which Will Excuse the Wife Need Not be Actual.* — This proposition is supported by numerous cases, but no very definite principle can be extracted from the decisions to serve as a test for determining whether there is a sufficient constructive presence of the husband to justify the inference that the wife was acting under his control. It is well established that the husband need not be literally in the wife's sight or in the same room: *Commonwealth v. Flaherty*, 140 Mass. 454; *Commonwealth v. Burk*, 11 Gray, 437. In one case the presumption of coercion is said to be raised by evidence that the husband was on the premises: *Commonwealth v. Welch*, 97 Mass. 593; and this ruling was followed in *Commonwealth v. Munsey*, 112 Mass. 287, in which, the husband being shown to have been in the barn, it was held that the trial court erred in refusing to instruct the jury that there was nothing in the relative situation of the house and barn which would prevent the defendant from being deemed as a matter of law under the husband's influence. So also the evidence in *Tabler v. State*, 34 Ohio St. 127, showed that the husband was about the house, but not in the room where the criminal act of the wife was committed, and these facts were said to raise a *prima facie* presumption of coercion; nor will a momentary absence from the room or a momentary turning of the back rebut the presumption of the husband's influence: *Commonwealth v. Welch*, 97 Mass. 593. The inference of constructive presence in *Connolly's Case*, 2 Lew. C. C. 229, where it appeared that a wife went from house to house uttering base coin, her husband accompanying her but remaining outside, was an extreme but logical application of the doctrine, though it probably may also be taken as an indication that the courts are rather disposed to stretch that doctrine in the wife's favor, where the circumstances show that the husband participated in the offense: Compare the remarks of the court in the case next cited. It has been held, on the other hand, that the mere proximity of a husband not actually present will not, at least in the case of a minor offense, raise in her favor the presumption that she was acting under his coercion: *State v. Shee*, 13 R. I. 535, where the facts proved were practically identical with those in *Commonwealth v. Welch*, 97 Mass. 593, and *Commonwealth v. Munsey*, 112 Mass. 287. These decisions appear to be irreconcilable with each other. On the whole the ruling of the Rhode Island court seems to state the preferable doctrine. The wife's privilege rests on such artificial grounds that it seems undesirable to extend it in any direction. In a later Massachusetts case, it was held, that where the husband was in an adjoining room "sick upon a bed, and the door between the room and the shop" (where an illegal sale of liquors was made) "was open," there was no "conclusive presumption" of marital coercion: *Commonwealth v. Gormley*, 133 Mass. 580. The expression, "conclusive presumption," was used in reference to the request by the do-



fendant for an instruction to the effect that under the facts shown she could not as a matter of law be held liable, and it was not intended to draw any distinction between conclusive and rebuttable presumptions in connection with this class of cases. In fact, no such distinction could be drawn, as no principle is better settled than that the presumption of marital coercion is in all cases rebuttable: Bishop's Criminal Law, sec. 362; see also proposition 4, p. 93. It may be inferred, therefore, that the court in this case intended merely to adhere to the doctrine announced in the former cases, that the proximity of a husband not actually present raised a presumption of coercion, but that the wife might be convicted under evidence showing the non-existence of such coercion. As the question under the rulings of the courts both of Massachusetts and Rhode Island, is eventually one for the jury, the difference in their views is perhaps not of much practical importance.

**EFFECT OF THE MARRIED WOMEN'S ACTS.** — The greater independence which married women possess under the legislation of the present century has naturally suggested the inquiry whether their criminal liability has been changed thereby. The subject has been considered chiefly in connection with cases of illegal sales of liquor, and apparently in the state of Massachusetts only. So long ago as 1858 it was doubted how far the usages of society or the new relations of the husband and wife may have qualified or reversed the presumption of the common law as to the non-liability of the wife for crimes committed in her husband's presence, but the question thus suggested was not discussed, the court merely remarking that it was a matter for the legislature to settle: *Commonwealth v. Burk*, 11 Gray, 437. In later cases, however, the judges have spoken more decidedly, and the rule is now established that the married women's acts have in nowise changed or modified the rules of evidence or the legal presumptions applicable to married women or their acts in criminal proceedings: *Commonwealth v. Wood*, 97 Mass. 225; *Commonwealth v. Gannon*, 97 Mass. 547; *Commonwealth v. Fennely*, 13 Allen, 560. The husband is still assumed to have the legal control of the domicile, and to be able therefore to prevent his wife from making an illegal use of it: *Commonwealth v. Carroll*, 124 Mass. 30; *Commonwealth v. Kennedy*, 119 Mass. 211; and the rule is the same even if such illegal use consists in the keeping of a brothel: *Commonwealth v. Wood*, 97 Mass. 225; *Commonwealth v. Hill*, 145 Mass. 307. As illustrating this subject, it may be mentioned that in Pennsylvania it is held that the liability of the husband for the wife's torts is the same after as before the passage of the married women's acts: *Quick v. Miller*, 103 Pa. St. 67. In the recent case of *Commonwealth v. Hill*, 145 Mass. 307, Justice Field remarked that "the presumption against the husband that acts done by the wife in his immediate presence are done by his command or authority, has perhaps lost something of its force in modern times in consequence of the rights given to married women by statute, and the diminished power of control which by law and usage husbands now have over the person and property of their wives." The net result of these acts, accordingly, seems to be that the judges will be somewhat inclined to treat them as a sort of imperfect legislative recognition of the fact that the presumption of marital coercion has no adequate foundation as society is now constituted, and probably to carry still further the practice of evading the rule, which Sir J. F. Stephen, in the passage quoted above, very truly states to be the only reason why the existence of the rule is tolerated. Such a state of things is, it must be admitted, eminently unsatisfactory, and the matter seems to call very urgently for that legislative interference by which alone it can now be adjusted on a rational basis.

## GOLDSMITH v. EICHOLD BROTHERS AND WEISS.

[94 ALABAMA, 116.]

**PARTNERSHIP DEFINED.** — A partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions.

**PARTNERSHIP — FIDUCIARY RELATIONS BETWEEN PARTNERS — RIGHTS ARISING FROM.** — A partnership is a relation of trust, and each partner has the right to have this trust worked out: 1. By having the partnership debts paid with partnership effects, and; 2. By having the surplus remaining after paying the partnership set apart for distribution among the several partners.

**PARTNERSHIP ASSETS — APPLICATION OF.** — When courts are called upon to wind up the affairs of a partnership, dissolved by death, respect will always be had to the fiduciary relations between the partners, and, in the absence of special circumstances to vary the rule, the partnership effects will be primarily applied to partnership debts. The insolvency of a deceased member is not a ground for varying this rule.

**THE APPLICATION OF PARTNERSHIP ASSETS TO THE PAYMENT OF PARTNERSHIP DEBTS,** after the firm has been dissolved by the death of one of its members, is made not because of any lien or right which the creditors of the firm can assert, but because it is the debtor's right to have the assets so applied.

**PARTNERSHIP CREDITORS — WHEN ESTOPPED TO HAVE THE FIRM ASSETS APPLIED TO THE FIRM DEBTS.** — The benefit of the rule requiring the application of the partnership assets to partnership debts accrues to the firm creditors, but, as such preferred payment is the result of the co-partner's lien, and not of the creditors', it follows that, if the partner has done any act by which he surrenders his lien or estops himself from asserting it, the creditor is equally estopped.

**WAIVER OF PARTNER'S RIGHT TO HAVE FIRM ASSETS APPLIED TO FIRM DEBTS.** — The right of a partner to have the partnership assets applied to the payment of partnership debts is not surrendered nor waived by a will in which he bequeaths all his estate and effects to the other member of the firm.

**PARTNERSHIP — CREDITOR'S SUIT AGAINST SURVIVOR — ELECTION OF REMEDIES.** — A partnership creditor who sues and obtains judgment against the surviving member of a firm as an individual is not to be regarded as having elected to treat his claim as an individual demand, and as being thereby debarred from asserting it afterwards to be a partnership debt; nor are his rights affected by the circumstance that he has joined a demand for an individual debt of the surviving partner in the same suit.

**LIMITATIONS OF ACTIONS BY CREDITORS AGAINST SURVIVING MEMBERS OF PARTNERSHIP.** — The surviving member of a partnership who is also the executor of a deceased member represents antagonistic interests in a suit for an accounting and a settlement of the affairs of the partnership, and an administrator *ad litem* must be appointed whether he brings such suit as survivor or as executor. Hence the time for bringing such a suit is regulated by a provision in a statute of limitations which declares that "The six months during which an executor or administrator is exempt from suit, after the grant of letters, is not to be taken as any part of

the time limited for the commencement of an action against him"; and as the right of a firm creditor to bring suit to have the partnership assets marshaled is neither greater nor less than the right of the surviving partner or the personal representative of the deceased partner to compel an accounting, it follows that the statute does not begin to run against the creditor until the expiration of six months after the death of the deceased partner.

*Wm. E. Richardson and Henry Chaeberlain, for the appellant.*  
*Pillans, Torrey, and Hanaw, for the respondent.*

STONE, C. J. In the authorized American edition of Lindley on Partnership, vol. 1, p. 2, are many definitions of the term "partnership." Perhaps none of them will be found more precisely and comprehensively accurate than that of Chancellor Kent: "A contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions": 3 Kent's Com. 23. To constitute the relation *inter sese*, the contract must extend beyond a common agreement to share in the profits. It must equally bind the parties to bear the burden of the losses: *McCreary v. Slaughter*, 58 Ala. 230; *Couch v. Woodruff*, 63 Ala. 466; *Mayrant v. Marston*, 67 Ala. 453.

Partnership is not necessarily an entire merger of the individual, his labor, energy, or estate in the firm. The extent of the merger is determined by the agreement entered into, and the purpose the partners have in view. Anything left out of the partnership agreement and its views, whether it be money, property, labor, or skill, pertains to the individual in as absolute right, as if there had been no contract of partnership. The merger of the individual into the firm or company extends to and includes everything embraced, expressly or impliedly, in the terms of the agreement, and to that extent changes the character of his ownership. The individual parts with the separate right and power to manage, direct, and control that of which, before that time, he had been supreme arbiter. His dominion was an integer. It becomes a fraction. He surrenders to the partnership an interest in his property, labor, skill, energy, one or more, as the agreement may bind him by express or implied stipulations, in consideration of a corresponding surrender, to like extent and for like purposes, by his copartners. The agreement consummated, each partner becomes seised and rightfully possessed of the same interest in and power over whatever has been

contributed to the firm by his copartners, as he retains in that contributed by himself. This, and no more.

These properties of partnership render it eminently a relation of trust. All its effects are held in trust, and each partner is, in one sense, a trustee; a trustee for the newly created entity, the partnership, and for each member of the firm, who thus becomes a beneficiary under the trust. He is more; he is a trustee, and a *cestui que trust*. A trustee, so far as his own duties bind him; a *cestui que trust*, so far as duties rest on his copartners. And it is sometimes said that each partner is both a principal and an agent; a principal to the extent he represents his own interest, but an agent only so far as he represents his copartners.

The first duty devolved by this trust on each of the partners is to apply the partnership effects to the payment of the debts of the partnership, and not to pervert them to individual uses or wants, without the consent of the copartners. Any attempt to so pervert them, whether by private arrangement or under judicial proceedings, can be intercepted by the non-consenting partners. This, on the plain principle that, being beneficiaries under the trust, they have a clear right to prevent its breach.

The trust goes farther. After discharging all the partnership liabilities, the *residuum* is still held in trust for partition or distribution among the several partners, according to their several interests; and the same rights and remedies exist to preserve, protect, and secure the proper administration of the trust fund to this end, as are given in enforcing the payment of debts.

In administering the two remedies noted above, the court simply enforces a trust against property held in trust, and at the suit of one in whose favor the trust is declared to exist. It is only carrying out the intention which influenced the formation of the partnership. Each partner has the right to have the partnership debts paid with partnership effects, so as to relieve his individual property of the burden; and each partner has a clear right to his share of any surplus that may be left after paying the partnership debts. All men will assent to the soundness and justice of the principles stated above.

Partnerships are dissolved in various ways. Sometimes by voluntary agreement, and sometimes by a sale from one or more partners to others, or by a sale to strangers. In cases



falling under either of these classes, there is generally no trust relation preserved, unless it is provided for in the terms of the dissolution or sale. The wants of this case do not require us to discuss this question.

Dissolution takes place also by the death of a member, and by bankruptcy or insolvency. In cases falling within either of these classes, the affairs of the partnership are frequently wound up, and the effects and estates administered in courts of justice. Courts always have respect to the fiduciary rights and duties which subsist between partners, and in the absence of special circumstances to vary the rule, will apply partnership effects primarily to partnership debts. This because of the trust which subsisted between the parties. Hence if the death of a member cause the dissolution, the representative or succession to his estate has the clear right to have the partnership effects applied to the payment of partnership debts, in preference to the debts of the survivor, and in like preference of any right he may assert to re-embark them in trade; and the insolvency of the deceased member does not vary the question. In the administration and settlement of a firm thus dissolved, the court will enforce the trust in favor of the deceased or bankrupt member's estate, and apply the assets first to the payment of the partnership debts, but not because of any lien or right the creditor or creditors can assert. They have no such lien or right. It is their debtor's right to have the assets thus applied; and in enforcing that clear right, the benefit and preference accrue to the partnership creditor. It is thus that the court of equity, by a process of its own, works out the partnership debtor's *quasi* lien in the prior payment of the partnership creditor's demand, while he himself has no lien, and can assert no claim to be a beneficiary under the trust.

The preferred payment being the result of the copartner's lien, and not of the creditor's, it follows that if the partner has done any act by which he surrenders his lien, or estops himself from asserting it, the creditor is equally barred or estopped. His *quasi* lien being at best only the resultant of his debtor's lien, of course it cannot exist after the debtor has ceased to have any lien from which it could result. This is axiomatic.

The questions we have been considering have been often and learnedly discussed by courts and by text-writers. Possibly no clearer enunciation of the principles can be found

than is shown in the opinion of Justice Matthews in *Fitzpatrick v. Flannagan*, 106 U. S. 648. We cite many authorities bearing on the question, without attempting to collate or classify them: *Pierce v. Pass*, 1 Port. 232; *Reese v. Bradford*, 13 Ala. 837; *Burwell v. Springfield*, 15 Ala. 273; *Halstead v. Shepard*, 23 Ala. 558; *Lang v. Waring*, 25 Ala. 625; 60 Am. Dec. 533; *Offutt v. Scott*, 47 Ala. 104; *Little v. Snedecor*, 52 Ala. 167; *Levy v. Williams*, 79 Ala. 171; *Evans v. Winston*, 74 Ala. 349; *Espy v. Comer*, 76 Ala. 501; *Espy v. Comer*, 80 Ala. 333; *Fancher v. Bibb Furnace Co.*, 80 Ala. 481; *Cannon v. Lindsey*, 85 Ala. 198; 7 Am. St. Rep. 38; Story on Partnership, secs. 97, 326, 360; Parsons on Partnership, \*113; Lindley on Partnership, \*334, \*351 et seq., 548 et seq.; *Rogers v. Batchelor*, 12 Pet. 221; *Case v. Beauregard*, 99 U. S. 119; *Wilson v. Soper*, 13 B. Mon. 411; 56 Am. Dec. 573, and note; *Menagh v. Whitwell*, 52 N. Y. 146; 1 Am. Rep. 683; *Schmidlapp v. Currie*, 55 Miss. 597; 30 Am. Rep. 530, and note; *Dob v. Halsey*, 16 Johns. 34; 8 Am. Dec. 293; *Gram v. Cadwell*, 5 Cow. 489; *Evernghim v. Ensforth*, 7 Wend. 326; *Hutchinson v. Smith*, 7 Paige, 26; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Farley v. Moog*, 79 Ala. 148; 58 Am. Rep. 585.

The firm of A. and B. Moog was composed of Abraham Moog and Bernard Moog. They were engaged in a mercantile business. They incurred a debt to Meyer I. Goldsmith, January 12, 1884, of twelve thousand five hundred dollars. Abraham Moog died February 23, 1884, leaving a will, which, after his death, was probated and established. Bernard Moog was named executor in the will, and relieved of the duty of giving bond as such. He qualified soon after his brother's death. The will contains this clause: "After payment of all my debts as above provided, I give and devise to my brother, Bernard Moog, all my property of every kind and description, real or personal and mixed," etc., "to have and to hold to him and his heirs, in fee-simple forever." The will contains no authority or power to continue the mercantile business after the death of Abraham Moog.

Bernard Moog did continue the business, employing therein the assets of the late firm of A. and B. Moog, until his business was broken up by attachments issued and levied January 12, 1885. In the meantime, on July 1, 1884, he incurred an additional debt to Meyer I. Goldsmith of six thousand dollars.

Abraham and Bernard Moog owned a valuable real estate which they used in connection with their business. The titles were made to Abraham Moog and Bernard Moog, their heirs and assigns, without any reference to their partnership name. In September, 1884, B. Moog executed twenty notes, payable to his own order at the Savings Bank of Mobile, each for the sum of \$1,250, the first due October 25, 1884, and the others in regular order at intervals of ten days, the last being due May 4, 1885. Contemporaneously with these notes he executed a deed of trust conveying said real property to a trustee to secure the payment of said twenty notes. This property was finally disposed of in payment of said notes, and is now held and occupied in part by Eichhold Brothers and Weiss as derivative purchasers under said trust deed.

In January, 1885, Meyer I. Goldsmith instituted suit by original attachment against Bernard Moog for the recovery of his combined claim of twelve thousand five hundred dollars and of six thousand dollars; and in May, 1885, he recovered judgment for the amount of the two claims and interest. Out of the property attached, which was personal chattels, he realized less than five hundred dollars. The residue of the judgment remains wholly unsatisfied, and Bernard Moog is insolvent.

The present bill was filed July 9, 1890. It seeks to subject the said real estate which had been used and occupied in the business of A. and B. Moog, to the payment of said partnership debt of twelve thousand five hundred dollars. It charges that the said twenty notes, given as they were after the firm had been dissolved by the death of Abraham Moog, were the individual debt of Bernard Moog, and hence could not be paid with partnership effects until partnership debts were first paid. There was a demurrer to the bill which the chancellor sustained, and from that ruling the present appeal is prosecuted.

The defense takes many forms. One contention is, that by giving and devising all his estate and effects to Bernard, the survivor, Abraham clothed him with the individual right and title to all the property of every kind which had belonged to the partnership, and thereby surrendered any lien he may have had to have the partnership effects applied to the payment of partnership debts. We will not say this could not have been done. Possibly a will containing an express waiver would have cut off the lien; and possibly, if it had

directed or authorized a continuance of the business with the firm effects, and it had been so continued, this would have worked a surrender of the lien by necessary implication. But we need not decide this, as the will contains no such provision. On the contrary, it first directs the payment of all of testator's debts, and gives and devises to Bernard only the residue after the payment of the debts. There is nothing in this contention.

It is further contended that, by suing Bernard Moog as an individual, and obtaining judgment against him as an individual, particularly by joining an individual debt of Bernard Moog in the same suit, Goldsmith has elected to treat his claim as an individual demand, and cannot now be permitted to assert it as a partnership debt. There is nothing in this. After the dissolution of the partnership by the death of Abraham Moog, a joint action at law could not be prosecuted against them. Bernard, if sued at all, must needs be sued alone. It cannot make any difference in principle that another claim is joined in the action, for which his deceased partner is not liable: Code of 1886, secs. 2604, 2605, and notes.

The defense relies on the statute of limitations of six years. Abraham Moog died February 23, 1884. According to the averments of the bill, Bernard Moog qualified as his executor March 22, 1884. This suit was brought July 9, 1890, more than six years after he so qualified. The suit being against the living survivor, it is contended that it was barred under section 2632 of the code. Such it surely would be if that presented the whole merits of the contention: *Bradford v. Spyker*, 32 Ala. 134; *Brewer v. Browne*, 68 Ala. 210; *Wells v. Brown*, 83 Ala. 161. But it does not. It must be borne in mind that the rights of creditors to sue in a case like this are precisely the right of the survivor, or of the representative of the deceased copartner, to compel a settlement of the copartnership accounts and assets. Till that right is barred by lapse of time, the right of creditors is not barred. A suit, then, for the purpose of settling the partnership account must be brought either by the personal representative of the deceased partner against the survivor, or by the survivor against the personal representative of the deceased partner. Instituted in either form, it is necessary that Abraham Moog's estate be represented by a personal representative. This, then, brings the case within section 2633 of the present code,



which provides: "The six months during which an executor or administrator is exempt from suit after the grant of letters is not to be taken as any part of the time limited for the commencement of an action against him." In section 2263 it is provided that "no suit must be commenced against an executor or administrator as such until six months . . . after the grant of letters testamentary, or of administration." If Bernard Moog were to sue, as surviving partner, to have an account and settlement, Abraham Moog's estate must be represented; and being himself the qualified executor, the appointment of an administrator *ad litem* for and in the interest of the estate would become a necessity. So, if Bernard Moog were to sue as executor, the same necessity would arise for an administrator *ad litem*; for Bernard Moog could not represent the two antagonistic interests which would be presented. In either form the six months' exemption from suit must be accorded to the representative of Abraham Moog's estate, and this brings the time less than six years from the death of Abraham Moog. The statute of limitations is no bar to the present action: *Steele v. Steele*, 64 Ala. 438; 38 Am. Rep. 15; *Allen v. Elliott*, 67 Ala. 432; *Espy v. Comer*, 76 Ala. 501.

The purpose of this suit being to subject lands to the payment of a partnership liability, it would seem the legal title must be brought before the court. According to the averments of the bill, the undivided half interest in the land is in the heirs at law of Abraham Moog, unless his will in favor of B. Moog changes the rule. We make this suggestion without intending to decide anything in regard to it.

Reversed and remanded.

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**PARTNERSHIP — DEFINITION OF.** — A partnership is a voluntary contract of two or more persons for joining together their money, goods, labor, and skill, or either of them upon an agreement to share the gain or loss proportionately between them, having for its object the advancement and protection of fair and open trade: *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376, and note; *Bromley v. Elliot*, 38 N. H. 287; 75 Am. Dec. 182, and extended note; *Howze v. Patterson*, 53 Ala. 205; 25 Am. Rep. 607; *Loomis v. Marshall*, 12 Conn. 69; 30 Am. Dec. 596, and extended note. See note to *Waverly Nat. Bank v. Hall*, 30 Am. St. Rep. 828, as to what agreements do not constitute partnerships. A partnership exists between two or more persons, whenever there is such a relation between them, that each is as to all the others, in respect to some business, both principal and agent: *Morgan v. Farrel*, 58 Conn. 413; 18 Am. St. Rep. 282, and note.

**PARTNERSHIP — INTERESTS IN FIRM PROPERTY.** — Partnership effects are a fund to be applied first to the payment of the partnership debts, and the interest of a partner therein is only his share of the surplus after they are

paid; *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; 98 Am. Dec. 332, and note; *Penn v. Whitehead*, 17 Gratt. 503; 94 Am. Dec. 478, and note; *Arnold v. Wainwright*, 6 Minn. 358; 80 Am. Dec. 448, and note; *Nixon v. Nash*, 12 Ohio St. 647; 80 Am. Dec. 390, and note; *Sutcliffe v. Dohrman*, 18 Ohio 181; 51 Am. Dec. 450, and note; *Dyer v. Clark*, 5 Met. 562; 39 Am. Dec. 697, and note. See also extended note to *Davies v. Atkinson*, 7 Am. St. Rep. 377, for a discussion of the application of firm assets to the payments of debts of individual members of the partnership.

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## LINDSAY v. COOPER.

[94 ALABAMA, 170.]

**ESTOPPEL BY SILENCE.** — When one knowingly suffers another in his presence, to purchase property to which he has a claim of title, which he willfully conceals, he will be deemed to have waived his claim, and will not afterwards be permitted to assert it against the purchaser. Therefore, if the vendee of land under an executory contract dies before he has paid any of the purchase price, and the vendor thereafter becomes his administrator, and having taken possession of the land and applied to the probate court for an order to sell the decedent's lands for the payment of his debts, allows the sale to be consummated without giving the purchaser any notice whatever of his personal title or interest in the property, and thus induces such purchaser to change his position to his detriment, the vendor and his privies will be estopped to assert any claim to the land against the purchaser and his privies.

**JUDICIAL SALES — RIGHTS OF PURCHASERS.** — THE RULE OF CAVEAT EMP-  
TOR applies in its utmost vigor and strictness to an administrator's sale, even to the extent of covering those defects of title which an examination of the records and other muniments of title does not disclose, and those secret equities which no ordinary diligence can detect.

**INVALIDITY OF ADMINISTRATOR'S SALE, HOW CURED.** — An administrator's sale which is invalid owing to the absence of jurisdictional allegations in the petition for the order of sale becomes binding on the representatives of the decedent if they knowingly receive and distribute among the creditors of his estate the proceeds of the notes given for the purchase money.

**ADVERSE POSSESSION — LACHES.** — Where an administrator recognizes the validity of a previous judicial sale of his decedent's land by filing the notes given for the purchase money as a claim against the purchaser's estate, and by the subsequent enforcement of the claim, such acts will stop the running of the statute as against an heir of the purchaser who is out of possession; and if such heir was an infant at the time of the suspensive acts, and commenced proceedings for the assertion of her rights to the land within three years after attaining her majority, she will not be deemed guilty of laches nor affected by the statute of limitations.

**ESTOPPELS ARE PROTECTIVE ONLY,** and are to be invoked as shields, and not as offensive weapons. Their operation should, in all cases, be limited to saving harmless or making whole the person in whose favor they arise, and they should never be made the instruments of gain or profit.

*J. B. Moore and R. C. Brickell, for the appellant,*

*E. W. Pettus, Cooper and Cooper, Roulhac and Nathan, and Jackson and Sawtelle, for the respondent.*

**McCLELLAN, J.** It is sought by the bill in this case to declare and enforce a trust against the respondents in respect of an one-third undivided interest in a certain quarter-section of land, to which they have the legal title, and of which they have been in possession, actually or by privity, since 1870. Complainant's theory is, that she has a perfect equity in and to that interest; that the respondents hold the legal title in trust for her, and should be decreed to execute that trust by vesting title in her, and held to account for rents and profits accruing pending the existence of the trust. The facts are complicated, but the evidence which goes to establish them is substantially free from conflict. We encounter no difficulty in finding them to be as follows, as far as material:—

William H. Price became seised and possessed of the land in fee-simple absolute about the year 1853, and continued in its occupancy for four or five years. In 1857, or 1858, he sold the land by executory contract to Isaac H. Walker, and put the purchaser in possession. Early in 1860 Walker died, without having paid the purchase money to Price, and without having received a conveyance of the land. Price became Walker's administrator, and in that capacity took possession of the tract in controversy, together with other lands held by the intestate; and applied to the probate court for an order to sell all these lands for the payment of decedent's debts. An order of sale was made, and acting under it Price sold, on December 17, 1860, all of said lands as the property of the intestate. At this sale Thomas E. Winston became the purchaser of the quarter section in question. In accordance with the terms of the sale, the purchaser executed his several notes with sureties for the purchase money, and Price executed to him a bond for title, binding himself as such administrator to convey all the right, title, and interest of the intestate upon payment of the purchase-money notes. Winston was let into possession immediately, and rented the land for the year 1861 to John A. Steele, who was a surety on the notes given by Winston to Price as Walker's administrator. At the close of 1861 Steele and Winston had a parol understanding and agreement, by the terms of which the former was to take the land off Winston's hands, and assume and pay

the purchase-money notes as they matured. Under this agreement, Steele continued in possession and cultivation of the land as the owner of it until 1870, but paid nothing on the notes. Meantime Price died in 1865, without asserting any individual claim or title to the land, and without taking any steps as Walker's administrator to collect the notes of Winston. On December 18, 1865, Theophilus A. Jones qualified as administrator of Price's estate, and soon afterwards reported and had the estate declared insolvent; but it does not appear that he advanced any claim to this land prior to 1870. Winston died in 1869; and in 1870, Steele delivered the possession of the land to Jones as Price's administrator, by whom it was sold as assets of Price's estate, under probate order on April 24, 1872, to Clark T. Barton, the sale being regularly reported and confirmed, and conveyance executed to the purchaser as ordered by the court. The respondents, Mary K. Cooper, Minerva Winston, and Calvin G. Jackson, hold by *mesne* conveyance from said Barton.

After Price's death, one Weatherford became the administrator *de bonis non* of the estate of Isaac Walker. Weatherford having died, this administration was committed to Abner W. Ligon, general administrator for the county of Franklin, on January 25, 1869. It does not appear that either Weatherford or Ligon ever made any efforts to realize on the Winston notes, by proceedings against the makers thereof personally, or against the land, until 1872; then Ligon, as administrator of Walker, filed a statement of the notes as a claim against the estate of Thomas E. Winston. Lewis B. Thornton, having qualified as administrator *de bonis non* of Winston's estate, reported the same insolvent, and a decree passed so declaring. The claim by Ligon was filed while the estate of Winston was being administered under this decree as insolvent, and pending this state of things, Ligon obtained an order to sell the Winston notes, along with other claims belonging to Walker's estate. At a sale under this order, James E. Moore bought these notes at the price of fifty dollars, which was distributed to the creditors of Walker's estate, and was let into the representation of the claim based upon them against Winston's estate. This claim was contested by Winston's administrator, but whether meritoriously or not we are not advised, as the objection was held not to have been seasonably made, and the estate was, upon that ground, adjudged to be liable for it: *Thornton v. Moore*, 61 Ala.



347; and the administrator compromised it with Moore by paying eleven hundred dollars therefor. It appears further, that no cognizance was had of the land, or the interest of Winston in it, in the administration of his estate; it was not administered. The estate, though declared insolvent, was not so in fact; or rather, by compromises and the like, effected by Thornton with creditors, their demands were satisfied, and a considerable sum remained which was distributed to the intestate's children. The present complainant is one of these children. There are two others, who do not join in this bill. The complainant was born in March, 1864, and filed this bill September 10, 1887, within three years after attaining her majority.

Whether or not Price and his privies are estopped to assert his legal title against Winston and those claiming under him and, among the rest, the present complainant, is a prominent if not indeed a vital question in the case. The facts specially bearing upon this inquiry which have not before been adverted to are the following: In his petition to the probate court for an order to sell this along with other land as the administrator of Walker, Price alleged that his intestate died "seised and possessed" of all the lands sought to be sold, and this averment is not in any manner qualified by the statement of any other fact or circumstance in limitation of Walker's ownership. There is no intimation that Price himself and in individual capacity held the legal title, naked or otherwise, or any beneficial interest in the land, or any lien for the unpaid purchase money. The order of sale which passed in response to this petition is likewise without intimation that any less estate than an unencumbered fee in the land was to be sold. The sale under this order was made by Price in person. It is not pretended for respondents that at the time and place of the sale, or at any other time and place, Price advanced, asserted, or made known in any manner to those present at the sale, or to Thomas E. Winston, who then purchased the land, that he, Price, had the legal title to the land and a lien upon it for the purchase money due from Walker to him, or either, or that any other or less estate than the unencumbered fee was in the estate of his intestate, or intended to be passed by the sale he was then making. To the contrary, this record cannot be read without enforcing the conclusion that he gave no notice whatever of his personal title or interest or claim in and to the property. Persons present

at the sale testify that the land was sold by Price as the property of Walker's estate. The bond for title, which he executed in his representative capacity to Winston, recites that the land was sold as Walker's, and evidences an undertaking to convey the title thereto as fully as it was vested in the obligor as Walker's administrator; and all this may be looked to, not indeed as importing an estoppel by the bond, but as admissions of Price against interest going to negative any reservation or notice of his personal interest at the sale to Winston. And beyond all this, the uncontroverted evidence is that Winston purchased the land at its full market value, bidding therefor \$15.02 per acre, amounting to \$2,403 for the one hundred and sixty acres, and executed his notes for that sum. Moreover, the report of the sale imports no intimation that any less than an unencumbered fee in the land was sold. On these facts, that Price alleged the seisin and possession of his intestate of the land, and asked an order to sell, thereby importing a purpose to sell an estate in fee: *McKenzie v. Baldridge*, 49 Ala. 564; that there is nothing in the petition, or the order of sale, or report of sale, or bond for title, or the notes accepted by Price in any degree indicating that less than the fee was intended to be or was in fact sold; that on the contrary, the manifest implication from each and all of these papers is that Walker's estate was in the unencumbered ownership of the land; that those present at the sale, and who testify in this case, in no wise suggest that any notice was given by Price of any individual interest or claim on his part; and that the land fetched its full market value, more, indeed per acre than the other lands of the estate lying adjacent to it, as appears from the report of sale,—we cannot, without the greatest violence to the probative force of evidence, reach any other conclusion than that Price, selling the land in person as Walker's administrator, gave no notice or intimation whatever of his individual rights in respect of it; but conscious as he must have been that the purchaser was acting upon the assumption and in the belief that he was getting the land free from all encumbrance and claim of adverse title, allowed him to proceed upon that assumption and in that belief to a change of his position, to his detriment, in taking upon himself a pecuniary liability evidenced by the notes, which doubtless could have been enforced at the time, and which were subsequently enforced against his estate. These facts involve every element of an estoppel *in pais* upon Price, conceding that he

had the legal title, or a lien for unpaid purchase money, or both, to and on the land when he sold it as Walker's administrator, to subsequently assert that title or enforce his lien against the purchaser at the sale. If he had the title and lien, or either, he must have known it. He must be holden to have known that Winston bought in the belief of the non-existence of any such adverse claim or right in him or in anybody else. It cannot be supposed that any sane man would pay the full value of property, not for the property, but for the privilege of paying its full value over again to its real owner, and thus acquiring it from the latter. Price not only stood by, in a sense, and saw Winston buy his land from another, believing that other to be its owner, and said nothing, but he represented that other in the transaction, and as his agent, in legal contemplation, participated in the sale of his own property to Winston, knowing that Winston's purchase was influenced by the belief, which Price knew to be ill-founded, that the property belonged to the principal, Walker's estate, and not to the agent, Price; and he said never a word of warning to the purchaser, but consciously, and hence intentionally and willfully as the law looks upon his conduct, permitted Winston to buy and pay for, in the sense of becoming legally liable for the purchase money, that which he professed to sell as administrator, but which he knew he did not own as administrator, and could not sell. In all reason, and by all the authorities, it was Price's moral and legal duty to speak and to give notice of his claim and rights in the premises; and "his silence, when in good conscience he ought to speak, shall close his mouth when he would speak." Having been silent when every consideration of moral and legal obligation was upon him to apprise the purchaser, acting on the assumption, known to Price, of the non-existence of the facts which Price could and should have disclosed to him, having changed his legal *status* to his detriment in consequence of Price's failure to discharge this duty, the law holds the latter estopped now to say that the real facts were other than he wrongfully allowed the purchaser to believe them to be at the time of the sale, on the familiar doctrine "that where one knowingly suffers another, in his presence, to purchase property to which he has a claim or title, which he willfully conceals, he will be deemed under such circumstances to have waived his claim, and will not afterwards be permitted to assert it against the purchaser": Herman on Estoppel and Res Adjudicata, 1054

et seq.; Bigelow on Estoppel, 476 et seq.; *Dewey v. Field*, 4 Met. 381; 38 Am. Dec. 376; *Stephens v. Baird*, 9 Cow. 274; *Favill v. Roberts*, 50 N. Y. 222; *Greene v. Smith*, 57 Vt. 268; *Fielding v. Du Bose*, 63 Tex. 631; *Wells v. Pierce*, 27 N. H. 503; *Vicksburg etc. R. R. Co. v. Ragsdale*, 54 Miss. 200; *Money v. Ricketts*, 62 Miss. 209; *Copeland v. Copeland*, 28 Mo. 525; *Raley v. Williams*, 73 Mo. 310; *Bullis v. Noble*, 36 Iowa, 618; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Heard v. Hall*, 16 Pick. 457; *Dickerson v. Colgrove*, 100 U. S. 578; *Pickard v. Sears*, 6 Ad. & E. 469; *Markham v. O'Connor*, 52 Ga. 183; 21 Am. Rep. 249; *Drake v. Glover*, 30 Ala. 382; *Burns v. Taylor*, 23 Ala. 255; *Williamson v. Ross*, 33 Ala. 509; *David v. Shepard*, 40 Ala. 587; *Leinkauff v. Munter*, 76 Ala. 194.

The estoppel thus on Price is equally efficacious in its operation upon all who claim under or through him. They, too, will not be heard to say, as against Winston or his privies, that Price, at the time of his sale as Walker's administrator, had any claim or title to the land in his individual capacity: *Wood v. Seely*, 32 N. Y. 105; *Parker v. Crittenden*, 37 Conn. 148; *International Bank v. Bowen*, 80 Ill. 541; *Kinnear v. Mackey*, 85 Ill. 96; *Drake v. Glover*, 30 Ala. 383; *Kennedy v. Brown*, 61 Ala. 296; *Hendricks v. Kelly*, 64 Ala. 388; *Taylor v. Agricultural etc. Ass'n*, 68 Ala. 229; *Wortham v. Gurley*, 75 Ala. 356.

And this principle has been carried, in the decisions of this court, to the extent of giving effect to the estoppel even upon *bona fide* purchasers for value and without notice of the facts operating the estoppel upon their grantor. The one fact that they are privies of him who is estopped, and in respect of the estate upon which the estoppel operates, is, according to these cases, quite sufficient to estop them also, notwithstanding their good faith, want of notice, and payment of a valuable consideration: *McCravey v. Remson*, 19 Ala. 430; 54 Am. Dec. 194; *Adler v. Pin*, 80 Ala. 354.

This doctrine, however, does not appear to be fully supported by the weight of authority, and its soundness being questioned by some members of the court as now constituted, our conclusion that the respondents are bound by the estoppel which rested on Price will be rested upon another consideration. They are purchasers, it is true, in good faith, without actual notice and for value. They are also, however, purchasers at a judicial sale, the sale made by Price's administrator to Barton in 1872 under an order of the probate court.



To such sales the rule of *caveat emptor* applies in its utmost vigor and strictness. The court orders the sale, in such cases, only of such interest and estate and rights in the premises as he had and could have asserted; no more, no less. The purchaser succeeds to his rights and attitude in respect of the property sold, "takes his shoes," stands in his place, acquires his interest as the same existed in his hands, subject to all infirmities of title then attaching to the estate, and to all equities, known or secret, which operated a limitation upon the nominal or apparent estate of the intestate in his lifetime. The purchaser buys at his peril; he takes upon himself the risks of any outstanding rights that could have been asserted against the decedent; and if by reason of the existence of such rights, whether known or not, or discoverable or not, he takes nothing by his purchase, he cannot complain: *Perkins v. Winters*, 7 Ala. 855; *Burns v. Hamilton*, 33 Ala. 210; 70 Am. Dec. 570; *Bland v. Bowie*, 53 Ala. 152; *Fore v. McKenzie*, 58 Ala. 115; *Lovelace v. Webb*, 62 Ala. 271.

There are some expressions to be found in opinions handed down here indicative of a doubt in the minds of the writers as to "whether the rule of *caveat emptor*, which applies to judicial sales, will go further than to cover those defects which may be disclosed by an examination of the chain of title; or at least whether it would cover such secret equities as no ordinary diligence could discover": *Wilson v. Holt*, 83 Ala. 539; 3 Am. St. Rep. 768. We do not share in this doubt. To give that limitation to the doctrine of *caveat emptor* would be to emasculate it altogether. To hold that the purchaser at an administrator's sale made under an order of the court of probate need only look out for defects disclosed by the proceeding in which the order is entered, and by the muniments of the intestate's chain of title, would be to put such purchaser upon the footing of a vendee from an individual, and to strip the fact that he buys at a judicial sale of all significance whatever; thus destroying the doctrine that he buys at his peril, and takes, not the estate the record and paper muniments indicate the intestate held, as would a vendee at private sale, but the interest only which was so held in point of extraneous fact. We can not subscribe to the limitation suggested, but on the contrary adhere to the broad doctrine announced in the authorities cited that the purchaser at such sale gets only such right, interest, or estate as resided in the intestate, the apparent title being qualified and limited by every fact or cir-

cumstance, whether *in pais* or of record, which would have constituted an outstanding equity against the decedent in his lifetime, and applying this principle to the case at bar, we hold that Barton and those holding under him are estopped in like manner, and to the same extent, that Price would now be were he yet living.

We have not been inattentive to the argument for appellees against an estoppel upon Price and his privies, which proceeds on the theory that the estoppel is sought to be based on the acts of Price as Walker's administrator. The theory is at fault in that it is Price's conduct as an individual that is relied on to estop him. His averment that Walker was "seised and possessed" of the land, his report of the sale, the title bond executed by him as administrator, and his acceptance, as such administrator, of Winston's notes — all representative acts — have been referred to in the course of this opinion, not as going to raise up an estoppel upon him in that capacity, or upon Walker's estate, but as evidence going to prove that in that capacity he sold the land as belonging absolutely to Walker's estate, without giving notice of any individual claim of his own to it — to show his silence when the duty of speech as an individual was upon him, as a predicate for the application of that principle of law which closes his mouth, and the mouths of those claiming under him, when they would now speak; and to hold them to the aspect of things which he then wrongfully allowed to be presented to Winston, inducing prejudicial action on the part of the latter.

It may be conceded that the sale to Winston was originally inoperative to pass the interest of Walker's estate, because of the absence of jurisdictional allegations from the petition for the order to sell, and hence that neither Price, as Walker's administrator, nor any successor to him in that office, nor the heirs of Walker, would be estopped to question its validity, or to deny the claims of Winston and his privies under it. All that may be conceded without in any degree affecting the rights of the present complainant as against those of the respondents who claim under Price. They assert no right under Walker's administrators or heirs, and their position is essentially in denial and repudiation of all rights in Walker's estate. Their position is that they have succeeded to the right and title which Price had, as they claim, as well after as before the administrator's sale, and which were not affected by that sale because they say it was Walker's interest alone,

and not Price's at all, which was sold, and the only interest Walker had, they contend, was the naked privilege of paying for the land, and by payment acquiring title to it. They have no right to attack the sale by Walker's administrator because no interest they now assert, or have ever asserted, was involved in that sale, or passed by it. Whether the sale was valid or invalid cannot concern them. Price originally could have attacked it, but only as the representative of Walker. Price's successor in that administration could, at one time, have drawn it in question, but only in the interest of Walker's estate. Walker's heirs, had the estate been administered as a solvent one, might likewise have had its invalidity declared. So, too, it may be that Winston could have repudiated it; but no assault has ever been made upon it from any of these sources. On the contrary it has all along been treated by every party having the right to avoid it as a valid sale. So far as strangers are concerned, it has been a valid sale from the first, and parties to it have been, and are now forever, estopped to question its validity — the representatives of Walker by the sale of Winston's notes and distribution of the proceeds to creditors of Walker's estate, and Winston's estate and his privies by the payment of those notes; and moreover no representative of or person interested in Walker's estate has ever contested, or is now contesting, the right sought to be effectuated by this bill. The sale must now be considered as valid, and as having been so all the time. By it, and its consummation in the payment and receipt of the purchase money, and its distribution to and retention for years by Walker's creditors, all the parties thereto are cut off from now objecting to its validity. By the conduct of Price as an individual, at this sale made by him as Walker's administrator, he and his privies are estopped to set up any individual right or claim he then had as against the present complainant.

The case is not like that of *Owen v. Slatter*, 26 Ala. 547, 62 Am. Dec. 745. The interest which the administratrix in that case had as an individual, in the land which she sold in her representative capacity, was an interest conferred by law, the right of dower, and attaching to all the lands of an intestate. The presumption is that all men have knowledge of this interest, as all men are presumed to know the law. The opinion proceeds on this theory, and can be supported upon no other. The court, among other things, said: "If the purchaser blindly bids off the land, without inquiring whether

the widow had relinquished her dower, or consented to a sale of it, electing to take a share of the proceeds in lieu thereof, it is his folly, and he has no one to blame but himself."

Our conclusion that Price incurred an estoppel on the assertion of his individual rights in the land, and our views as to the effect of this estoppel upon the present holders of his title, dispose of the defense advanced on the idea that the respondents, who are now in possession claiming under Price, are entitled to protection as *bona fide* purchasers for value, adversely to them; and leaves for consideration the defense of laches on the part of complainant, and consequent staleness of the demand now asserted by the bill.

This defense is to be considered from two points of view—as respects the representatives and heirs of Walker's estate, and with reference to the purchasers from Price's estate. It may be conceded that, had twenty years elapsed from the last recognition on the part of Walker's representatives and heirs of the sale to Winston, the latter's heirs, though infants during the whole of that period, could not demand a specific enforcement of the contract of sale. But, even passing over the fact that possession under that sale was held on the part of or in behalf of Winston, down to the year 1870, or to within seventeen years of the filing of the bill, the sale was recognized in the most unequivocal manner by Walker's administrator as late as the year 1872, by filing the purchase-money notes as a claim against Winston's estate, by subsequently selling those notes as assets of Walker's estate, and by the enforcement of that claim, through the purchaser at said sale, against Winston's estate. Upon these uncontroverted facts, there can be no room to say that the doctrine of prescription may be invoked by Walker's estate, to defeat the right now asserted by the complainant. The fact is that that right did not accrue to the complainant until the payment of the notes, which was less than ten years before the institution of this suit, and during the greater part of this period she was an infant. It is true that Winston in his lifetime, and his privies at any time after his death, might have paid off the notes, and demanded a conveyance from Walker's estate; or that, had a tender been declined, a bill might have been filed, offering to pay the notes, and praying a specific performance of the contract made with Price as Walker's administrator, as evidenced by the latter's bond for title; but no laches can be imputed to Winston, or those claiming under him, in failing



so to do, so long as the contract was treated by Walker's representatives as a subsisting one, even to the extent of its actual enforcement against Winston's estate.

Mrs. Lindsay can not therefore be said to have lost any right against Walker's estate, by negligent delay in asserting it. Has she been guilty of laches which will defeat her claim against those now holding under Price individually? On considerations already adverted to, the rights of these parties can not be helped out by any reference to the title or interest of Price in the land prior to the sale to Winston. Whatever rights they have are such only as have accrued to them by their own dealings with and attitude toward the land since Price's death. What are these? The first transaction on their part, or which can be said to have taken place in their behalf, respecting the land, was in 1870. Till then they bear the relation of strangers to the subject-matter of controversy. At that time, Steele surrendered the possession of the land to Jones, as Price's administrator. It cannot be successfully contended that this act of Steele had any other effect than to put Price's estate in the actual possession of the premises. There is no ground for any insistence that under his parol agreement with Winston, assuming its validity and binding efficacy upon Winston and his heirs, Steele had any authority to surrender the land to Walker's estate even, without saving Winston harmless on the purchase-money notes, and manifestly that arrangement never contemplated or authorized Steele to deliver possession to Price's administrator, or any other stranger, leaving the purchase-money notes to be paid by Winston's to Walker's estate. This surrender by Steele, therefore, stands for no more in this case than had Price's administrator casually, and without license of anybody, taken possession of the land in 1870. In the aspect of the case most favorable to these respondents in this connection, the utmost that can be affirmed in this behalf is that since 1870 they have had actual adverse possession, claiming in good faith against all the world; and it is admitted that, had complainant been *sui juris* during the period of this adverse possession, her rights would be foreclosed by the ripening of the adverse holding into a perfect title; but, on the other hand, it needs no argument or authority to demonstrate that, as she was an infant at the inception of this possession, and afterwards until within three years of bill filed, no title accrued to the respondents from it as against her: Code secs.

2613, 2624; and that, as the whole period of such possession up to the filing of the bill was less than twenty years, the doctrine of prescription has no application.

The complainant is, of course, entitled to the relief prayed against Walker's heirs. The purchase money having been in the manner detailed paid to the administrator of his estate, and distributed to his creditors, Mrs. Lindsay has a right to demand a conveyance to her of whatever interest his estate had in the undivided third part of the land which has descended to her, regardless of the original invalidity of the sale to her ancestor.

The effect of the estoppel on Price individually was not to pass the title out of him into Winston; and that title having passed into the respondents now in possession, the operation of the estoppel on them has not been to divest the legal title out of them and to vest it in Winston's heirs, but only to prevent an assertion of it by them against the complainant, who is entitled moreover to whatever rights would have been hers had Price in fact had no title to or claim upon the land as he led her ancestor to believe: *Bigelow on Estoppel*, 461; *Grissler v. Powers*, 81 N. Y. 57; 37 Am. Rep. 475; *Fall River Nat. Bank v. Buffinton*, 97 Mass. 498; and upon this principle, primarily, she has a right to claim the conveyance of the legal title to a one-third undivided interest by those respondents in whom it is now vested, since, had the truth as to Price's want of title been as he led her ancestor to believe it to be, she would now be entitled to investiture of it by Walker's heirs.

There is, however, another principle which the chancellor may be justified in applying on the final disposition of the cause, but which in the present state of the evidence as to the value of the land and its yearly rental, since it came to the possession of Barton, we are unable to apply intelligently. That principle is that estoppels are protective only, and are to be invoked as shields, and not as offensive weapons. Their operation, in all cases, should be limited to saving harmless, or making whole, the person in whose favor they arise, and they should not in any case be made the instruments of gain or profit. This doctrine has been given lodgment in our own adjudications, though it appears not to be generally accepted in other courts: *Nelson v. Kelly*, 91 Ala. 569; *Adler v. Pin*, 80 Ala. 351. It may be found, if the parties elect to go into that inquiry, that full equity can be done the complainant by charging the land with one third of the sum paid by Thorn-

ton in settlement of the Winston notes, with interest from the time of the payment; and that that course would involve less injury to those now in possession than to pass the title to one third of the land into the complainant, and hold respondents accountable for rents.

The decree of the chancellor is reversed, and that this aspect of the case may be further considered, if the respondents desire, the cause is remanded.

Reversed and remanded.

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**ESTOPPEL BY SILENCE.** — Where a man stands by and sees another purchasing land to which he has a prior claim, and does not disclose his title, he becomes estopped to set up his title against such a purchaser: *Marines v. Goblet*, 31 S. C. 153; 17 Am. St. Rep. 22, and note; note to *Cook v. Walling*, 10 Am. St. Rep. 22; note to *Hafler v. Strange*, 7 Am. St. Rep. 662; *Guffey v. O'Reiley*, 88 Mo. 418; 57 Am. Rep. 424, and extended note; *Markham v. O'Connor*, 52 Ga. 183; 21 Am. Rep. 249; *Rice v. Bunce*, 49 Me. 231; 8 Am. Rep. 129; *Workman v. Guthrie*, 29 Pa. St. 495, and note; 72 Am. Dec. 654; *Bryan v. Ramirez*, 8 Cal. 461; 68 Am. Dec. 340, and note; *Goodeffroy v. Caldwell*, 2 Cal. 489; 56 Am. Dec. 360, and note; *Peters v. Canfield*, 74 Mich. 498.

**ESTOPPEL — UPON WHAT FOUNDED.** — Estoppels *in pais* are interposed to prevent injustice and to guard against fraud: *Alexander v. Walter*, 8 Gill. 239; 50 Am. Dec. 688; note to *Welland Canal Co. v. Hathaway*, 24 Am. Dec. 59. Under the statute of frauds it is not permissible that an estoppel *in pais* should work a legal transfer of the title to the land: *Hayes v. Livingston*, 34 Mich. 384; 22 Am. Rep. 533.

**JUDICIAL SALES — CAVEAT EMPTOR.** — Sales by order of a probate court are judicial in their character, and the maxim of *caveat emptor* applies thereto: *Owen v. Slatter*, 26 Ala. 547; 62 Am. Dec. 745; *Sackett v. Twining*, 18 Pa. St. 199; 57 Am. Dec. 599, and note; *Farmers' etc. Bank v. Martin*, 7 Md. 342; 61 Am. Dec. 350, and note.

**ESTOPPEL AGAINST HEIR TO DENY VALIDITY OF ADMINISTRATOR'S SALE.** Heirs are estopped to deny the validity of an administrator's sale, and at the same time enjoy the benefits derived from the appropriation of the purchase money: *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584; 13 Am. St. Rep. 73, and note; *McPherson v. Cunliff*, 11 Serg. & R. 422; 14 Am. Dec. 642, and note. See to same effect, *Thompson v. Simpson*, 128 N. Y. 270.

# KANSAS CITY, MEMPHIS AND BIRMINGHAM RAILROAD COMPANY v. HIGDON.

[94 ALABAMA, 286.]

**APPEAL — NON-PREJUDICIAL ERROR.** — Where the matter set up in a special plea is covered by another plea, the sustaining of a demurrer to the special plea, if error, is error without prejudice.

**AGENCY — LIABILITY OF PRINCIPAL FOR AGENTS' ACTS.** — The principal is responsible for the act of an agent, when done within the scope of his authority, though in violation of a rule or instruction of the principal, unknown to the person dealing with the agent.

**RAILROAD COMPANIES.—LIABILITY FOR THE LOSS OF A DOG THROUGH THE ACTS OF A CONDUCTOR AND BAGGAGE MASTER.** — If a passenger's dog is removed, by the order of the conductor, from a passenger car and received for transportation by the baggage master, these acts are done apparently within the course of the employment of those officials. Hence, if the baggage master accepts the dog for carriage, without drawing the attention of the passenger to a rule of the company which requires the payment of a fee for the carriage of dogs, and afterward refuses to deliver the dog to the passenger at the station which he had announced to be his destination, unless that fee is paid, whereupon the animal is taken on to another station and there lost, the company is liable for that loss. The fact that a special rule regarding the carriage of dogs had been promulgated is no defense in such a case, where the evidence shows that the attention of the passenger was not called to the rule, and that he had no knowledge or notice of it.

**ACTION** by a passenger on a railroad train to recover damages for the loss of a dog.

*Hewitt, Walker and Porter*, for the appellant.

*Cabaniss and Weakley*, for the respondent.

**WALKER, J.** The defendant had the benefit, under pleas numbered 1 and 2, of the matters set up by the three special pleas, the demurrers to which were sustained. Such being the case, if there was error in sustaining the demurrers it was error without injury to the defendant, and does not afford ground for a reversal of the judgment: *Louisville etc. R. R. Co. v. Davis*, 91 Ala. 487.

The appellee was a passenger on the appellant's train from Birmingham to Elliott, a station on the appellant's line of road. When he boarded the train he went into a second-class car, carrying his dog along with him. When the conductor passed through the train, collecting tickets, he saw the dog, and then told the appellee that it was against the rules of the company to carry dogs on its passenger coaches, and that he would have to put the dog in the baggage car. Thereupon



the appellee and a brakeman took the dog into the baggage car, and delivered it to the baggage master. The appellee testified, without contradiction, that he told the baggage master to put the dog off at Elliott, and also that he told him he would not pay him any money for the dog. When the train arrived at Elliott, the baggage master refused to deliver the dog unless the appellee would pay him a fee of twenty-five cents. The appellee declining to make this payment, the dog was carried to Memphis, and was lost. The appellee afterwards offered to pay what was due on the dog, but did not renew such offer after he was informed that the dog was lost. There is no evidence to show that when the appellee delivered the dog to the baggage master he had knowledge or notice of the rule under which the appellant seeks to relieve itself of responsibility. The conductor was acting within the apparent scope of his authority when he gave directions as to the disposition to be made of the dog. When the baggage master received the dog there was nothing to indicate that he was acting in his own behalf rather than as an employee of the appellant, and for it. It does not appear that the appellee was in any way made to understand that in reference to the carriage and custody of the dog he was to look to the baggage master individually, and not to the railroad company. He was not informed that the company was unwilling to transport the dog or to become responsible for it. He was simply told to leave the dog in another part of the train, and with the person in charge of the baggage. He was not presumed to know the rules of the company as to the kinds of property it would receive for transportation. It does not even appear in this case that the rule relied on was posted in the depot or in any other public place at the station where the appellee was received as a passenger. The rule itself shows that it was the duty of the defendant's employees to give notice to the owners of dogs of the conditions upon which they would be carried by the railroad company, and if the owners were unwilling to accept such conditions, to refer them to the express company. In the present case the conductor permitted the dog to remain on the train, and had it put in the baggage car, and neither he nor the baggage master intimated to the appellee that the company was unwilling to carry the dog or to become responsible therefor. It affirmatively appears that the appellee did not know of the rule in question. He was entitled to rely upon and to follow the instructions given by the

conductor: *South and North Ala. R. R. Co. v. Huffman*, 76 Ala. 492; 52 Am. Rep. 349; *Jones v. Cincinatti etc. R. R. Co.*, 89 Ala. 376; *Lake Shore etc. Ry Co. v. Rosenzweig*, 113 Pa. St. 519. A rule of which the passenger has no notice cannot have effect to relieve the railroad company of responsibility for an article accepted for carriage by an employee who is intrusted with the duty of receiving and taking charge of goods delivered for transportation, and who accepts the article in question apparently in the course of his employment and on behalf of the principal. The conductor and the baggage master could be treated by a person having dealings with the defendant as having all the ordinary powers incident to their respective positions, except so far as restrictions are imposed upon their authority which are known or ought to be known to the person dealing with them. In transacting the business intrusted to them, within the usual and ordinary scope of such business, they act within the extent of their authority; and the principal is bound, provided the party dealing with them acts in good faith and without notice of any restrictions or limitations upon their authority: *Wheeler v. McGuire*, 86 Ala. 398; *Louisville Coffin Co. v. Stokes*, 78 Ala. 372; and the principal is responsible for the act of the agent, when done within the apparent scope of his authority, though in violation of a rule or instruction of the principal which was unknown to the person dealing with the agent: *Gilliam v. South and North Ala. R. R. Co.*, 70 Ala. 268. In the present case the baggage master, when he received the dog, was engaged in the particular business with which he was intrusted by the defendant. The plaintiff was entitled to suppose that he was dealing with the defendant through its regularly accredited agent in that department of its business. If the defendant was unwilling to receive or to become responsible for the dog, the plaintiff should have been informed to this effect by the agent. No such information having been given, and the rule now set up being unknown to the plaintiff when his dog was received without objection, he was entitled to look to the defendant for its carriage and proper delivery; and as the dog was lost and was not accounted for, the defendant was liable on the undisputed facts shown by the evidence. The plain conclusion from the evidence is, that the dog was lost in consequence of the negligence of the baggage master; and, in the circumstances developed by the proof, the defendant could not shift the liability from itself to the bag-

gage master individually: *Cantling v. Hannibal etc. R. R. Co.*, 54 Mo. 385; 14 Am. Rep. 476; *Minter v. Pacific R. R. Co.*, 41 Mo. 503; 97 Am. Rep. 288; Bishop on Non-Contract Law, sec. 1157. The affirmative charge in favor of the plaintiff was properly given.

Affirmed.

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**AGENCY — LIABILITY OF PRINCIPAL.** — A principal is bound by all the acts of the agent within the scope of his authority: *Busch v. Wilcox*, 82 Mich. 336; 21 Am. St. Rep. 563, and note; *Wachter v. Phoenix Ass. Co.*, 132 Pa. St. 423; 19 Am. St. Rep. 600, and note; *Kircher v. Conrad*, 9 Mont. 191; 18 Am. St. Rep. 731, and note.

**RAILROADS — LIABILITY OF, FOR ACTS OF EMPLOYEES.** — A railroad company is answerable for the acts of its servants in the course of their employment, whether abusing or rightfully pursuing the powers conferred upon them: *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510; *Chicago etc. R'y Co. v. West*, 125 Ill. 320; 8 Am. St. Rep. 380, and note. See also *Louisville etc. R'y Co. v. Douglass*, 69 Miss. 723; 30 Am. St. Rep. 582, and note with cases collected.

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## GAY, HARDIE AND COMPANY v. BRIERFIELD COAL AND IRON COMPANY.

[94 ALABAMA, 303.]

**JURISDICTION, CONFLICT OF.** — When two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it, to the exclusion of the other. If a trust estate is being administered by a court of competent jurisdiction, or if property is *in gremio legis* through the proceedings of such a court, no other court can interfere and wrest from it the possession and jurisdiction first obtained. It is immaterial whether the two courts of concurrent jurisdiction derive their powers, one from the federal and the other from a state government, or both from the same government.

**JURISDICTION, EXCLUSIVE LIMITATION OF THE RULE REGARDING EXCLUSIVENESS OF.** — The principle that no court can interfere with the proceedings of a court of concurrent jurisdiction is subject to the qualification that, to prevent the abuse of the principle by rendering possible the successful perpetration of injustice or fraud through the forms of law, suitors and litigants are not restricted to any one forum for the adjudication of their rights, provided only that such adjudications are not upon questions pending in another concurrent court which had prior jurisdiction, and provided that its writs or process shall not hinder the performance of any lawful mandate of such concurrent court, or interfere with or disturb the possession of any subject-matter then *in gremio legis*.

**RECEIVERS, JURISDICTION OF OTHER COURTS OVER.** — No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized even by the court granting the receiver, and is not

open to revision by it, if the court had jurisdiction of the subject-matter and the parties. Such a judgment, however, merely establishes the existence and extent of the claim; the manner in which it shall be paid is under the control of the court which appointed the receiver.

**JURISDICTION OF STATE COURT OVER MATTERS LITIGATED IN A FEDERAL COURT.** — Though the trustee of the mortgage bonds of an insolvent corporation may have procured in the circuit court of the United States a decree for the foreclosure of the mortgage and the sale of the property, the simple contract creditors of the corporation may maintain a bill in a state court to have the issue of the mortgage bonds and the decree for the foreclosure of the mortgage declared fraudulent and void as to them. Their right to maintain such a bill rests not merely on the ground that the subject-matter of the second suit is not the same as that of the first, but also on the ground that they are without adequate means of asserting their claims in the foreclosure suit, since they are unable to make themselves parties thereto without the consent of the complainant therein, and do not occupy that relation to the matter or the parties in the suit, which would enable them to file a bill of review of the decree, and show error apparent on the record.

**WAIVER OF IRREGULAR PROCEEDINGS.** — All objections that might have been made to the irregularity of filing a bill in the wrong county are deemed to have been waived, if the case is removed by the consent of counsel to another county, and there submitted on demurrers to the bill without any reference having been made to the irregularity.

*Alex. T. London*, for the appellants.

*Pettus and Pettus*, for the respondents.

**COLEMAN, J.** Complainants, as simple contract creditors of the Brierfield Coal and Iron Company, file their bill on behalf of themselves and all other creditors who may come in as such and contribute to the prosecution of the suit. The case made by the bill, so far as is necessary to be stated, omitting names, is this: That on May 4, 1882, the Brierfield Coal and Iron Company was organized as a corporate body, with an authorized capital stock of seven hundred and fifty thousand dollars, divided into seven thousand five hundred shares of one hundred dollars each, of which amount three hundred and twenty-five thousand dollars was subscribed; that after organization, and before any business was done, the president, in pursuance of a resolution adopted by the stockholders, opened other books of subscription for the purpose of raising money to purchase the necessary property and machinery and outfit to open and operate coal and iron mines, and manufacture coke and iron, etc.; that the last subscription was made under the following agreement: "Now, therefore, the undersigned agree to pay to said company the amounts respectively set opposite our names, in such sums



and at such times as the directors of said company may require, and to receive from said company, for each nine hundred dollars paid in, the sum of one thousand dollars in a six per cent mortgage bond of said company, and nine hundred dollars in the capital stock of said company. Not more than . . . per centum of each subscription to be called for during one month." Four hundred and twenty thousand dollars of this last subscription was taken. No report of the last subscription was made, or in any manner made public; that on the 1st of September, 1882, the stockholders, who were the subscribers, authorized the issue of five hundred thousand dollars of first-mortgage bonds, to run thirty years, and to bear six per cent interest, payable semi-annually, and to secure their payment authorized the execution of a first mortgage on all its property and effects; that the bonds were issued, one thousand dollars in bonds for each nine hundred dollars paid in as aforesaid, and also, in addition to the bonds issued, to each subscriber for nine hundred dollars paid, nine hundred dollars of stock were issued, which purported on its face to be fully paid for; that the mortgage was executed and duly recorded, and is made exhibit A to the bill; that nothing was paid for the stock and bonds except certain amounts paid on account of the subscription; and that the bonds were issued to and are now held by parties having full notice and knowledge of the agreement on which the same were issued, and the larger part are held by the original subscribers; that during the years 1886 and 1887, the Brierfield Coal and Iron Company became indebted to orators for a large amount; that in July, 1887, the said company became financially embarrassed, and the trustee named in the deed of trust, in pursuance of a provision in the deed of trust, demanded and received "a further assurance" to secure the bonds which had been issued, and within a few days thereafter demanded and took possession of all the property of said company; and on the third day of August, 1887, the said trustee filed his bill in the circuit court of the United States for the middle district of the state of Alabama, and asked authority from the said circuit court to issue certificates, which should be a first lien upon the property of said corporation; that when the bill was filed by the trustee there was due and unpaid of the subscription for the stock a large amount, to wit, five hundred thousand dollars, and with the knowledge of these facts the trustee, with the knowledge

and consent of the directors and of said corporation, procured an order of the court for that purpose, and issued sixty-five thousand dollars in certificates, which were to be a first lien or charge upon the property; that on the 28th of July, 1887, the corporation was insolvent, and after the trustee took possession of the property it ceased to carry on the business for which it was organized; that the bonds were issued without consideration, and under the laws of Alabama were void; that under the bill filed in the said circuit court of the United States, with the consent of the corporation, the court has decreed a foreclosure of the mortgage and further assurance, and a sale of the property; that the debts of the corporation, not included in the mortgage, amount to one hundred and fifty thousand dollars, and that the issue of the bonds was a fraud on the creditors, and the "deed of further assurance" was fraudulent, and made with intent to hinder, delay, and defraud the creditors; and that the bill was filed and prosecuted in the federal court, and the certificates were issued for the purpose of hindering, delaying, and defrauding the creditors of said corporation. Other facts to show fraud are averred.

The bill states that complainants and the other creditors had no notice or knowledge or information of the terms upon which the bonds were issued, or the consideration of the same, or for the mortgage or further assurance, until after the bill was filed in the circuit court of the United States. The bill prays that the bonds be declared fraudulent and void, and that the mortgage and further assurance be decreed fraudulent and void, and the issue of certificates be declared fraudulent, and that the decree of foreclosure and sale be declared fraudulent and void against complainants, and for an account. Only the trustee and the corporation are made parties defendant in the present bill.

To the bill, as a whole, the respondents severally demurred, and each assigned several grounds of demurrer; but all raise, and were intended to raise in different ways, the question of the jurisdiction of the chancery court, the plaintiff's bill showing that the circuit court of the United States, under a bill filed by the trustee, had decreed a foreclosure and sale of the property, which was then unexecuted, and had authorized the issue of the certificates. No other question is raised by the demurrers, and none other will be considered.

The principle is universally acknowledged, that when two

courts have concurrent jurisdiction, that which first takes cognizance of the case, has the right to retain it, to the exclusion of the other; that if a trust estate is being administered by a court of competent jurisdiction, or where property is in *gremio legis*, of a court of rightful jurisdiction, no other court can interfere, and wrest from it the possession and jurisdiction first obtained. As was said in *Peck v. Jenness*, 7 How. 624, 625, "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, has once attached, that right can not be arrested or taken away by proceedings in any other court. These rules have their foundation, not merely in comity, but in necessity. For, if one court may enjoin, the other may retort by injunction; and thus the parties be without remedy, being liable for a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

The rule here declared has been adopted and followed invariably by all subsequent decisions. Many of them, however, have given it a very broad and extensive significance, while others have limited its meaning, and consequently the application of the principle has not in all respects been uniform.

In the case of *Vaughan v. Northup*, 15 Pet. 1, it was held, that an administrator appointed in one state must account for the assets received by him according to the law of his appointment, and could not be sued in the court of another state for the assets received and held by him in his official capacity. *Williams v. Benedict*, 8 How. 107, was a case where an estate had been declared insolvent, and the assets were being administered in the state courts for the benefit of all the creditors. It was held, that the property was in *gremio legis*, and not subject to levy by the United States marshal at the suit of a creditor suing in the federal courts.

In the case of *Peale v. Phipps*, 14 How. 372, commissioners had been appointed to settle up and distribute the assets of an insolvent bank, and it was held that no other court had jurisdiction to interfere at the suit of creditors, and apply the assets to the payment of their claims; that it was the duty of

all creditors to apply to the state court which had taken jurisdiction of the settlement and distribution of the assets. The principles declared in this decision are reaffirmed in *Barton v. Barbour*, 104 U. S. 126.

In the case of *Taylor v. Carryl*, 20 How. 583, a writ of attachment issued by a state court had been levied upon a vessel, and the vessel replevied. Suit was afterwards begun in a court of admiralty to enforce seamen's wages, and the writ placed in the hands of a marshal. It was held that the state court having possession first, the possession could not be interfered with by the admiralty court, citing *Hagan v. Lucas*, 10 Pet. 400. In this case there was a dissenting opinion by Taney, C. J., who recognized the general principle, but held that because of the equities of the claimants (the lien of seamen's wages), of which alone the admiralty court had jurisdiction, the jurisdiction of the admiralty court did not violate the rule. The rule declared by Taney, C. J., seems to be the law in this state, in which it has been declared that although the probate and chancery courts may have concurrent jurisdiction, yet if there are peculiar equities of which the probate court cannot take jurisdiction, then the chancery court may proceed, without a violation of the rule: *Gould v. Hayes*, 19 Ala. 448; *Wilkinson v. Stuart*, 74 Ala. 198.

The case of *Freeman v. Howe*, 24 How. 450, after re-affirming the principle in *Peck v. Jenness*, 7 How. 624, 625, declared that property in the hands of the United States marshal, seized by him upon a writ from the circuit court of the United States, could not be replevied or interfered with by a writ from a state court, and further held that the principle did not depend upon the rights of the parties involved, and that it applied to persons who were not parties to the original or first suit. In *Riggs v. Johnson Co.*, 6 Wall. 166, it was declared that the rendition of a judgment did not exhaust the jurisdiction, but that it continued until the judgment was satisfied; that process subsequent to the judgment was as necessary as process antecedent; that process of the state courts could not interfere with the jurisdiction of the federal courts, neither the federal courts with the state court; that where there was concurrent jurisdiction, the one which first had jurisdiction of the matter continued to exercise it without interference.

In the case of *Barton v. Barbour*, 104 U. S. 126, Woods, J., declared that the rule was not limited to cases where the purpose was to interfere with the possession of the receiver, but



extends to suits in *assumpsit*, or other cases where the effect of the suit or judgment against the receiver would be to diminish the assets in his hands. Miller, J., in a dissenting opinion, uses the following language: "I know of no principle or precedent whereby a court of law, having before it a plaintiff with a cause of action of which it has jurisdiction, and a defendant charged with an act also within its jurisdiction, is bound, or even is at liberty, to deny the plaintiff his lawful right to a trial because the defendant is a receiver, appointed by some other court, and to leave the suitor to that for remedy"; and quoting approvingly from *Kinney v. Crocker*, 18 Wis. 74, continues: "There can be no room to question this conclusion [the right to sue a receiver without leave of the court], in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds under the order of a court of chancery, but only an attempt made to obtain a judgment at law in a claim for damages."

In *Wiswall v. Sampson*, 14 How. 52, 66, it was held that property in the hands of a receiver for one court could not be sold so as to pass title to the purchaser, under executions issued from another court. If such a sale was pronounced valid, it would have the effect to wrest from another court its rightful possession of the property.

In *Buck v. Colbath*, 3 Wall. 334, — opinion by Miller, J., — it was held that whenever property has been seized by an officer of a court, the property is in possession of the court, and no other court can take possession of it. This general principle has its limitations. It is only while the property is in the possession of the court, actually or constructively. When the litigation is ended or the possession discharged, other courts can then deal with it. No contest can then arise about the possession. Officers of the court seizing property described in the mandate, such as writs of replevin at common law, orders of sequestration in chancery, or process *in rem*, will be protected; but when the writ issued is to be levied generally, without particular instructions or description of the property to be taken in possession or levied upon, and the officer exercises a discretion in the execution of the writ, he may be sued in trespass for an abuse of the discretion, or a wrongful use of the writ, but no suit can be maintained to take from him the possession of the property.

The chancery court of Louisville, Kentucky, by a decree directed its marshal to deliver the church (the matter of contro-

versy) to Watson and others. While this suit was pending, and the church was in the possession of the marshal of the chancery court, Jones and others filed a bill in the United States court to get possession of the church, and to enjoin the marshal from delivering the church to Watson, and to enjoin Watson from taking possession of the church. In *Watson v. Jones*, 13 Wall. 713, Miller, J., said: "The decisions of this court in the cases of *Taylor v. Carryl*, 20 How. 583; *Freeman v. Howe*, 24 How. 450; and *Buck v. Colbath*, 3 Wall. 334, are conclusive that the marshal of the chancery court cannot be displaced as to the actual possession of the property, because that might lead to a personal conflict between the officers of the courts for the possession; and the cases of *Diggs v. Wolcott*, 4 Cranch. 179, and *Peck v. Jenness*, 7 How. 624, 625, are conclusive against any injunction from the federal court forbidding Watson et al. from taking possession of the church which the decree of the chancery court required the marshal to deliver to them." But the court held, under the prayer for general relief, the court was authorized to grant any relief to the plaintiff, authorized by the pleadings and proof, "which did not enjoin the defendants Watson and others from taking possession of the church, or which did not disturb the possession of the marshal of the Louisville chancery court." We do not cite this case as indorsing altogether the conclusion reached by the court in the relief granted, but as an authority recognizing and declaring the limitations placed upon the general rule laid down in *Peck v. Jenness*, 7 How. 624, 625, and which has been followed in so many decisions.

The case of *Krippendorf v. Hyde*, 110 U. S. 276, arose in this way: Hyde and Brother brought suit in the United States circuit court against Frey et al., and sued out an attachment, which was levied upon a large stock of goods in the possession of Krippendorf, who claimed them as his own. Krippendorf executed a forthcoming bond to the marshal. After judgment against Frey, the goods having been disposed of, Krippendorf paid their value to the marshal. He then filed his bill on the equity side of the same court in which the attachment suit was brought, made the marshal and attaching creditors defendants, set up his claim to the money in the hands of the marshal, and prayed that the marshal be enjoined from paying it over to the creditors. The court held that Krippendorf might have maintained trespass against the marshal, but that he could not replevy the property in a state

court, as it must be regarded as in the custody of the United States circuit court. It was held that the bill was maintainable, not as an original bill in equity, but as ancillary to the principal action at law, in which the attachment issued, and should be regarded as merely a petition in that cause, . . . and on account of the peculiar relations of the courts of the state and the United States, it was permissible as a necessary result to prevent a failure of justice, and to furnish in such cases a certain, adequate, and complete remedy, against injurious abuses of the process of the court, by supplying a means in the principal suit of trying the title to property in the custody of the law.

The case of *Covell v. Heyman*, 111 U. S. 176, re-affirms the doctrine declared in *Krippendorf v. Hyde*, 110 U. S. 276, and holds that it is an error for a state court to permit the recovery of the possession of property by its rightful owner against a marshal of the United States, held by him by the levy of an attachment or execution issued from a federal court; that the property is in the custody of the law, and its possession cannot be disturbed by the process of any state court. This case further holds, that the owner could maintain suit in trespass against the marshal, or by petition in the court from which the writ issued to the marshal, the owner could be fully protected, either in his rights of ownership to the property or the money in the hands of the marshal; citing a number of authorities, which have been referred to and quoted from in this decision.

In the case of *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294, Heidritter brought suit in *assumpsit* in the state of New Jersey, and in the same suit averred facts to fix and establish a mechanic's lien upon a building of the defendant. At the time the suit was commenced to fix and enforce a mechanic's lien, the premises in controversy were in the actual possession of a United States marshal, having been seized by the collector of internal revenue, and were being held, pending the prosecution of a suit to have the premises condemned and declared forfeited for having been unlawfully used as a distillery. The building was sold under a judgment of the state court, and plaintiff, Heidritter, became the purchaser. The defendant held under the marshal's deed, the premises having been sold by him on execution from the federal court. The court held that the proceedings in the state court to enforce the mechanic's lien took place when the property was in the ex-

clusive custody and control of the district court. The substantial violation of the jurisdiction of the district court consisted in the control over the property in its possession assumed and asserted in commencing the proceedings to enforce against it the lien claimed by the plaintiffs, prosecuting the claims to judgment, and consummating them by a sale; citing *Wiswall v. Sampson*, 14 How. 52, and others. The opinion proceeds, however, as follows: "But it is to be understood as a qualification of what has been said, that we do not mean to decide that the plaintiff in the actions in the state court might not, without prejudice to the jurisdiction of the district court, commence their actions, so far as that was a step necessary by the mechanic's lien law of New Jersey, for the mere purpose of fixing and preserving their rights to a lien; provided always they did not prosecute their actions to a sale and disposition of the property, which, by relation, would have the effect of avoiding the jurisdiction of the district court under its seizure. The distinction seems reasonable and just, and is supported by decisions"; citing *Clifton v. Foster*, 103 Mass. 233; 4 Am. Rep. 539; *Williams v. Benedict*, 8 How. 107; *Yonley v. Lavender*, 21 Wall. 276.

In the case of *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400, it was held that the possession of the receiver must not be disturbed, except by permission of the court, by persons having adverse though paramount claims, and a sale under execution of property in the custody of a receiver, though under a levy made prior to his appointment, is void, unless authorized by the court; that before the sale was made, leave to make the sale should be granted by the court which appointed the receiver; that the appointment did not destroy the lien, and application might also be made to the court for payment of the execution out of the proceeds of the sale made by the receiver.

In the case of *Drury v. Cross*, 7 Wall. 299, the directors fraudulently procured a mortgage to be foreclosed for a much larger sum than was due, of which, by a fraudulent combination with the purchaser, they were to be benefited. Upon a bill by the creditors, it was decreed that the purchaser should be held liable as a trustee for the creditors.

In the case of *Stout v. Lye*, 103 U. S. 66, the general principle of law under consideration was conceded. The real question before the court for decision, and which was decided, was, whether the state court or the federal court first had



jurisdiction; and it was held that by the filing of the petition, and the proceeding in the state court for the foreclosure of the mortgage, that court was the first to assume and exercise jurisdiction; and the court further held that the decree ascertaining and fixing the amount of the indebtedness of the mortgagor to the mortgagee was conclusive and binding upon other creditors of the mortgagor, so far as it fixed a liability of the mortgagor and its amount to the mortgagee. The principles of law raised by the demurrers of the respondents in the case under consideration were not involved in the case of *Stout v. Lye*, 103 U. S. 66.

The *Holladay case*, 27 Fed. Rep. 830, was a bill in equity in the federal court by Hickox against Holladay to set aside a fraudulent conveyance made by Ben Holladay to his brother Joseph Holladay. After disposing of other questions which arose in the case, the opinion proceeds as follows: "The answer of Holladay also contains an allegation in bar of this suit, to the effect that on November 7, 1883, and prior to the commencement thereof, the circuit court of the state for the county of Multnomah, in a suit then pending therein between Ben Holladay and Joseph Holladay, appointed a receiver of all the property mentioned in the bill herein, who is now in possession of the same as such receiver, which suit is still pending in said court. In support of this defense, counsel submit the proposition that while property is in the hands of a receiver appointed by a court, no other court can acquire or take jurisdiction of a suit concerning such property, and cites a number of authorities in support thereof; but the proposition is altogether too broad, and is unsupported by the authorities cited. The receiver has no right in the property, but only the possession thereof. So long as that is not disturbed or questioned, parties may litigate in the same court or elsewhere questions concerning the ultimate right and title to the property; and, therefore, notwithstanding the case of Holladay, and the possession of the receiver therein, this court may take jurisdiction of a suit to set aside or postpone an alleged fraudulent conveyance of any of this property by Ben Holladay which hinders or delays the plaintiff in the enforcement of his judgment against said Holladay. In *Buck v. Colbath*, 3 Wall. 334, this question is examined by Mr. Justice Miller, and the conclusion reached that the rule among courts of concurrent jurisdiction, that the one which first obtains jurisdiction of a case has the exclusive right to

decide every question arising therein, is subject to limitations. See also *Andrews v. Smith*, 19 Blatchf. 100; 5 Fed. Rep. 833.

"The object of the suit in the state court between the two Holladays is not stated in the answer; but in the nature of things, it cannot involve the matters in controversy here, and particularly the question of whether the plaintiff is entitled, as a creditor of Ben Holladay, to have these conveyances to Joseph Holladay set aside, or postponed in favor of the judgment against the former. If this court should find that these conveyances were made with intent to hinder and delay the plaintiff in the collection of his demand, under such circumstances as makes the grantee therein a participant in the fraud, it would be its duty to decree that they be set aside, or postponed in favor of the plaintiff's judgment. So far there would be no interference with the process of the state court, or the possession of the receiver. Whether this court will stop there, and remit the plaintiff to his execution out of the same state court on his judgment therein, or provide for the sale of so much of the property by a master as may be sufficient to satisfy the same, together with the cost incurred in this court, will depend on circumstances. The latter course cannot be pursued while the receiver is in charge, for that would necessarily interfere with his possession. But so long as the plaintiff's right to enforce the judgment, and for the amount found due him, depends on a decree of this court, it is proper, and very convenient, that any disposition of the property in question to satisfy the same should be made on its process. And provision may be made in the decree that the sale shall be delayed until the receiver is discharged, or that the plaintiff may apply on the footing of the decree, for an order of sale as soon as such discharge takes place."

In the case of the *Daniel Kaine*, 35 Fed. Rep. 786, Paine recovered a judgment in the state court of Pennsylvania against James Linn, a tenant in common of the steamboat *Daniel Kaine*, execution issued, and the sheriff made this return: "Levied upon all the right, title, and interest of the defendant in the steamboat *Daniel Kaine*, in the hands of the United States marshal, and gave notice to the United States marshal (Miller) of said levy, and made claim upon proceeds of boat." After stating these facts, the court proceeds: "Was it then beyond the reach of his execution creditors whose judgment was in the state court? It is, indeed, undeniable, that this court has obtained exclusive jurisdiction over the vessel for

all the purposes of the suit which had been here instituted: *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294; and it is not to be doubted that property once attached or levied on is in the custody of the law, and is not liable to be taken by another execution in the hands of a different officer, especially if that officer is acting under a different jurisdiction: *Hagan v. Lucas*, 10 Pet. 400; *Taylor v. Carryl*, 20 How. 583; *Freeman v. Howe*, 24 How. 450. It will be perceived, however, that the sheriff's levy here did not involve the disposition or control of the property. It was made in manifest subordination to, and in recognition of the right of the marshal to hold and dispose of the vessel. Nor was actual seizure necessary to give efficacy to the sheriff's levy, as it was made, not upon the *res* itself, but merely upon the defendant's interest: *Srodes v. Caven*, 3 Watts, 258; *Welsh v. Bell*, 32 Pa. St. 13; but the execution creditor here need not stand on the sheriff's levy. In Pennsylvania, a *fi. fa.* binds all the defendants' personal property in the bailiwick, whether there is a levy or not; and the lien attaches from the time the writ is put in the sheriff's hands: *Duncan v. McCumber*, 10 Watts. 212. The issuing of the execution from the court of common pleas was not an interference with the marshal, and in nowise tended to bring about a conflict of jurisdiction. What good reason, then, is there for denying to this execution creditor the benefit of a lien? In *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294, the court noticed and carefully distinguished between the proceedings in the state court for the purpose of declaring and establishing the mechanic's lien, and the subsequent proceedings involving the sale of the property, the latter only being adjudged void."

In the case of *Ball v. Tompkins*, 41 Fed. Rep. 486, after stating the general principle, that "this court cannot invade the possession of the subject-matter of controversy already taken by the state court having concurrent authority, and in the exercise thereof; for the rule is here as elsewhere, that the court which first acquired possession of the subject will retain it, and the power to dispose of it by its own adjudication, citing *Williams v. Benedict*, 8 How. 107; *Freeman v. Howe*, 24 How. 450; *Yonley v. Lavender*, 21 Wall. 276, proceeds as follows: "And this brings us to the pivotal question in the present inquiry: What is the nature and character of the possession of the state or federal court which excludes the exercise of authority over the subject or thing by the other? From

the authorities on this subject (which in the circuit courts are not altogether harmonious), and from the reasons for the rule, I apprehend it to be, substantially, that the possession contemplated as sufficient to make it exclusive is that which the court by its process, or some equivalent mode, has, either for the direct purpose of the proceeding, or for some other purpose ancillary to the main object, drawn into its dominion and custody some thing. That thing may be corporeal or incorporeal, a substance, or a mere right. These may be the subject-matter of jurisdiction in a pending cause, which often proceeds from the beginning to the judgment without the court's having taken actual dominion of any thing; but there is no exclusive jurisdiction over such a matter. The result may be a judgment which will establish a right, but the court has not had any possession. The pendency of a controversy in a suit in a state or federal court is no bar to a suit in the other court involving the same controversy: *Stanton v. Embrey*, 93 U. S. 548; and each will proceed in its own course to a judgment establishing the right. The control which each court has over its own processes has always been found adequate to prevent mischief from diverse judgments in the several jurisdictions; but, in proceeding on its way, whenever either court finds that the other has already taken actual dominion over some subject, it will let the thing alone, so long as that dominion is retained, and proceed, if there be enough material besides to support the exercise of its jurisdiction, and the pursuit may reach fruit. If not, it will stop.

There are many cases in the supreme court reports where this subject has been discussed, and these principles applied. Some of them have been already cited. Others are *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294; *Rio Grande R. R. Co. v. Gomila*, 132 U. S. 478.

Under the act of Congress of March 3, 1887, receivers appointed by the courts of the United States may now be sued without leave in any court having jurisdiction over the subject.

No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized, even by the court appointing the receiver, and is not open to revision by it, if the court rendering the decision had jurisdiction of the subject-matter and the parties. The manner in which it shall be paid, and the adjustment of the



equities between all persons having claims on the property and effects in the hands of a receiver, must be under the control of the court having custody through its receiver; but this does not affect the jurisdiction of other courts conclusively to establish by judgment the existence and extent of a claim: *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753.

It is a well established rule, that when there is a fund in court for distribution, creditors, or those entitled to share in the distribution, may come in by petition, and have their claims adjusted by the court administering the trust, and receive their distributive share. Such were the facts in the case in *Williams v. Benedict*, 8 How. 107, and *Peale v. Phipps*, 14 How. 372, and some others cited; but, when a bill is filed to foreclose a mortgage, the proper parties are the mortgagor and mortgagee. The fund primarily is applied to the mortgage debt, the balance to the mortgagor. A stranger to the mortgage, in the absence of a statute or rule of court, cannot have himself made a party, without the consent of the complainant: *Renfro v. Goetter*, 78 Ala. 313; *Flournoy v. Harper*, 81 Ala. 494; *Hambrick v. Russell*, 86 Ala. 199.

Neither do the complainants, in the case under consideration, have that relation to the matter or parties in the foreclosure suit, which would enable them to file a bill of review of the decree in that case, and show error apparent on the record; or by bill in the nature of a bill of review, and show that they were overreached and defrauded by its procurement. They were neither parties nor privies to that proceeding, and have no title or claim of ownership to the property conveyed by the mortgage: *Whiting v. Bank of United States*, 13 Pet. 16; *Humphreys v. Burleson*, 72 Ala. 4; *Dunklin v. Harrey*, 56 Ala. 181; *Newlin v. McAfee*, 64 Ala. 364; *Curry v. Peebles*, 83 Ala. 226; *Lee v. Lee*, 55 Ala. 602; *City of Opelika v. Daniel*, 59 Ala. 215.

Extracts at length have been quoted from leading cases, that the reasoning and conclusions of the different courts construing, limiting, and applying the general principle stated in *Peck v. Jenness*, 7 How. 624, 625, may be the better understood and appreciated. All the authorities recognize the importance of carefully preserving the boundary line between courts of concurrent jurisdiction, in order to prevent conflicts, and to preserve in harmony their relations to each other. Harmony between the state and federal courts is the life of our complex system of government, and should be guarded by a

"flaming sword which turns every way." To prevent abuse of the principle, and the successful perpetration of injustice or fraud, through forms of law, courts accord to suitors and litigants all necessary latitude; and they are not restricted to any one forum for the adjudication of any question or right, provided only that such adjudications are not upon questions pending in another concurrent court which had prior jurisdiction, and provided that its writs or process shall not hinder the performance of any lawful mandate of such concurrent court, or interfere with or disturb the possession of any subject-matter then in *gremio legis*.

Possibly plaintiffs might sue the Brierfield Coal and Iron Company in a court of law, and recover judgment, and have execution as in the case of the steamboat *Daniel Kaine*, in 35 Fed. Rep. 786, or file a bill on the judgment as in the *Holladay case*, 27 Fed. Rep. 830; or, when necessary to fix and establish a lien, they may proceed for this purpose as in the case of *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294, and in neither instance transgress the domain of the United States court. Any attempt to enforce the judgment or lien thus established, by interfering with the possession or subject-matter under the control of the concurrent court, would be nugatory.

In accordance with the principle declared by Miller, J., in the case of *Watson v. Jones*, 13 Wall. 679, the court should grant any relief authorized by the pleadings and proof, which did not conflict with the decree of the United States court, or disturb the possession of the property in the hands of the court, although the bill may ask for some relief which perhaps can not be granted.

It may be, that notwithstanding the complainants do not claim any ownership in the property conveyed by the mortgage, or may not have that relationship to the foreclosure suit which, under the decisions of this state, cited above, would authorize them to file a bill of review, or an original bill in the nature of a bill of review, to correct or set aside the decree rendered in the circuit court of the United States, for error apparent, or for fraud in its procurement, under the liberal system declared in the case of *Krippendorf v. Hyde*, 110 U. S. 276, to prevent abuse and injustice, plaintiffs might get relief by filing a petition as ancillary to the foreclosure suit. We express no opinion as to that question. We do hold, however, that if the trustee in the deed of trust, and the de-

fendant corporation, the Brierfield Coal and Iron Company, and the stockholders and directors, with the knowledge and assistance of the stockholders, fraudulently combined and colluded together to hinder, delay, and defraud the creditors of the defendant corporation, and to carry out this fraudulent purpose procured the certificates mentioned in the pleadings to be fraudulently issued, and fraudulently procured the execution of the deed of further assurance; and that the bonds secured by the trust were without consideration, and issued in violation of law, of which the holders had notice, and a decree of foreclosure of the deed of trust was procured in the United States court for the same fraudulent purpose and intent, which facts seem to be substantially averred in the bill, and which, on demurrer, must be regarded as true, the complainants, as creditors, are entitled to relief in some court. We further hold that the jurisdiction of the chancery court of the state of Alabama of all these matters is full and complete, and unless these questions are pending in some other court of concurrent jurisdiction, in such way and manner as may be pleaded in bar to this suit, the complainants, upon proof of the averments of the bill, are entitled to every relief in this court: *Watson v. Jones*, 13 Wall. 679.

In granting relief, if the pleadings and proof justify it, the chancery court will be controlled by the limitations and principles herein declared, so as not to conflict with the jurisdiction of the federal court.

We do not wish to be understood as intimating that the bill is in all respects without defect as to parties, or that a proper decree could be rendered upon the pleadings in their present shape, or that any decree would affect the rights of bondholders, or holders of the certificates, who have not been made parties to the cause. We simply adjudge the grounds of demurrer assigned, being against the bill as a whole, are not well taken, and should have been overruled.

Reversed and remanded.

CLOPTON and WALKER, JJ., not sitting.

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STONE, C. J., filed a concurring opinion in which, after recapitulating the facts set forth in the opinion of Justice Coleman, and pointing out that, under the circumstances, the bonds of the corporation were to be regarded as having been issued to the holders without any consideration, and alluding to the suspicious fact that the husband of one of the holders was named as trustee in the mortgage given for the security of the bonds, proceeded to discuss the doctrine as to the limits within which a court can entertain ju-

jurisdiction of suits relating to matters of which a court of concurrent jurisdiction has already taken cognizance. "Each of the governments, federal and state, has a judiciary, a necessary arm for the enforcement of delegated power and preservation of good order; and in the administration of justice controversies may and do arise in the adjustment of which the courts of the two governments have concurrent jurisdiction. . . . Properly administered, each tribunal can exercise all its rightful jurisdiction, and grant all rightful relief to the suitors before it, without abridging the equal rights of other equally meritorious suitors before other tribunals having equal power. The difficulty lies in determining when or from what arbiter the mandate can be authoritatively uttered, 'thus far shalt thou go.' That two material bodies cannot occupy the same space, is an established law of physics. If this impossible feat be attempted, collision must be the result. So when one court has acquired and is in jurisdiction over a subject-matter *inter partes*, no other court of simply concurrent power can take jurisdiction of that same subject-matter between the same parties; and the rule is much more inflexible when, under some color or process of its own, the court first acquiring jurisdiction has obtained possession of the *res* which is the subject of the suit. When this is the case, the thing is in the custody of the court, and until disposed of by final judgment or decree, that possession cannot be interfered with by any court of concurrent jurisdiction, whether its powers be invoked by a party to the first suit or by a stranger to the litigation." He then expressed his full concurrence with the statements of Justice Coleman as to the extent of the rule, and proceeded thus: "The reason of the rule exists in the prevention of collisions between courts of concurrent jurisdiction. Neither the reason nor the rule finds any field of operation, when the proceedings in one jurisdiction do not in any manner interfere with those in the other. . . . Under the suit by the trustee in the United States court, all the property of the Brierfield Coal and Iron Company was placed in the hands of a trustee or receiver, to be administered for the purposes specified in the mortgage, and the further assurance. Until that court finishes the litigation there pending, and relinquishes the possession of the property, no other court can disturb that possession, or interfere with the untrammelled adjudication of the issues raised in that suit; and the decision or decree rendered, or to be rendered in that suit, will bind all the parties to it and their privies, unless it is reversed by a court having authority to revise its judgment: *Stout v. Lye*, 103 U. S. 66. In other words, while the proceedings of the court are *in fieri*, and the corporation's effects are in the hands of that court's trustee or receiver, no other court of concurrent jurisdiction, and no suitor in such court, can disturb or interfere with such possession, or with that court's untrammelled adjudication of the questions before it. The rule has no greater extent than this: 2 Leading Cases in Equity, part 2, 1402."

The fact was then emphasized that as Gay, Hardie & Co. had not been made defendants in the suit by the trustee, they could not be heard in defense of it. It was pointed out that the law furnished them with no coercive means of having themselves made defendants, and that even if they were notified to come and prove their claims, they would not be in a position to controvert the legality of the bonds and mortgage. The charges of fraud were then summarized, and it was shown that in the trustee's suit "no adversary interest was presented," and that "in the nature of things none could be regularly presented." A judgment thus obtained was collusive, and could have no binding effect on creditors who are not and have no



legitimate means of making themselves parties. "Only parties and their privies in estate or blood are estopped from disputing the ascertained facts on which judgments of courts are founded. As to creditors who are strangers to the record, if fraudulent, they are of no avail. When they are made a fraudulent contrivance or aid in hindering, delaying, or obstructing creditors in the enforcement of their just demands, they acquire no additional force by the circumstance that in form they are the solemn judgments of a court. Nothing is simpler or easier of accomplishment than to reduce an unfounded or fraudulent claim to judgment when the ostensible antagonists concur in the desire to do so, and the court or presiding judge, being ignorant of the secret intent, and acting only on the case shown in the pleadings, is without knowledge of the purpose intended. He is thus sometimes made the innocent instrument of a most atrocious fraud. Chancery sweeps away such contrivances 'as chaff before the wind.'"

The conclusion deduced from the foregoing considerations is thus stated: "It is certainly true that no court will or can restrain or intermeddle with another court of co-ordinate jurisdiction. It does, however, often interfere with parties who are conducting litigation before another tribunal. It would seem there can be no objection to taking testimony to establish the justness of complainant's claim, and if true as charged, the fraud of the corporation through its officers in placing or attempting to place its effects beyond the reach of its *bona fide* creditors. Nor does it appear that steps cannot be taken to subject the unpaid subscriptions of stock in the corporation to the demand of complainants. It is not shown that the circuit court of the United States has taken any jurisdiction of this subject, or been asked to do so."

An application for a rehearing was made, and Justice Stone delivered a short opinion, in which, while admitting that the appellees had fully demonstrated that, so long as the circuit court of the United States had control and possession of the property and effects of the Brierfield Coal and Iron Company, no other court could interfere with that possession, he again expressed his conviction that any decree which that court might deliver would be determinative merely of the rights involved, as between the parties to the suit, but that its effect extended no further. It could not determine property rights against other claimants who were not parties to the litigation, and the fact that the court which was to deliver the decree was a federal court was immaterial. Another argument in support of the main ground on which the equity of the bill in the present case rested was, that the arrangements by which the stockholders were allowed to receive the bonds without consideration were in direct violation of the principle that the capital stock of a corporation is a trust fund for its creditors. This corporation, "instead of holding the capital stock as a trust fund primarily for the benefit of the creditors and secondarily for the stockholders, reversed this rational order of things, transformed the stockholders into creditors, and made them a preferred class, with a prior, paramount mortgage lien over all other creditors who may have trusted or may trust the corporation." Such facts, if truly represented in the complainants' bill, rendered further comment unnecessary. In an earlier portion of his opinion he disposed of an objection as to the venue of the action, which is sufficiently explained in the last of our *syllabi* to this case.

**JURISDICTION — CONFLICT OF.** — Where two courts possess equal and concurrent jurisdiction of a matter, that court in which jurisdiction first attaches will retain the case for final disposition: *Merrill v. Lake*, 16 Ohio, 373;

47 Am. Dec. 377; *Chapin v. James*, 11 R. I. 86; 23 Am. Rep. 412; *Keating v. Spink*, 3 Ohio St. 105; 62 Am. Dec. 214; *Dutil v. Pacheco*, 21 Cal. 438; 82 Am. Dec. 749. This rule was applied in regard to federal and state courts in *Hines v. Rawson*, 40 Ga. 356; 2 Am. Rep. 581; *Sharon v. Sharon*, 84 Cal. 424. When once the state courts have acquired jurisdiction of a question, the federal judiciary has no control over it until the state has finally exhausted its judicial power by a final decision in its highest tribunal: *State v. Bachelder*, 5 Minn. 223; 80 Am. Dec. 410. On the other hand, a state court has no jurisdiction of an action to foreclose a mortgage where the premises were, at the commencement of the action, in the hands of a receiver appointed by a federal court having jurisdiction to make such appointment: *Milwaukee etc. R. R. Co. v. Milwaukee etc. R. R. Co.*, 20 Wis. 165; 88 Am. Dec. 735. So also where a circuit court of the United States has canceled a forged instrument, and enjoined the claiming of property rights thereunder, it is the duty of the state court to respect that injunction, and to prevent the enforcement of any property rights which are essentially based upon the forged and canceled instrument: *Sharon v. Sharon*, 84 Cal. 424.

RECEIVERS, SUITS AGAINST. — Whether leave to sue a receiver is necessary is discussed in the note to *Naglee v. Alexandria etc. R'y Co.*, 5 Am. St. Rep. 316. *Spalding v. Commonwealth*, 88 Ky. 135, and *Brown v. Rauch*, 1 Wash. 497, are recent authorities for the doctrine that such leave is necessary. That the possession of a receiver cannot be disturbed by persons having adverse though paramount liens, unless permission is given by the court appointing him, see *Walling v. Miller*, 108 N. Y. 173; 2 Am. St. Rep. 400.

## FARLEY v. FARLEY.

[94 ALABAMA, 501.]

**MARRIAGE AND DIVORCE — PLEADING MARRIAGE.** — In a bill for divorce, an averment by the complainant that on a certain day "she was lawfully and legally married to the defendant," is sufficient, though subsequent allegations in the bill show that the wife was induced to go through the ceremony of marriage by the fraudulent representations of the defendant that the person who performed the ceremony was an authorized minister.

**MARRIAGE AND DIVORCE — MARRIAGE PER VERBA DE FUTURO FOLLOWED BY COHABITATION.** — Marriage is not constituted by cohabitation without the solemnization of the marriage ceremony, where it is the understanding of the parties cohabiting that they are not to become husband and wife until a formal ceremony takes place.

**MARRIAGE AND DIVORCE.** — A MARRIAGE WITHOUT A LICENSE AND BY AN UNAUTHORIZED PERSON is valid, if the parties consent thereto and afterwards cohabit together.

**MARRIAGE AND DIVORCE — VALIDITY OF A MARRIAGE PROCURED BY FRAUD.**

Where there is an executory agreement to marry, and one of the parties is induced, by fraudulent representations, to go through a marriage ceremony before a person not authorized to perform it, and the ceremony is followed by cohabitation, the marriage is valid for all civil purposes, unless and until avoided by the deceived party. If the defendant in a divorce suit is the party who was guilty of the fraud, he cannot take

advantage of his own wrong and assert that the consent was not mutual, for the purpose of avoiding the marriage.

**MARRIAGE AND DIVORCE — PLEADING.** — An averment as to the charge of adultery which states "that said defendant has been guilty of adultery with divers parties and persons, whose names are unknown to the oratrix," is sufficiently certain.

*Watts and Son*, for the appellant.

*Charles Wilkinson*, for the respondent.

Per CURIAM. Appellee seeks by the bill the dissolution of the bonds of matrimony, on the ground that defendant has abandoned her, and has committed adultery with divers other women. The appeal, being taken from a decree overruling a motion to dismiss the bill for want of equity, and a demurrer thereto, involves only the sufficiency of its allegations. The bill alleges that the parties were of the age of consent. The averment as to the marriage is, "that heretofore, to wit, on the sixth day of May, 1890, your oratrix, Daisy Farley, whose maiden name was Daisy Flexnor, was lawfully and legally married unto Hoxie C. Farley, the defendant to this your oratrix's bill of complaint." This is a sufficient averment of the marriage: 2 Bishop's Marriage and Divorce, sec. 332. Defendant insists, however, that this general averment is limited and modified by subsequent allegations of fact, which show there was never a legal marriage between complainant and defendant. The allegations referred to are, that defendant, having taken advantage of the innocence and inexperience of complainant, did not in fact have the marriage ceremony performed by an authorized minister, but substituted therefor a person unknown to her, who, she subsequently discovered, was not a minister; that defendant and such person represented to complainant that he was a regularly ordained minister of the Gospel, well known in the city of Montgomery; also, that they had procured from the judge of probate of Montgomery County a license for the marriage of complainant and defendant, and that by these representations, which were untrue, they imposed upon her credulity, and she married defendant for her great love towards him. The bill also avers that complainant and defendant associated together and cohabited as husband and wife.

Whether, under our statutes, a legal marriage can be had without license, and without solemnization, was left an open and unsettled question in *Robertson v. State*, 42 Ala. 510; but in the subsequent case of *Beggs v. State*, 55 Ala. 108, it was

held that a marriage without license from the judge of probate, and without solemnization by any person authorized by statute to solemnize it—merely by the consent of the parties—followed by cohabitation, is valid. The statutes having been since re-enacted, without material change in phraseology, and as marriages may have been contracted on the faith of the decision, and the legitimacy of children depend on maintaining the rule therein declared, whatever may be our individual opinion as to the legality of such marriages under our statutes, we do not feel at liberty to depart from the doctrine in *Beggs v. State*, 55 Ala. 108; if deemed impolitic and unwise, the legislature must furnish the remedy.

It may be reasonably inferred from the averments of the bill, being taken as true, that complainant, at least, did not mean and intend to enter into the relation of husband and wife, unless there was a formal solemnization of the marriage. As a general proposition, when the nuptials are delayed with an understanding of the parties that they are not to become husband and wife until a formal ceremony takes place, marriage is not constituted by copulation without such solemnization; for, in such case, consent to become husband and wife presently, indispensable to a valid marriage, does not exist: *Peck v. Peck*, 12 R. I. 485; 34 Am. Rep. 702; 1 Bishop's Marriage and Divorce, sec. 262. This, however, is not the question here presented. Complainant consented, in fact became the wife of defendant, though beguiled into the assumption at that time of the *status* of marriage, by misrepresentations of the legality and binding effect of the formal ceremony. The precise question is, when there is an executory agreement to marry, with the understanding that the parties were not to become husband and wife without formal solemnization, what is the effect of an intervening ceremony, without license, performed by a person unauthorized, imposed on complainant by false pretenses and representations, but believed by her to be lawful and *bona fide*? A marriage procured by deception and fraud, except, it may be, of certain kinds and magnitude, is not absolutely void, but only voidable, and valid for all civil purposes unless and until avoided by the deceived party. The party imposed upon may disaffirm or ratify the contract of marriage after discovery of the fraud; and, it has been held, that voluntary cohabitation thereafter as husband and wife is a ratification. As under the rule declared in *Beggs v. State*, 55 Ala. 108, a valid mar-



riage may be constituted without license and solemnization, merely by the consent of the parties, certainly complainant may ratify her consent to an immediate marriage, procured by false representations, and thus, by relation, render the marriage good *ab initio*. The contract, however, can be avoided only by the party defrauded. Says Mr. Bishop: "The doctrine seems to require no qualification, that a voidable marriage is, until the act or sentence transpires which renders it void, as good for every purpose as if it contained no infirmity." 1 Bishop's Marriage and Divorce, sec. 116. If, in answer to the usual questions, though propounded by a person not authorized to solemnize the marriage, both parties consented to a union, defendant is estopped from asserting that the consent was not mutual, or that he did not consent; he will not be permitted to take advantage of his own wrong and fraud to escape the duties and responsibilities of the marital relation. "The party who commits a fraud is bound, and remains bound until the party deceived has made his or her election, and will thereafter be bound, or not, according to the election made": *Tomppert v. Tomppert*, 13 Bush, 326; 26 Am. Rep. 197; *Hampstead v. Plaistow*, 49 N. H. 84; *State v. Murphy*, 6 Ala. 765; 41 Am. Dec. 79. The allegations of the bill, fairly construed, show that complainant elected to treat and recognize the marriage as valid. The averment as to the charge of adultery is, "that said defendant has been guilty of adultery with divers parties and persons, whose names are unknown to your oratrix." The charge is averred with a sufficient degree of certainty: *Holston v. Holston*, 23 Ala. 777.

Affirmed.

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MARRIAGE PER VERBA DE FUTURO FOLLOWED BY COHABITATION is not valid in such sense as to render issue legitimate: *Cheney v. Arnold*, 15 N. Y. 345; 69 Am. Dec. 609, and extended note thereto; *Peck v. Peck*, 12 R. I. 485; 34 Am. Rep. 702; *Curtwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105; *Estate of Grimm*, 131 Pa. St. 199; 17 Am. St. Rep. 796.

MARRIAGE AND DIVORCE. — A MARRIAGE PER VERBA DE PRÆSENTI, followed by cohabitation, is a valid marriage, though not solemnized according to the laws of the place where the contract is made: *Fenton v. Reed*, 4 Johns. 52; 4 Am. Dec. 244; *Newbury v. Brunswick*, 2 Vt. 151; 19 Am. Dec. 703; *Dyer v. Brannock*, 66 Mo. 391; 27 Am. Rep. 359; *Richard v. Brehm*, 73 Pa. St. 140; 13 Am. Rep. 733; *Voorhees v. Voorhees*, 46 N. J. Eq. 411; 19 Am. St. Rep. 404. The sole condition prescribed by the law to give civil effects to a putative marriage is good faith on the part of one or both the parties. Such good faith means a belief, both honest and reasonable, that the marriage is valid and in violation of no legal prohibition: *Smith v. Smith*,

43 La. Ann. 1140. In *Peck v. Peck*, 155 Mass. 479, it was held that where a man and a woman, whose domicile was in California, agreed in Oregon that they were to live together "so long as mutual affection should exist," and thenceforward cohabited and held themselves out to be husband and wife, such an agreement was not a marriage contract by the law of either of those states.

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## THOMPSON v. STATE.

[94 ALABAMA, 535.]

**LARCENY — ASPORTATION, WHAT IS.** — The offense of larceny is not complete if the accused fails to acquire such dominion over the property as to enable him to take actual custody or control. Therefore, where the evidence merely showed that the defendant struck the hand of the prosecuting witness, and either knocked or took out two dollars, which the witness was holding, but that it was dark at the time and the witness did not see the money either in the defendant's possession or on the ground, a conviction for larceny cannot be sustained.

*R. L. Harmon*, for the appellant.

*William L. Martin*, attorney-general, for the state.

**WALKER, J.** The witness for the state testified that he held out his open hand with two silver dollars therein, showing the money to the defendant; that the defendant struck witness's hand and the money was either knocked out of his hand or was taken by the defendant, he could not tell positively which. It was after twelve o'clock at night, and the witness did not see the money either in defendant's possession or on the ground. The court charged the jury: "If the jury find from the evidence that the defendant with a felonious intent grabbed for the money, but did not get it, but only knocked it from the owner's hand with a felonious intent, this would be a sufficient carrying away of the money, although defendant never got possession at any time of said money." This charge was erroneous. To constitute larceny, there must be a felonious taking and carrying away of personal property. There must be such a caption that the accused requires dominion over the property, followed by such an asportation or carrying away as to supercede the possession of the owner for an appreciable period of time. Though the owner's possession is disturbed, yet the offense is not complete if the accused fails to acquire such dominion over the property as to enable him to take actual custody or control: *Frazier v. State*, 85 Ala. 17; 7 Am. St. Rep. 21; *Croom v. State*, 71 Ala. 14; *Ed-*

*monds v. State*, 70 Ala. 8; 45 Am. Rep. 67; *Wolf v. State*, 41 Ala. 412. It is not enough that the money was knocked out of the owner's hand, if it fell to the ground and the defendant never got possession of it. The defendant was not guilty of larceny, if he did not get the money under his control. If the attempt merely caused the money to fall from the owner's hand to the ground, and the defendant ran off without getting it, the larceny was not consummated, as the dominion of the trespasser was not complete. Charge No. 1 was a proper statement of the law as applicable to the evidence above referred to, and it should have been given.

Reversed and remanded. —

**LARCENY. — ASPORTATION, WHAT IS:** See note to *State v. Homes*, 57 Am. Dec. 272, 273. There must be a severance of the property from the possession of the owner to some appreciable extent: *Frazier v. State*, 85 Ala. 17; 7 Am. St. Rep. 21. To remove wheat from the owner's garner in a mill into defendant's adjoining garner is a sufficient asportation to constitute larceny: *State v. George*, 89 N. C. 475; 45 Am. Rep. 698.

## FERRIS v. MONTGOMERY LAND AND IMPROVEMENT COMPANY.

[94 ALABAMA, 557.]

**PARTITION. — WHERE IMPROVEMENTS HAVE BEEN MADE BY A COTENANT,** partition should be so ordered that he may receive, as his share, the parcel upon which those improvements have been made, provided that by such a division full justice can be done to the claims of the other cotenants.

**PARTITION — RIGHTS OF ONE PURCHASING FROM A COTENANT AND MAKING IMPROVEMENTS. —** Where a cotenant, having received a conveyance of the interests of the other cotenants, sells a portion of the land to a *bona fide* purchaser, who erects valuable improvements thereon, and the heirs of one of the original cotenants subsequently obtain a judgment setting aside the conveyance of their ancestor's interest, such purchaser will be entitled in a suit for partition of the land brought by his vendor, to have the parcel which he has improved allotted to him, if the partition may be so made without prejudice to the other cotenants.

**PARTITION — PARTIES. —** In a suit for partition it is indispensable that all cotenants not uniting in the bill should be made parties defendant, and therefore since the United States cannot be made a party without its consent, a plea of one of the defendants which avers that the interest claimed by another defendant belongs to the United States, will, if sustained by the proof, render a final partition impossible, unless the United States consents to become a party to the cause.

*W. A. Gunter*, for the appellants.

*Tompkins and Troy*, for the respondents.

**WALKER, J.** Josiah Morris, being seised in fee of a tract of land containing seventy-nine acres in June, 1873, by a deed in which his wife joined, conveyed an undivided one-half interest therein to Eugene Beebe and Ferrie Henshaw, who were partners doing business under the firm name of Beebe and Henshaw. Henshaw died intestate in 1879. In January, 1887, Morris conveyed his remaining undivided half interest in the land to the Montgomery Land and Improvement Company. At the same time, Beebe, claiming and representing that as the surviving partner of Beebe and Henshaw he was fully authorized and empowered by the heirs of Henshaw to sell and convey the entire half interest of himself and the deceased Henshaw, executed to the same company a deed purporting to convey to it that undivided half interest in the land; and that company, relying upon Beebe's statements and declarations, received from him the conveyance, undertaking to convey the undivided half interest of Beebe and Henshaw, and paid him therefor. Immediately after the execution of the deeds to it, the Montgomery Land and Improvement Company entered upon and took possession of the entire tract of land. That company, in September, 1887, undertook to sell and convey to the Southern Cotton Oil Company a part of said tract. The part so attempted to be sold and conveyed was a lot containing about ten acres. The oil company took possession of this lot in good faith, believing that the land and improvement company had a good title thereto, and had conveyed the same to it, and erected permanent improvements thereon of the value of one hundred and fifty thousand dollars. Thereafter it was discovered that Beebe had no right to convey the interest of his deceased partner, Henshaw; and the heirs of Henshaw have recovered a judgment at law against the oil company for their undivided interest in the lot upon which the improvements had been erected. The original bill in this case was filed by the land and improvement company against the oil company and the heirs of Henshaw, for a partition of the whole tract above mentioned. The bill alleges that the tract can be equitably divided, so that the Henshaw heirs may have their respective interests allotted out of the unimproved portion of the tract which the complainant has not attempted



to convey; and the complainant offers to allow them to receive on the partition their respective portions out of the unimproved part.

The oil company, in its answer and cross-bill, admits the allegations of the original bill, and alleges that at the time of its purchase from the land and improvement company it had no notice or information that the Henshaw heirs, or any other than its vendor, had any interest in or title to the land; that it took the land described in its deed in good faith, believing that it acquired a good title to the entire interest therein; and that, acting under such belief, it erected the valuable improvements before it had any knowledge or information of the interest or claim of the Henshaw heirs. It accepts the offer of the original bill, that the interest of the Henshaw heirs be allotted to them out of the unimproved land remaining in the possession of the land and improvement company, and by cross-bill prays for a writ of injunction to restrain the issue and execution of writs of possession on the judgment at law in favor of the Henshaw heirs.

Demurrers and a plea were interposed for the Henshaw heirs to the original bill and to the cross-bill. The plea and some of the grounds of demurrer to the original bill and to the cross-bill were overruled. Other grounds of demurrer were sustained. The appellants are the Henshaw heirs who assign as errors the rulings adverse to them. There are also cross-assignments of errors by the complainant in the original bill and the complainant in the cross-bill, respectively.

When the land and improvement company took possession of the entire tract under the deeds from Morris and Beebe, though, in ignorance of the interests of the Henshaw heirs, it claimed the land as sole owner, yet, in reality, the extent of its right was that of a tenant in common with them. The interest which it had acquired gave it an equal right with them to occupy the premises. One tenant in common cannot be deprived of the right to use and enjoy the common property because his cotenants are willing to let the property lie idle, or fail or refuse to set up any claim to it; and while he is thus left in sole possession, he may manage the common property in any way he pleases, provided he does not injure his cotenants: *Newbold v. Smart*, 67 Ala. 326; *Gayle v. Johnston*, 80 Ala. 395. He may cultivate or improve the property, and the plain dictate of justice is that he is permitted to enjoy the fruits of his own labors, unless that result involves some in-

fringement upon the rights of his cotenants who stand off and forbear to make any use of the property. The tenant out of possession may at any time assert his right to share in the possession, or he may have the property partitioned by a division among the cotenants in severalty, each taking a distinct part according to the extent of his interest. He cannot complain of the mere possession of a cotenant so long as he refrains from setting up any claim to share in that possession; and if in the partition the part of the property which he receives is as much as he would have been entitled to if his cotenant had not been in possession at all, then, certainly, it cannot be said that his share in the property has been diminished by the fact that his cotenant has improved the part which is allotted to him in the division. This court has not been unmindful of the equitable claim of a tenant in common who has in good faith expended his labor and capital in the improvement of property of which he has had sole possession while his co-owners have abandoned or neglected it; but this equitable claim is not permitted to impair the right of the cotenant out of possession, or to hinder or burden him in the partition of the property. Improvements which have been made by the tenant in possession either cover so much of the common property that the parts which the cotenants out of possession are entitled to receive on a partition cannot be set off to them without including a portion of the improvements, or they cover no more than the part which may be allotted to the occupying tenant. In the former case, the tenant who has made the improvements must suffer a loss as to part of them, unless his cotenants are required to compensate or reimburse him therefor. In the latter case, the cotenants who have not been in possession may get their full share of the property without any of the improvements. In the one case, if the tenant who has had nothing to do with making the improvements is required to contribute to the payment therefor, to this extent his right to a partition is burdened and encumbered as the result of the fact that improvements have been made. In the other case, he may get his full share of the property, and he is not injured by the allotment to the occupying tenant of the part of the land which the latter has improved.

There have been cases in this court involving the claim of one tenant in common to compensation from his cotenants for improvements made by him on the common property;

and also cases in which the claim of the improving tenant was merely to have the part of the property which he had improved allotted to him, so that his cotenants who had contributed nothing in the improvements should receive their parts of the common property out of the unimproved portion thereof. In the former class of cases the claim to compensation for improvements made was not denied, but the amount of the compensation was not permitted to go beyond the amount of the rents charged against the improving tenant: *Horton v. Sledge*, 29 Ala. 498; *Ormond v. Martin*, 37 Ala. 598; *Turnipseed v. Fitzpatrick*, 75 Ala. 304. In the latter class of cases there has been a full recognition of the equitable rule that the court, if it is practicable, should so order the partition as to give the benefit of any improvements made on the premises to him who may have erected or made them; and this is done by assigning to such part owner the portion of the estate on which such improvements are situated: *Donnor v. Quartermas*, 90 Ala. 164; 24 Am. St. Rep. 778; *Wilkinson v. Stuart*, 74 Ala. 198; *Sanders v. Robertson*, 57 Ala. 465. In each of the classes of cases the equitable claim of the one who has made the improvements is recognized and is enforced so far as such enforcement does not involve an impairment of the rights of his cotenants. There is a conflict in the authorities upon the question of allowing a cotenant on partition to recover compensation for improvements made by him without the assent of his cotenants; but in cases where one cotenant has improved only a parcel of the premises which does not exceed his share of the whole tract, the generally, if not universally, recognized rule in courts of equity is to have allotted to him, in a partition, the parcel which has been enhanced in value by his expenditures and industry: *Freeman on Cotenancy and Partition*, 2d ed., secs. 509-511; *Robinson v. McDonald*, 11 Tex. 385; 62 Am. Dec. 480, and note; *Nelson v. Clay*, 7 J. J. Marsh. 138; 23 Am. Dec. 387; *St. Felix v. Rankin*, 3 Edw. Ch. 323. When the equitable claim of the improving tenant can be fully recognized and protected by awarding him the part which he has improved, the question of requiring the other cotenants to make compensation for the improvements is not involved. They get their full shares of the property without any charge or burden upon them because of the improvements.

The equity of a cotenant to have the part of the common property which he has improved allotted to him on a partition

is not founded upon the idea that he made the improvements with the consent, express or implied, of his cotenants. In *Donnor v. Quartermas*, 90 Ala. 164, 24 Am. St. Rep. 778, and in *Sanders v. Robertson*, 57 Ala. 465, the cotenants in whose favor respectively this equity was recognized had made the improvements while claiming to be sole owners of the common property and while in adverse possession thereof; and in *Wilkinson v. Stuart*, 74 Ala. 198, the rule is so stated by the court as to cover the case of a tenant who makes improvements upon the common estate without the authority of his cotenant. In *Horton v. Sledge*, 29 Ala. 498, it was declared that the improving tenant was not entitled to compensation for improvements to the extent of the rents charged against him unless he made the improvements at a time when he really and *bona fide* believed himself to be the true owner of the land, and unless he was induced to make those improvements by that belief really entertained. The authorities generally, both in cases where compensation for improvements is allowed, and in cases where the improved portion of the estate is allotted to the cotenant who has expended his labor and capital thereon, treat the fact that the improvements were made by one who supposed himself to be legally entitled to the whole premises as an equitable consideration in his favor: 1 Story's Equity Jurisprudence, sec. 655; Sedgwick and Wait on Trial of Title to Land, secs. 693, 694; note to *Pitt v. Moore*, 6 Am. St. Rep. 495; *Patrick v. Marshall*, 2 Bibb, 41; 4 Am. Dec. 670; and authorities cited *supra*. Where it is practicable, without injury to the other cotenants, to allot the improved portion to the one who made the improvements, the reason for making such allotment depend upon the existence of the fact that he believed himself to be the sole owner of the entire tract does not apply, as in cases where compensation for improvements is charged against the other cotenant; for the allowance of compensation, though it is not permitted to go beyond the amount of the shares of the rents to which the other cotenants would be entitled, is still a charge upon them to that extent; while if they get their shares in full out of the unimproved portion, and are not required to make compensation in any way, the fact that improvements have been made does not affect their rights in the partition. The recognition in this way of the equitable claim of the tenant who has made improvements in no way impairs the rights of his cotenants on a partition. A court of equity will not allow one man to deprive another of the fruits of his



labors and expenditures, if such an unconscionable result may be avoided consistently with the security to each of them of the full measure of all that he is entitled to claim. In such case we think that the true rule is expressed in the opinion in *Hall v. Piddock*, 21 N. J. Eq. 314, where it was said: "The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for embarrassing his cotenants or encumbering their estate or hindering partition." The cotenant, whether he supposes himself to be the sole owner, or knows that there are others who are owners in common with him, is entitled to occupy and use the property, though his cotenants fail or refuse to share with him in the enjoyment thereof; and if in the course of his use and occupation, he makes improvements on a part of the common property in good faith, and without any intention of embarrassing or obstructing a partition or gaining an advantage therein, there is no good reason why he should not be allowed to retain the part improved by him if his improvements in fact do not constitute a hindrance or obstacle in the way of the other cotenants getting their full shares on the division of the property. A court of equity will simply so order the partition as to secure the rights of all parties without visiting an unnecessary hardship upon any of them. In the present case, if the facts were just as they are disclosed by the original bill, except that the land and improvement company had made no conveyance of any of the land, but had erected the improvements on the parcel now held by the oil company, there could be no doubt of the propriety of allotting that parcel on a partition to the land and improvement company.

It is insisted, however, that the conveyance to the oil company can not be allowed to have the effect of conferring upon that company an equity to have allotted to it, on a partition of the whole property, the parcel which it holds under a conveyance from only one of several tenants in common. So far as the grantor's cotenants are concerned, the extent of the operation of his conveyance was to transfer to his grantee his undivided interest in the particular parcel therein described. Such a conveyance is ineffectual to prejudice or abridge the rights of the cotenants who do not join in it; for each tenant in common has an undivided interest in the whole tract and in every part of it, and the right of one of them in any part of the property cannot be impaired by the act of another.

The conveyance does not, so far as the cotenants who did not join in it are concerned, sever the special tract therein described from the general tract to which the tenancy in common extends. They still have the same interest in the part of the property described in the conveyance as they had before it was executed. They are still entitled to a partition, and may have their shares in the property set off to them in severalty, just as if no conveyance had been made. Their rights are not increased or diminished. The grantee is simply clothed with the rights of his grantor in the special tract described in the conveyance: *Ward v. Corbett*, 72 Ala. 438. The tenants in common who did not join in the conveyance do not acquire, in consequence thereof, any greater rights in the common property, or in any part of it, than they had before. They have no more right to demand that the particular tract described in the conveyance, or any part of it, be allotted to them on a partition, than they would have had if the conveyance had not been made.

We have seen that, if one tenant in common deals in good faith with a part of the common property as if he were the sole owner thereof, by erecting improvements on his own account, he will be allowed, on a partition, to retain the improved part, if that does not involve any prejudice to the rights of his co-owners. If the improvements are made, not by the original tenant in common, but by his grantee, we can perceive no good reason why the latter should not have the benefit of the same measure of protection which a court of equity would have afforded to his grantor if no conveyance had been made. There is abundant support in the best authorities for the rule, that in making the partition in such a case, if the part sold and conveyed by one tenant in common can be assigned to the purchaser as a part or the whole of the share of his grantor without prejudice to the grantor's cotenants in the original tract, it will be so assigned: *Young v. Edwards*, 33 S. C. 404; 26 Am. St. Rep. 689; *Gittings v. Worthington*, 67 Md. 146; *Boggess v. Meredith*, 16 W. Va. 28, 29; *Worthington v. Staunton*, 16 W. Va. 208; *Teal v. Woodworth*, 3 Paige, 472; *St. Felix v. Rankin*, 3 Edw. Ch. 323; *Camoron v. Thurmond*, 56 Tex. 22; 11 Am. & Eng. Ency. of Law, 1092, 1093; Freeman on Cotenancy and Partition, secs. 199-205. Under this rule, the grantee merely has the benefit of the equitable claim which would have been recognized in favor of his grantor if no conveyance had been made. The other

tenants in common are not allowed to disregard the conveyance so far as it could prejudice their rights, and, at the same time, give it such effect as to secure to them an equitable advantage which they would not have had if the grantor had made no transfer but had improved part of the property himself.

"There can be no doubt that the grantee of the specified parcel will become seised thereof in severalty if, upon partition, it should be assigned to him or to his grantor; and that if not so assigned, he will lose his entire interest. He is more deeply interested in the partition than are any of the tenants in common of the entire tract. It matters little to them where their respective properties may be located; but with the grantee of a special location, it is all important that such a division may be made as will allow his deed to become operative. He is entitled to the consideration of the court, and will, whenever his claims are known to the court, be protected as far as possible, without doing injustice to the cotenants of the whole tract. He has therefore been regarded as a proper party defendant, even in states where his conveyance has been spoken of as void against the cotenant of his grantor": Freeman on Cotenancy and Partition, 2d ed., sec. 465. Whether the partition is sought by the grantor who retains an undivided interest in the remaining portion of the original tract, or by his cotenants who did not join in his conveyance, it is proper to make the grantee of a specific portion a party defendant, so as to afford him an opportunity to assert his derivative equitable claim, to the end that the rights of the cotenants who are still entitled to a partition of the entire tract may, if practicable, and without prejudice to them, be satisfied by an allotment of their shares out of that part of the original tract which was not included in the conveyance. The equitable claim of the purchaser from one tenant in common, founded upon the fact that he has, in good faith, and without any purpose of embarrassing a partition, undertaken to acquire and has improved the parcel of land described in his deed, is not to be defeated by denying him the right to be a party to the proceeding in which the claims of other parties to the property in question may be so adjusted as to afford him protection. This can be done effectually only in a suit for a partition of the original tract. The grantee in a conveyance of a part of that tract from one of the tenants in common is a proper party to such a suit, because

of his interest in having the partition so directed as to protect him, so far as that may be done without prejudice to the rights of the other cotenants in common: *Gates v. Salmon*, 35 Cal. 588; 95 Am. Dec. 139; *Sutter v. San Francisco*, 36 Cal. 115; *Harlan v. Langham*, 69 Pa. St. 235; *Whitton v. Whitton*, 38 N. H. 127; 75 Am. Dec. 163; *Batterton v. Chiles*, 12 B. Mon. 348; 54 Am. Dec. 539. The claim of such grantee constitutes an equity which is involved in a partition of the original tract, and may be recognized and brought to the attention of the court in an original bill filed by others interested in the partition of the common property, or the grantee may propound it in a cross-bill.

The averments of the bill show that the land and improvement company acquired Beebe's undivided one-fourth interest in the entire tract. The plea of the Henshaw heirs alleges that that interest belongs to the United States. This is merely a denial of a part of the title claimed by the complainant in the original bill and the complainant in the cross-bill. "In suits for the partition of lands, if the defendant denies the title of the complainant, the chancellor need not dismiss the bill, or delay the suit until a trial can be instituted and had at law, but may direct the issue as to the title of the complainant to be tried as other issues of fact are triable": Code of Alabama, sec. 3588; *McMath v. DeBardelaben*, 75 Ala. 68; *McQueen v. Turner*, 91 Ala. 273. If the denial of the plea is sustained by the proof, there can be no partition unless the United States becomes a party to the suit, so as to be bound by the result thereof; for it is indispensable, in a suit for partition, that all cotenants not uniting in the bill be made parties defendant: Freeman on Cotenancy and Partition, 2d ed., sec. 463. The United States cannot be made a party defendant without its consent. If the denial of the plea is not supported by the proof, there will be no obstacle to the rendition of a final decree. If the proof sustains the averments of the plea, the complainant may desire to have the United States made a party to the cause. It will then be a question whether the bill should be summarily dismissed because of the inability of the complainant to bring a necessary party before the court, or should be retained and the equities of the parties now before the court protected until the absent party shall choose to submit itself to the jurisdiction of the court, or to assert its right to a partition in some other proceeding, in which the equities of all the parties in interest may be ad-



justed. As that question is not now presented, we will not undertake to decide it.

The demurrers to the original bill and to the cross-bill should have been overruled. The plea of the Henshaw heirs is sufficient, and should have been sustained. The ruling on the motion to require the cross-complainants to give an additional bond will not be disturbed. As each of the assignments of errors is sustained in part, the costs of appeal will be equally divided between the three parties.

Reversed and remanded.

CLOPTON, J., not sitting. —

**PARTITION. — NECESSARY PARTIES, ALL PERSONS INTERESTED ARE:** *Batterton v. Chiles*, 12 B. Mon. 348; 54 Am. Dec. 539; *Portis v. Hill*, 14 Tex. 69; 65 Am. Dec. 99; *De Uprey v. De Uprey*, 27 Cal. 329; 87 Am. Dec. 81; *Boone v. Knox*, 80 Tex. 642; 26 Am. St. Rep. 767; *Schissel v. Dickson*, 129 Ind. 139.

**PARTITION. — COTENANTS WHO HAVE MADE IMPROVEMENTS** are entitled to have the portions of the premises including the improvements set off to them if practicable: *Howey v. Goings*, 13 Ill. 95; 54 Am. Dec. 427; *Nelson v. Clay*, 77 J. J. Marsh. 138; 23 Am. Dec. 387; *Louvalle v. Menard*, 1 Gilm. 39; 41 Am. Dec. 161; *Robinson v. McDonald*, 11 Tex. 385; 62 Am. Dec. 480; *Martindale v. Alexander*, 26 Ind. 104; 89 Am. Dec. 458; *Buck v. Martin*, 21 S. C. 590; 53 Am. Rep. 702; *Appeal of Kelsey*, 113 Pa. St. 119; 57 Am. Rep. 444; *Tevis v. Collier*, 84 Tex. 638. Compare also the cases cited in the note to *Donnor v. Quartermas*, 24 Am. St. Rep. 783. Where individual tenants in common have sold the whole of particular parts of the tract by metes and bounds or other sufficient description, the specific tracts conveyed should be allotted in severalty to the grantees, and charged respectively, in proportion to their value, to the shares and interests of the granting cotenants, where it can be done without material injury to the rights of the cotenants not joining in the deeds: *Emeric v. Alvarado*, 90 Cal. 444.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**CALIFORNIA.**

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**GORMAN v. SOUTHERN PACIFIC COMPANY.**

[97 CALIFORNIA, 1.]

**PASSENGER, LIABILITY FOR WRONGFULLY EJECTING.** — THAT A CONDUCTOR WAS HONESTLY MISTAKEN in believing that a passenger had not paid his fare does not constitute any defense to an action by the latter to recover damages for his wrongful expulsion from the car.

**RAILWAY CORPORATIONS.** — MEASURE OF DAMAGES FOR WRONGFUL EXPULSION of a passenger in ordinary case, without needless violence or insult, and from which no bodily injury results, is the cost of a ticket from the point of expulsion to the passenger's destination, together with an allowance for such damages as actually result from loss of time.

**RAILROAD CORPORATIONS.** — IN ALLOWING DAMAGES FOR THE WRONGFUL EXPULSION OF A PASSENGER from a railway car, accompanied with undue violence, and by abuse and insult, the jury is entitled to consider the ignominy endured, his mental sufferings, and humiliation and wounded pride which one in his condition of life and standing in the community would experience.

**RAILWAY CORPORATIONS.** — AN ACTION OF TORT will lie to recover damages for the wrongful expulsion of a passenger from a railway car, and though the complaint alleges a contract for carriage, the action is not for breach of the contract, but for tort by breach of duty.

**RAILWAY CORPORATIONS.** — EXEMPLARY DAMAGES may be allowed by a jury in an action for the wrongful expulsion of a passenger from a railway car, if in such expulsion the defendant was guilty of oppression, fraud, or violence, actual or presumed.

**RAILWAY CORPORATIONS** — DAMAGES FOR EXPELLING PASSENGERS, WHEN NOT EXCESSIVE. — If the evidence tends to prove that after a passenger had surrendered his ticket, the conductor denied that fact, and demanded the payment of additional fare, and being refused, grabbed the passenger suddenly by the coat collar, shoved him out of the door, pulled him to the platform, and shoved him down the steps, a verdict awarding five hundred dollars damages cannot be regarded as excessive, nor as indicating that the jury acted under the influence of passion or prejudice.

*James C. Martin and A. A. Moore*, for the appellant.

*Eli R. Chase, John L. Chase, and Chase and Miller*, for the respondent.

BELCHER, C. The plaintiff brought this action to recover damages, resulting from his wrongful expulsion from a railroad train owned and operated by the defendant.

It is alleged in the complaint that on the twenty-first day of May, 1890, plaintiff was desirous of being conveyed from Antioch, in Contra Costa County, to Bethany, in San Joaquin County, upon defendant's railroad train, and that he paid to defendant's agent at Antioch the usual fare for that purpose, and received in return a ticket entitling him to such conveyance on the regular passenger train running between the two places named; that he got aboard the train, and soon after leaving Antioch the conductor thereof took up his ticket, and thereafter, and before reaching Bethany, to which place the ticket entitled him to ride upon the train, forcibly and with violence expelled and ejected him from the train, and refused him the privilege of riding thereon the balance of the distance to Bethany, about twenty miles; that he sustained damages in consequence of his forcible and violent ejection from the train, as aforesaid, in the sum of ten thousand dollars, for which he asked judgment.

The answer of the defendant denied that plaintiff had any ticket or was forcibly or violently ejected from the train; admitted that he boarded the train at the place charged, and alleged that he never exhibited or showed a ticket, but, to the contrary, paid his fare to the next station from Antioch, and thereafter, before reaching Bethany, upon his refusal to pay further fare, he was given the usual and necessary time to present his ticket or pay, and doing neither, was requested by the conductor to vacate the train at a station and near to divers dwelling houses, and that he did so vacate while the train was standing still.

The case was tried before a jury, and a verdict returned in favor of the plaintiff for five hundred dollars, on which judgment was entered.

The defendant appeals from the judgment, and an order denying its motion for a new trial.

The principal contention on the part of the appellant is, that the case was not one in which exemplary damages could be allowed, and that the damages awarded by the jury were excessive.

At the trial, the plaintiff testified that he bought a ticket and got on the train at Antioch, as stated in the complaint, and his testimony in this regard was confirmed by the station agent. He then proceeded as follows: "Soon after the train left, the conductor, Mr. Nightingill, asked for my ticket, and I gave it to him. We ran to the next station, and just after we left, the conductor came to me again—the same one—and asked for my ticket. I said: 'I gave it to you just after leaving Antioch.' He said I did not, and that I must pay my fare, or show a ticket, or get off the train. I repeated that I had paid my fare once by buying a ticket, which I gave to him; this he denied, and immediately seized the bell rope over his head with one arm, and took me by the collar of the coat with the other, just as you would grab a dog. He threw me up in this way against the door, and pulled me out to the platform, and shoved me so violently down that when I got about two steps down I says: 'For God's sake, don't break my neck.' He said, 'Get off.' . . . . When I finally left the train, it had not fully stopped. . . . . When the conductor took my ticket he put it in his pocket. When he asked me the second time for a ticket after leaving Brentwood, I wanted him to look in his pocket and he would find it as proof, but he would not give time to consider that matter at all, but took me violently, and all of a sudden he grabbed me by the coat-collar and lifted me up off my feet and shoved me before him out of the door. . . . . When the conductor took me by the collar it did not hurt me,—that is, it did not hurt me physically. I was not hurt, except that it hurt my feelings to be put off in the presence of other people as if I had n't paid my fare."

The conductor was called as a witness by the defendant, and testified that he did not take up or receive any ticket from the plaintiff, and did not use any violence towards him, or seize him by the collar, or put his hand upon him at all; that when he first called for the ticket plaintiff said he wanted to go to Brentwood, the next station, and paid his fare thereto, thirty-five cents, by giving to witness a dollar and receiving back the change; that on leaving Brentwood witness again asked plaintiff for his fare, and told him he must pay his fare, show a ticket, or get off the train, and plaintiff said, "Stop your train, then, and I will get off"; and that he stopped the train in the immediate vicinity of the station, and plaintiff stepped off, without any violence and without being touched.



In rebuttal, the plaintiff testified: "I did not say to the conductor, after leaving Brentwood, as he testified, to stop the train and I would get off, nor nothing purporting to convey that idea. I did not get off voluntarily from the train; there would be no object in my getting off. I did not give him a dollar for my fare from Antioch to Brentwood, and he did not give me any change back; we never had one word from the time he took my ticket until we passed Brentwood."

It clearly appears from the verdict that the jurors believed the plaintiff and not the conductor, and it must therefore be assumed that the plaintiff was ejected from the train in the manner and under the circumstances stated by him; but assuming this to be so, it is still claimed for appellant that plaintiff was entitled to recover only his actual damage, and that the amount allowed was entirely excessive.

If a passenger refuses to pay his fare, or to exhibit or surrender his ticket when reasonably requested so to do, the conductor may put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, on stopping the train: Civil Code, sec. 487; but if a passenger has once paid his fare, he cannot be ejected because he refuses to pay a second time, and if he is so ejected the company will be liable to him in damages: Beach on Railways, sec. 881; and it will be no defense to an action against the company for a wrongful expulsion that its conductor was honestly mistaken: *Quigley v. Central Pac. R. R. Co.*, 11 Nev. 350; 21 Am. Rep. 757; *Hamilton v. Third Avenue R. R. Co.*, 53 N. Y. 25.

The measure of damages in an ordinary case of wrongful expulsion, without unnecessary violence or insult, and from which no bodily injury results, is the cost of a ticket from the point of expulsion to the passenger's destination, together with an allowance for such damages as actually result from loss of time; but when the expulsion is accompanied by undue violence, or by insult and abuse, the jury is authorized to consider the injured feelings of the plaintiff, the indignity endured, his mental suffering, the humiliation and wounded pride which one in his condition in life and standing in the community would experience, and to award him compensatory damages therefor: Beach on Railways, secs. 890, 891, and cases cited.

When a passenger is wrongfully expelled from a train, it is a breach of duty on the part of the carrier, and an action in

tort will lie to recover damages: Redfield on Carriers, sec. 422; Beach on Railways, sec. 887; *Head v. Georgia Pac. R'y Co.*, 79 Ga. 358; 11 Am. St. Rep. 434. In the case last cited it was held that (we quote from the *syllabus*) "an action on the case by a passenger against a railway company for wrongfully expelling him from a train with force and violence, though the declaration allege a contract for carriage, is not for breach of the contract, but for a tort by breach of duty, and punitive as well as actual damages are recoverable, if the circumstances of the particular case warrant such recovery."

The Civil Code, section 3294, provides: "In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant."

Here the action was clearly in tort for breach of duty, and under the section of the code quoted the jury was authorized to give exemplary damages, if, in expelling the plaintiff, the defendant was guilty of oppression, fraud, or violence, actual or presumed.

The question then is, can it be said, in view of the facts proved and the well-settled rules of law above stated, that the damages were so excessive as to justify the court in disturbing the verdict on that ground?

"The rule is well settled that where a trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the measure and amount of damages are matters for the jury alone. In such cases courts will not disturb the verdict on the ground that the damages are excessive, unless the amount of damages is so disproportionate to the injury proved as to make it clear that the jury, in rendering the verdict, must have acted under the influence of passion or prejudice": *Russell v. Dennison*, 45 Cal. 337.

We see nothing in this case to indicate that the jury acted under the influence of passion or prejudice, and in our opinion the verdict cannot be disturbed on the ground that the damages were excessive.

It is also contended for appellant that the court erred in giving certain instructions and in refusing to give other instructions to the jury.

The instructions given stated the law of the case fully and

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fairly, and we think correctly. The instructions refused were asked upon the theory that the plaintiff could in no event recover more than his actual damages, and that such damages could not exceed the cost of a ticket from the point where he was expelled to the point of his destination, together with a reasonable allowance for his loss of time.

We see no prejudicial error in the action of the court upon the instructions given and refused, and in our opinion the judgment and order appealed from should be affirmed.

VANCLIEF, C., and TEMPLE, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order are affirmed.

PATERSON, J., HARRISON, J., GAROUTTE, J.

RAILROADS — EJECTING PASSENGER WHO HAS PAID FARE. — DEFENSE: See *Moore v. Fitchburg R. R. Corp.*, 4 Gray, 465; 64 Am. Dec. 83, and note; *Head v. Georgia Pac. R'y Co.*, 79 Ga. 353; 11 Am. St. Rep. 434.

RAILROADS — EJECTING PASSENGER WITHOUT VIOLENCE — DAMAGES. — The measure of damages for the wrongful expulsion of a passenger from a railroad train, is the loss of time, inconvenience, and the necessary expenses to which he was subjected: *Southern etc. R'y Co. v. Rice*, 38 Kan. 398; 5 Am. St. Rep. 766, and note.

RAILROADS — EJECTING PASSENGER — DAMAGES FOR MENTAL SUFFERING. If a passenger is expelled from a train in a violent or insulting manner he may recover damages for injuries to his feelings: *Southern etc. R'y Co. v. Rice*, 38 Kan. 398; 5 Am. St. Rep. 766, and note; *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133, and note; *Serwe v. Northern Pac. R. R. Co.*, 48 Minn. 78; *Texas Pac. R'y Co. v. James*, 82 Tex. 306. See also *Georgia R. R. etc. Co. v. Eskew*, 86 Ga. 641; 22 Am. St. Rep. 490, and note.

RAILROADS. — VIOLENT EJECTION OF PASSENGER: See *Mykleby v. St. Paul etc. R'y Co.*, 39 Minn. 54, for a case in which such an action was held to be an action in tort and not in contract, which is also the doctrine of *McKay v. Ohio River R. R. Co.*, 34 W. Va. 65; 26 Am. St. Rep. 913.

RAILROADS — EJECTING PASSENGER. — EXEMPLARY DAMAGES: See *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; 28 Am. St. Rep. 858, and extended note at page 881, in which the principal case is cited, and note to *McKay v. Ohio River R. R. Co.*, 26 Am. St. Rep. 920.

## KENNEDY v. CALIFORNIA SAVINGS BANK.

[97 CALIFORNIA, 93.]

**ATTACHMENT.** — **AN ACTION AGAINST A STOCKHOLDER** for his proportion of the debt of a corporation of which he is a member is founded upon a contract within the meaning of the section of the code authorizing an attachment to issue in an action upon a contract.

**ATTACHMENT** — **FAILING TO STATE AMOUNT CLAIMED.** — Attachment in an action against a corporation and its stockholders which merely states the amount of the indebtedness claimed to be due from the corporation, without specifying the amount for which each of the stockholders is claimed to be liable, is irregular as to such stockholders and should be discharged on motion.

**AN ATTACHMENT** which as to a defendant in the action is issued for a greater sum than he is shown to be liable for by the complaint, must be set aside, though in levying the writ no more of his property was seized than is sufficient to satisfy the demand against him.

*William H. Fuller, Works and Works, and Works, Gibson, and Titus, for the appellant.*

*Wellborn, Stevens, and Wellborn, and Sprigg and Barber, for the respondent.*

DE HAVEN, J. This is an appeal from an order dissolving an attachment. The action is upon certificates of deposit issued to plaintiff by the defendant, the California Savings Bank, a corporation in which the other defendants are the stockholders, and the relief demanded is for a judgment for the amount of money represented by such certificates, and against each of the defendants for the proportionate part thereof for which he is liable as a stockholder.

The motion to dissolve the attachment was made by the defendant Havermale alone, and was upon these grounds: 1. That said action is upon a statutory liability, and not upon a contract; 2. That the writ of attachment, in its statement of plaintiff's demand against him, is not in conformity with the complaint.

These grounds are widely different, the first going to the right of the plaintiff to any attachment in the action, and the last relating only to an irregularity in the writ itself which could be avoided by the issuance of another, and unless it was the intention of the court to sustain the motion upon the first ground, it should have specified in the order granting the same that it was based upon the latter ground alone, thus leaving the plaintiff free to take the proper steps in the action to procure the issuance of a writ conforming to the complaint.



The order of the court was general, and it is therefore necessary to examine both grounds of the motion, in order to fully dispose of all questions affecting the right of the plaintiff to an attachment in the action.

1. The first ground stated in the motion presents the question whether an action against a stockholder for his proportion of the debt of a corporation of which he is a member is upon a contract, within the meaning of sec. 537 of the Code of Civil Procedure, relative to attachment; and that it is such an action, we entertain no doubt. In a general sense, the action is founded upon a contract, and it is none the less so because under the provisions of sec. 3 of article XII. of the constitution of this state and sec. 322 of the Civil Code the stockholder is made liable to perform the contract in part. The constitution, in the section above referred to, declares: —

“Sec. 3. Each stockholder of a corporation or joint-stock association shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association.”

This section prescribes the terms upon which individuals are permitted to transact business through the medium of a corporation, and the necessary legal effect of the conditions thus prescribed is, that a corporation when created becomes the agent of its stockholders to make such contracts and incur such liabilities as are authorized by law and its articles of incorporation, and the contracts which it thus makes bind the stockholders to the extent named. As said by the supreme court of Ohio, in *Brown v. Hitchcock*, 36 Ohio St. 678: “The corporation itself is a mere legal entity, existing only in legal contemplation, and is created for the convenience and benefit of the stockholders. All its dealings are for and on their account. It can contract no debts, except under the authority, express or implied, of the stockholders, and through their corporate agents. Our constitution and laws, therefore, make it an essential condition to persons thus availing themselves of the instrumentality of a corporation for the transaction of business that the security of their personal liability shall attach to and attend all of the corporate liabilities.”

It would seem, therefore, that an action against a stockholder to recover his proportion of the amount due upon a

contract made by a corporation, which is only an agency adopted by him for the transaction of business, was essentially an action founded upon a contract: *Norris v. Wrenschall*, 34 Md. 496; *Corning v. McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; *Hawthorne v. Calef*, 2 Wall. 10; *Dennis v. Superior Court*, 91 Cal. 548; Cook on Stockholders, sec. 223; *Allen v. Sewall*, 2 Wend. 327; *Ex parte Van Riper*, 20 Wend. 616.

In the case of *Dennis v. Superior Court*, 91 Cal. 548, the question whether an action like this was one arising upon contract was directly involved, and we there said: "We think that the personal liability of a stockholder of a corporation for his proportion of the indebtedness of the corporation is an obligation arising upon contract, within the meaning of section 112 of the Code of Civil Procedure, giving original jurisdiction to a justice's court in actions arising upon contract for the recovery of money, when the amount claimed is less than three hundred dollars."

The views here expressed are not in conflict with what was decided in *Green v. Beckman*, 59 Cal. 545, and the other cases following it which are relied upon and cited by defendant. In those cases the question was, whether an action like this against a stockholder was upon a statutory liability, within the meaning of section 359 of the Code of Civil Procedure, which provides that actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, must be brought within the time there specified. The court in *Green v. Beckman*, 59 Cal. 545, held that it was; that the legislature must have intended the section to apply to such an action; otherwise it was meaningless, in so far as it related to actions against stockholders. The court in that case said: "The construction of section 359 of the Code of Civil Procedure is not free from difficulty. . . . Our attention has not been called to any provision of the statute which imposes any 'penalty' or 'forfeiture' upon a stockholder for any act as such, and no effect can be given to the words 'liability created by law,' unless we apply it to the liability which the law imposes when one becomes a stockholder, and thus establishes the relation to the creditors of the corporation to which the law affixes the responsibility." There is no intimation in this language, nor did the court there intend to hold, that such an action might not also be regarded as based upon contract, within the general meaning of that phrase, or as used in other chapters of

the Code of Civil Procedure; but the court simply held, that for the purposes of that section, and in the connection in which they there appear, the words "liability created by law" should be construed as referring to actions such as this to enforce the liability of stockholders.

2. The corporation and the other defendants are jointly sued, and the complaint shows the indebtedness of the corporation to plaintiff to be forty-five thousand five hundred dollars, of which amount the defendant Havermale is only liable for one fifth. The writ of attachment recited that the action was brought to recover from the defendants forty-five thousand five hundred dollars and costs, and commanded the sheriff "to attach and safely keep all the property of said defendants, . . . or so much thereof as may be sufficient to satisfy the plaintiff's demand as above mentioned." The question presented by the second ground of the motion to discharge the attachment is, whether this writ as thus framed was irregularly issued as to the defendant Havermale. We think that it was, and the motion to discharge the attachment was properly granted for this reason. Section 540 of the Code of Civil Procedure provides that the writ of attachment must require the sheriff "to attach and safely keep all the property of such defendant within his county, . . . or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint," etc. In this case, as to defendant Havermale, the writ did not state the amount of plaintiff's demand against him in conformity with the complaint, but stated a very much larger sum, and by it the sheriff was directed to seize property of his sufficient to satisfy the entire amount due to plaintiff from the corporation, although he was only liable for one fifth of that amount. When the complaint demands different amounts from the several defendants in an action, the writ must conform to the complaint and direct the attachment of so much property of the respective defendants as will secure the amount alleged to be due from each. The clerk is not authorized to issue a writ of attachment against the property of any defendant for an amount exceeding the demand which is made against such defendant in the complaint, and if he does, the writ must be discharged as to such defendant on his motion. The law upon this point is thus very clearly stated by the supreme court of Utah, in *Bowers v. London Bank*, 3 Utah, 417: "The statute leaves no discre-

tion in any way as to the amount which shall be stated in the writ of attachment. It is a plain, direct, and specific instruction and direction, which the clerk has no right or authority to disregard. The process of attachment is a special statutory remedy, and in resorting to it the terms of the law conferring it must be strictly pursued. If the clerk had stated any other sum in the writ than that in conformity with the demand in the complaint, it would have been a material departure from the requirements of the statute, and would have vitiated the proceeding, and rendered it utterly void. The requirements of the statute are so plain that there is no room left for construction or speculation."

It is urged, however, that as no more of defendant Havermale's property than is sufficient to satisfy the demand against him was attached, he cannot complain, and his motion to discharge the writ should have been denied; but section 556 of the Code of Civil Procedure provides that the motion to discharge an attachment irregularly issued may be made before any actual levy under the writ, and section 558 of the same code further declares: "If upon such application it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged." Under these sections it is immaterial whether much or little, or any, property of a defendant has been actually levied upon, but the court must, upon proper application therefor, discharge the writ of attachment thus wrongfully issued.

The order in this case will therefore be affirmed, upon the the second ground stated in the motion of defendant.

Order affirmed.

SHARPSTEIN, J., HARRISON, J., PATERSON, J., GAROUTTE, J., and BEATTY, C. J., concurred.

McFARLAND, J., concurring. I concur in the judgment of affirmance, but I express no opinion on the question whether or not the liability of a stockholder, under the constitution and statute, for his proportionate part of such debts as the corporation may afterwards incur, is the result of "a contract for the direct payment of money" made by the stockholder, within the meaning of section 537 of the Code of Civil Procedure. There has been no decision in this state holding that an attachment will lie in such a case; and the opinion of the court in *Green v. Beckman*, 59 Cal. 545, is rather the other way. In *Dennis v. Superior Court*, 91 Cal. 548, no such



question arose or was discussed; and it is not claimed in appellant's brief that in any case cited from other states the direct point here involved was definitely decided. An attachment is a harsh statutory process by which the property of an alleged debtor is violently taken away from him prior to an adjudication of the debt, and it should be confined to cases which clearly come within the terms of the statute; and it is not clear to me at the present time that the liability of a stockholder for something that may possibly happen is within the clause of the statute above quoted.

Rehearing denied.

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**CORPORATIONS — NATURE OF STOCKHOLDERS' LIABILITY FOR DEBTS OF CORPORATIONS.** — The personal liability of a stockholder of a corporation for his proportion of the indebtedness of the corporation, is an obligation arising upon contract, within the meaning of the California code: *Dennis v. Superior Court*, 91 Cal. 548. Upon this subject further, see notes to *Corning v. McCullough*, 49 Am. Dec. 308; *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 846; *Prince v. Lynch*, 99 Am. Dec. 432.

**CORPORATIONS. — LIABILITY OF STOCKHOLDERS WHETHER JOINT OR SEVERAL:** See *Buines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, in which it is held to be several, and not joint. See also note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 815, 852, and note to *Buines v. Babcock*, 29 Am. St. Rep. 164.

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## MILLS v. LA VERNE LAND COMPANY.

[97 CALIFORNIA, 254.]

**MECHANIC'S LIEN — ASSIGNMENT OF RIGHT TO CREATE.** — A laborer or material-man cannot assign his right to create and assert a lien by complying with the statutory provisions, and clothe the assignee with the power to create the lien for himself.

**MECHANIC'S LIEN, RIGHT TO, WHEN PERSONAL AND UNASSIGNABLE.** — Where, throughout the whole of the statute, the right to a lien and the right to enforce it appear to be confined to a contractor, laborer, or person furnishing materials, and where, in no instance, is an assignee recognized in connection with the securing or enforcing of the lien, there can be no construction given such statute other than as conferring a mere personal right on the contractor, laborer, etc., and not on his assignee.

*J. G. Rossiter*, for the appellant.

*W. S. Wright*, for the respondents.

**McFARLAND, J.** This action was brought to enforce an asserted lien under the mechanic's lien law. The court below sustained a general demurrer to the complaint, and judgment was rendered for defendants. Plaintiff appeals.

The averments of the complaint are (in brief) that the La Verne Company, defendant, was indebted to Meek and Benton in the sum of seven hundred dollars for labor and materials furnished by them for and in the construction of a building on land of said company; that said Meek and Benton, by a written instrument, assigned the indebtedness to plaintiff, and also assigned, if the thing could be done, all their "right of lien" against said building and land; and that afterwards, and within the statutory time, plaintiff, as assignee, formally filed in the recorder's office a notice of claim of lien against said property for the money due said Meek and Benton for the said labor and materials which they had furnished as aforesaid; and we think that the demurrer was properly sustained.

The question presented is not whether a lien for work or materials can be assigned, or would pass under an assignment of the debt secured, but whether a laborer or material-man can assign his mere right to assert and create a lien by complying with statutory provisions, and clothe the assignee with the power to create the lien for himself; and we are satisfied that he cannot. This question has never been heretofore determined in this state. In *Patent Brick Co. v. Moore*, 75 Cal. 205, referred to by appellant, the only question involved was, whether, in an action brought by the assignee of "a lien," there should be an averment that the assignment was in writing. The case in our reports which comes the nearest to touching the principle involved is *Godeffroy v. Caldwell*, 2 Cal. 489, 56 Am. Dec. 360, where it was held that "one who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of the [mechanic's lien] law."

The decisions on the point in other states are, no doubt, somewhat conflicting, although the conflict may be explained, to some extent, by the different provisions of various statutes, some showing more clearly than others that only a personal right was intended to be conferred; but the weight of authority is clearly to the point that the said right cannot be assigned.

In *Rollin v. Cross*, 45 N. Y. 771, the court said: "The lien under statutes of this character is, in general, a personal right given to the mechanic, materialman, and laborer for his own protection, and the right to create it cannot be assigned or transferred to another. The statute under which the plaintiff

claims does not authorize a lien to be filed by the assignee of a debt for work performed under a building contract." In *Fitzgerald v. Trustees*, Mich. N. P. 243, the court holds that "the lien is personal to the contractor or subcontractor, and is assignable." In *Caldwell v. Lawrence*, 10 Wis. 331, it is held that "the lien of the mechanic, lumberman, etc., for work and materials is a personal right, and cannot be transferred or assigned so as to enable the assignee to prosecute the claim in his own name, and avail himself of the benefit of the lien given against the building." In Iowa, the courts having decided that such right was not assignable, the legislature enacted that "the mechanics' liens are assignable, and shall follow the assignment of the debt"; but the court, in *Brown v. Smith*, 55 Iowa, 31, held that the statute referred "to the lien perfected by the filing of a claim therefor, and not to the inchoate right to a lien," and further, as follows: "The mere performance of the requisite labor is not sufficient. His right to a lien cannot be said to exist until he has complied with the statute. When he does so, it will be conceded, for the purposes of this case, that he has a lien which may be assigned, and that an assignment of the account carries with it the lien. The language of the statute is, that the lien is assignable, and not the mere right, which follows the performance of labor, and which depends for its existence on the volition of the subcontractor." In the late case of *Horton v. Sparkman*, 2 Wash. 168, the court, speaking of a claim filed by an assignee, said: "This he could not do. The lien given by statute is personal to the laborer; it does not run with the chose in action." There are many other decisions in various states to the same point; but the foregoing citations are sufficient to show the general drift of judicial opinion on the subject.

In Phillips on Mechanics' Liens, decisions on both sides of the question are referred to; and we think that the true rule is expressed in the following paragraph, from section 54 of said work: "Where, throughout the whole act, the right of lien and the right to enforce it appear to be confined to the contractor, laborer, or persons furnishing materials, and where in no instance is the assignee of such claim recognized in connection with the creation or enforcing of the lien, there can be no construction given to such a statute other than as conferring a mere personal right on the contractor, laborer, etc., and not on his assignee"; and under our statutory provisions on the subject, no right of lien is given to an assignee, or to any

person other than those mentioned in section 1183 of the Code of Civil Procedure; and the persons there mentioned include only "mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists, builders, miners, and all persons and laborers of every class, performing labor upon or furnishing materials to be used in the construction," etc.

Appellant invokes the rule that the assignment of a debt carries with it the lien by which it is secured. But, in the first place, that rule is not of universal application; it does not apply, for instance, to vendors' liens, or to the many liens which accrue to various kinds of bailees. And in the second place, at the time of the assignment of the debt to plaintiff in the case at bar, there was no lien securing it in existence; the assignors had merely a personal right to create a lien by complying with the statute. But the statute nowhere confers such right upon an assignee. It would be impossible for an assignee to comply with the statute, for the code (sec. 1187) provides that the contractor, or other persons mentioned in section 1183, must himself file a claim for record, stating the character of the labor or materials which he himself furnished for the building. And this shows clearly that the legislature was providing a lien only for a contractor, laborer, or materialman. It is urged that it would be a construction beneficial to the laborer to hold that he could sell or raise money upon his mere personal, inchoate right to procure a lien; but the legislature may not have thought that it would be advantageous to a laborer (for whose benefit the law was originally passed) to allow him the privilege of frittering away his wages at ruinous discount to money lenders and speculators. At all events, a court can neither make nor amend a statute. The law must be enforced as we find it enacted.

Judgment affirmed.

DE HAVEN, J., and HARRISON, J., concurred.

Hearing in Bank denied.

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**MECHANIC'S LIEN — ASSIGNABILITY OF.** — A lien is not assignable which the law gives for the price of labor done on the material of another: *Bradley v. Spofford*, 23 N. H. 444; 55 Am. Dec. 205, and note. One cannot enforce a lien against a railroad for work and labor done on an account assigned to him prior to the filing of the lien: *O'Connor v. Current River R. R. Co.*, 111 Mo. 185; but under the Minnesota statute a mechanic's lien is assignable: *Tuttle v. Howe*, 14 Minn. 145; 100 Am. Dec. 205, and note; and the same rule is maintained in Indiana: *Midland R'y Co. v. Wilcox*, 122 Ind. 84.



## PEOPLE v. MONTECITO WATER COMPANY.

[97 CALIFORNIA, 276.]

**QUO WARRANTO. — THE MAKING OF A CORPORATION A PARTY DEFENDANT** in a proceeding by *quo warranto* under the allegation that it is a corporation *de facto*, accompanied by allegations from which it appears that it is not a corporation *de jure*, does not admit the corporate capacity of such defendant, nor preclude the plaintiff from inquiring into its right to be a corporation. The corporation *de facto* is not only a proper, but is also a necessary party defendant.

**CORPORATIONS. — TO ACQUIRE THE RIGHT TO BE A CORPORATION**, the prescribed statutory conditions must be substantially complied with.

**CORPORATION, FORMATION OF, VITAL DEFECTS IN. —** If a statute requires articles of incorporation to be subscribed and acknowledged by five or more persons, and such articles, though subscribed by five persons, are acknowledged by four only, this defect is fatal to the existence of the corporation in a proceeding against it by *quo warranto*.

*John J. Boyce, Richards and Carrier, and George H. Gould,*  
for the appellant.

*W. C. Stratton,* for the respondents.

TEMPLE, C. Plaintiff appeals from a judgment entered upon demurrer to complaint.

The demurrer was general, and on the ground of insufficiency of the facts. It is a proceeding taken by the attorney-general of the state in the nature of a *quo warranto* to deprive the defendant corporation of its corporate charter, and procure its dissolution on two grounds: 1. For want of a substantial compliance with the statutory requirements in its formation; and 2. For abandonment and misuse of its corporate franchise and powers, and for alleged violations of law.

In answer to the first point, the respondent raises the preliminary objection that by making the corporation a defendant, its corporate character is admitted, and cannot be questioned in this proceeding. As authority for this proposition, the case of *People v. Stanford*, 77 Cal. 360, is chiefly relied upon.

In that case it was alleged in the complaint that the assumed corporation had never been a corporation. If it were not a corporation of any character, it had no legal existence, and could not be sued. By making it a party, plaintiff conceded that it was a person that could be sued. It was said that the corporation could not be treated as a person which could be sued simply to obtain a judgment that it was not and never had been such a person. There is no such incon-

sistency here. It is averred that the corporate defendant is a corporation *de facto*, but it is claimed that it did not become a corporation *de jure*, because the persons who attempted the incorporation did not comply with the conditions which the statute makes conditions precedent to its rightful incorporation. Under such circumstances, although the association is a legal entity, which may be sued, its right to corporate existence may be questioned by the state in a proceeding of this character: Civ. Code, sec. 358.

This court said in *People v. La Rue*, 67 Cal. 530, and repeated the language in *First Baptist Church v. Branham*, 90 Cal. 22: "A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world except the paramount authority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid; and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted, its acts are to be treated as efficacious."

Under such circumstances, it seems clear that the corporation is not only a proper but a necessary party: *People v. Flint*, 64 Cal. 49; *People v. Gunn*, 85 Cal. 244.

It is contended that the corporation is not rightfully such, because, while five incorporators signed the articles of incorporation, only four acknowledged the same.

Section 292 of the Civil Code reads as follows: "The articles of incorporation must be subscribed by five or more persons, a majority of whom must be residents of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property."

It was said in *People v. Selfridge*, 52 Cal. 331: "The right to be a corporation is in itself a franchise; and to acquire a franchise under a general law, the prescribed statutory conditions must be complied with." Still, a substantial rather than a literal compliance will suffice: *People v. Stockton etc. R. R. Co.*, 45 Cal. 313; 13 Am. Rep. 178. Was there a substantial compliance in this case?

Because a substantial compliance will do, it does not follow that any positive statutory requirement can be omitted on the ground that it is unimportant. They are conditions precedent to acquiring a statutory right, and none can be dispensed with by the court.

What is a substantial rather than a literal compliance may be illustrated from the cases. In *Ex parte Spring Valley Water Works*, 17 Cal. 132, the certificate stated the place of business, but did not describe it as the "principal place of business," as required. The court said: "The statement that San Francisco was the place of business would seem to imply that it was not only the principal but the only place of business."

In *People v. Stockton etc. R. R. Co.*, 45 Cal. 306, 13 Am. Rep. 178, the affidavit required in such cases to be attached to the certificate stated that ten per cent of the amount subscribed had been actually paid in, omitting the words "in good faith," which the statute required. In the certificate it was stated that more than ten per cent had been actually in good faith paid in. It was held sufficient; and it would seem that if it was actually paid in cash, it must have been paid in good faith.

And it was further held that payment by checks drawn against sufficient funds in a bank, which was ready to accept and pay the checks, was substantially payment in cash.

In *People v. Cheeseman*, 7 Cal. 376, the acknowledgment taken by the notary omitted to state that the persons whose acknowledgments were taken were personally known to the notary. The certificate did state that the persons who signed appeared before him and acknowledged it. The statute did not prescribe what the acknowledgment should contain, and it was held a substantial compliance with the requirement, although the form prescribed for acknowledgments to deeds was not followed. It was acknowledged.

In all these cases it will be seen that the thing required was done, but not literally, as directed; but there was no omission of any requirement. No case has been cited where the entire omission of a thing prescribed has been excused, unless it be the case of *Larrabee v. Baldwin*, 35 Cal. 155. That was not an action instituted by the state to disincorporate on the ground of noncompliance. As we have seen, unless the state complains, a *de facto* corporation must be considered, under our code, as possessing a corporate character, and the stockholders, when sued upon their individual liability, should not be allowed to make the point that they did not comply with the law.

In that case the certificate was signed by five directors, but two failed to acknowledge it. Other questions are discussed

at great length in the opinion, but in regard to the point made on the certificate it was simply remarked: "It is not clear that any fatal defect exists in the certificate of incorporation. If so, it is cured by the act of April 1, 1864." Plainly, it was unnecessary to consider the question.

The curative act referred to declares: "All associations or companies heretofore organized and acting in the form or manner of corporations, and that have filed certificates for the purpose of being incorporated, but whose certificates are in some manner defective, or have been improperly acknowledged before a person not authorized by law to take such acknowledgments, are hereby declared to be and to have been corporations from the date of the filing of such certificates, in the same manner and to the same effect and intent as if such certificates were without fault and properly acknowledged before the proper officer, and all such certificates are hereby validated and declared to be legal, and shall have the same force and effect as if such certificates were free from all fault or defect, and were properly acknowledged," etc.: Stats. 1863, 1864, p. 303.

Section 292 of the Civil Code required the articles to be subscribed and acknowledged by each. As this is an express condition precedent to a valid incorporation, it is not of consequence to the court whether it be a wise or necessary requirement or not. Still, it is easy to see a reason for it. The certificate secures the state and all concerned against the possibility of any fictitious names being subscribed to the articles, and furnishes proof of the genuineness of the signatures.

If the acknowledgment can be dispensed with as to one, why not as to two, or three, or all?

Ordinarily, no doubt the state would not be expected to institute a proceeding of this character for such a defect alone, and we must presume that the attorney-general would not have instituted this inquiry, if he were not convinced that there were reasons sufficient to justify it. Other reasons are alleged, but as the statute authorizes a proceeding to forfeit the charter where the statute has not been complied with, although the corporation is acting in good faith, and is a *de facto* corporation, the complaint must be held to state a cause of action, and the demurrer should be overruled.

The judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.



HAYNES, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

DE HAVEN, J., MCFARLAND, J., FITZGERALD, J.

**QUO WARRANTO.** — An information in the nature of a *quo warranto*, to oust the defendants from acting as a corporation, and to test the fact of their incorporation, should be filed against the individuals; an information against the corporation in its corporate name would admit the existence of the corporation: *People v. Rensselaer etc. R. R. Co.*, 15 Wend. 113; 30 Am. Dec. 33, and note at page 48. Where a corporation *de facto* has exercised the powers of a legal corporation, the forfeiture of its charter may be enforced by *quo warranto*: *Regents v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 72. See also *State v. Bank*, 2 McMull. 439; 39 Am. Dec. 135, and note.

#### Defective Formation of Corporations.

**Acceptance of the Charter.** — Formerly corporations were generally, if not universally, created by special grants to a designated person or persons and his or their associates, of the right to be a corporation and to exercise the corporate powers conferred in the grant. When this mode of creating a corporation is the one resorted to, the only additional act essential to the existence of the corporation is the acceptance of the grant or charter. This grant, like a conveyance from one person to another, must have two consenting parties. The grant itself is but an offer of corporate privileges to the person or persons entitled to take advantage of it, which unless accepted within a reasonable time, becomes inoperative: *State v. Bull*, 16 Conn. 179; *State v. Dawson*, 16 Ind. 40; *Lincoln etc. Bank v. Richardson*, 1 Greenl. 79; 10 Am. Dec. 34; *Smith v. Silver Valley Min. Co.*, 64 Md. 85; 54 Am. Rep. 760. Like all other offers it may be withdrawn at any time prior to its acceptance: *Lincoln etc. Bank v. Richardson*, 1 Greenl. 79; 10 Am. Dec. 34; *State v. Dawson*, 16 Ind. 40; and must be accepted or rejected as made. Hence the grantees cannot attach any conditions to their acceptance nor modify the offer in any respect: *Rex v. Westwood*, 2 Dow & C. 21; 7 Bing. 1, 90; *Lyons v. Orange etc. R. R. Co.*, 32 Md. 18, 29. If they undertake to exercise corporate powers without accepting the charter offered them and complying with all the conditions precedent, their action is unauthorized and their right to exercise corporate powers will be denied upon *quo warranto*: *Thompson v. New York etc. R. R. Co.*, 3 Sand. Ch. 626; *Lyons v. Orange etc. R. R. Co.*, 32 Md. 18, 29; *Rex v. Amery*, 1 Term. Rep. 589. In some instances the acceptance of all the persons named in the charter is essential and the action of a less number inoperative: *Rex v. Amery*, 1 Term. Rep. 589. Except, however, where from the grant it is apparent that the acceptance of all the grantees is necessary to carry out the objects sought by the granting authority, we apprehend that the acceptance of a majority of the grantees is sufficient: *State v. Dawson*, 16 Ind. 40, and when the grant is made to a designated person or persons and his or their associates, that the person or persons named may form and constitute the corporation without the addition of any associates whatever: *Penobscot etc. Corporation v. Lamson*, 16 Me. 224; 33 Am. Dec. 656; *Smith v. Silver Valley Min. Co.*, 64 Md. 85; 54 Am. Rep. 760. The mode in which the acceptance

is manifested is not material, unless made so by the grant or charter itself. Undoubtedly the authority which is competent to make the grant or offer of the corporate charter is equally competent to attach conditions to its acceptance, and to prescribe the time and manner in which the corporate authority shall be exercised; and whenever conditions precedent to the acceptance of the charter or to the existence of the corporation are prescribed, they must be substantially observed or the right to the corporate franchise will not be called into being. But when on the other hand conditions are not specified and the only question is whether the charter has been accepted or rejected, then such acceptance may be established from any evidence sufficiently establishing the assent of the beneficiaries and their intended assumption of corporate powers. No formal action is required, no written or recorded evidence of the acceptance is essential. It is sufficient that the corporate powers conferred by the charter have been exercised or that the corporators have in any manner unequivocally shown their intention to accept and to exercise them: *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; 86 Am. Dec. 128; *Russell v. McLellan*, 14 Pick. 63; *Taylor v. Newberne*, 2 Jones Eq. 141; 64 Am. Dec. 566; *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102; *McKay v. Beard*, 20 S. C. 156; Morawetz on Corporations, secs. 23-26.

In all or nearly all the states of the American Union general laws have been enacted under which all persons who offer to comply with their provisions may form corporations for the purpose of becoming authorized to exercise the corporate franchises conferred upon persons complying with such statutes. The chief purpose of this note is to inquire what is the result of an attempted but incomplete compliance with such statutes when the assumed defect is urged, whether in proceedings in the nature of *quo warranto* or in what should properly be styled a mere collateral attack upon an acting corporation.

*Substantial Compliance with the Statute is Indispensable.* — The public statutes to which we have referred generally prescribe the execution of a paper ordinarily called the certificate or articles of incorporation, that this paper shall be signed by a specified number of persons, and sometimes, that it shall be acknowledged by them before an officer authorized to take acknowledgments of deeds; that it shall specify the duration and purposes of the corporation, its principal place of business, the amount of its capital stock, and the number of shares into which it shall be divided. These certificates or articles of incorporation are further generally required to be filed in some public office, usually that of the clerk of the county in which the principal place of business of the corporation is to be conducted, and sometimes a certificate of such filing, or a certified copy of the articles as filed, is required to be presented to or filed with the secretary of state or some other officer who on his part issues either a license to act as a corporation or a final certificate which is treated as the last act required in the proceedings to create the corporation. At least, in all cases in which the right to exercise corporate franchises is questioned by *quo warranto*, a substantial compliance with the statute authorizing the formation of the corporation must be shown, or the right to exercise the franchise must be denied: *Mokelumne Hill etc. Co. v. Woodbury*, 14 Cal. 425; 73 Am. Dec. 658; *Harris v. McGregor*, 29 Cal. 125; *Bates v. Wilson*, 14 Col. 140; *Field v. Cooks*, 16 La. Ann. 153; *Attorney-general v. Hanchett*, 42 Mich. 436; *Baptist Church v. Baltimore etc. R'y*, 4 Mackey, 43; *McCallion v. Hibernia etc. Soc.*, 70 Cal. 163. "We have no doubt but that in this state a substantial compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation, and

that a failure to comply therewith, in any material particular, is ground for the impeachment of corporate existence in an appropriate proceeding prosecuted by proper authority"; *People v. Cheeseman*, 7 Col. 376. On the other hand, no more than a substantial compliance with the statute is exacted from persons seeking to form a corporation, and their attempt is not rendered nugatory by their failure to comply with the statute literally, if they have complied with it substantially: *People v. Stockton etc. R. R. Co.*, 45 Cal. 306; 13 Am. Rep. 178; *Enkright v. Logansport etc. R. R.*, 13 Ind. 404.

*Failure of Corporators to Sign Articles.* — If the right to exercise a franchise is attacked by *quo warranto*, or, though not attacked in that manner, if the statutes or decisions of the state permit the existence of the corporation to be attacked in the particular suit or proceeding before the court, it is essential that the articles of incorporation should have been signed by the number of persons prescribed by the code or statute, and the signing by a less number is ineffectual: *People v. Montecito W. Co.*, 97 Cal. 276; *ante* p. 172; *Corey v. Morrill*, 61 Vt. 598; *State v. Critchett*, 37 Minn. 13. Furthermore, it is essential that they should have been signed with an intention on the part of the signers that they should be acted upon at the time they were filed, and if it appears that the signatures were affixed with an understanding on the part of the signers that "they were not to take effect until certain things were done, which never were done," then the articles are inoperative and no corporation has been called into being: *Corey v. Morrill*, 61 Vt. 598.

*Omission to State Name of Corporation.* — If the statute requires the name of the corporation to be stated in its articles, its omission therefrom is fatal, and it has been held that this omission cannot be cured by the fact that the articles are preceded by a heading in which a name has been used appropriate to the corporation and its objects. Thus, where persons resident in Fairview executed articles of incorporation for the purpose of constructing a turnpike commencing at a point in that town, but failed to state in them what the name of the corporation should be, it was held that this defect could not be supplied by a preliminary statement at the head of such articles as follows: "Fairview Turnpike, Fairview, Fayette County, Indiana": *Rhodes v. Piper*, 40 Ind. 369; *Piper v. Rhodes*, 30 Ind. 309.

*The Requirement of the Statute that the Objects or Purposes of the Corporation* shall be stated in its articles must be complied with, and such compliance cannot consist of a vague or general specification. Though the name of the corporation as stated in its articles indicates that it is to do a banking business, yet if the statement of its object is such that it substantially includes every business which the company may think profitable to the shareholders, the purposes are insufficiently stated: *In re Crown Bank*, L. R. 44 Ch. Div. 634. Hence it is not sufficient to state that the business of the corporation "shall be such as the association may from time to time prescribe by its rules, regulations, and by-laws": *State v. Central Ohio Relief Ass'n*, 29 Ohio St. 399. If the purpose as disclosed in the articles is one not sanctioned by law, no corporation is created thereby: *State v. Beck*, 81 Ind. 500. If, on the other hand, a lawful purpose is specified, but the articles assume for the corporation the existence of powers which it is not permitted to exercise, then this additional and unauthorized assumption may be treated as surplusage, and the corporation regarded as entitled to exercise the lawful powers only: *Eastern P. R. Co. v. Vaughn*, 14 N. Y. 546; *Becket v. Uniontown B. Ass'n*, 88 Pa. St. 211. If the term of the existence of the corporation as stated in its articles is in excess of the period allowed by law,

the corporation will not on that account be regarded as incompetent to carry on its business for such time as the statute permitted to corporations of the class to which it belonged: *People v. Cheeseman*, 7 Col. 376.

*The Omission from the Articles of the Following Matters* required by statute has also been adjudged fatal: A failure to state that a majority of the members of an association voted in favor of its incorporation: *People v. Selfridge*, 52 Cal. 331; omission to state the amount of the capital stock: *State v. Shelbyville etc. Co.*, 41 Ind. 151; *Heinig v. Adams etc. Mfg. Co.*, 81 Ky. 300; or the number and names of the directors: *Reed v. Richmond etc. R. R.*, 50 Ind. 342; or the place of residence of the incorporators: *Busenback v. Attica etc. Co.*, 43 Ind. 265; *Heinig v. Adams etc. Mfg. Co.*, 81 Ky. 300; or the principal place of transacting the business of the corporation: *Clegg v. Hamilton etc. Grange Co.*, 61 Iowa, 121.

*Failure to File Articles.* — Very generally the statutes require the articles of incorporation to be filed in some public office after they are executed. Whether this filing is a condition precedent to the corporate existence manifestly depends upon the language of the statute; but few, if any, of the statutes upon the subject are susceptible of any other construction than that the filing is indispensable: *Childs v. Hurd*, 32 W. Va. 99; *Doyle v. Mizner*, 42 Mich. 332; *Garnett v. Richardson*, 35 Ark. 144; *Indianapolis M. Co. v. Herkimer*, 46 Ind. 142; *First Nat. Bank v. Davies*, 43 Iowa, 424; *Abbott v. Omaha etc. Co.*, 4 Neb. 416; but some of the statutes provide that on the filing of the certificate or articles, the persons associating themselves and their successors and assignees shall be "from the time of the commencement fixed in the certificate an incorporated company"; and by these statutes the effect of the filing of the certificate may be to confer corporate authority as from its date, though this was long anterior to such filing: *Vanneman v. Young*, 52 N. J. L. 403.

Many of the statutes further provide that after the articles of incorporation are filed with the county clerk or some other public officer they shall be recorded either by him or some other official, or that a certified copy of them shall be filed with the secretary of state, or that some license or further certificate shall be procured from some public officer. If the language of the statute is consistent with the idea that the corporation exists from the filing of the articles or certificate, then doubtless the failure to further record it, or to do some other act, is a mere irregularity not destructive of the life of the corporation; *Washington etc. Church v. Baltimore etc. R. R. Co.*, 5 Mackey, 269; *Walton v. Riley*, 85 Ky. 413; *Bushnell v. Consolidated Ice etc. Co.*, 138 Ill. 67; *Sparks v. Woodstock Iron etc. Co.*, 87 Ala. 294. More frequently the statutes are not in harmony with this idea, and clearly indicate that it is not until the last act is done that the artificial or corporate person can come into being. Where such is the case, all the acts are essential. The final license or certificate and the original filing must both exist, and the latter is insufficient without the former: *Childs v. Hurd*, 32 W. Va. 67; *Richmond F. Ass'n v. Clarke*, 61 Me. 351; *Stowe v. Flagg*, 72 Ill. 397; and the former without the latter: *Doyle v. Mizner*, 42 Mich. 332. If the incorporators have done everything required of them, they cannot be prejudiced, nor the right of the corporation to exist and to do business impaired, by any wrongful and unauthorized act of the officer with whom the articles are filed, as by his antedating them without any complicity on the part of the incorporators: *State v. Foulks*, 94 Ind. 493.

*Statutory Ratification or Recognition of Defective Corporation.* — In the absence of any constitutional inhibition it is always within the power of the



legislature to create a corporation in any mode from which the legislative intention to do so may legitimately be inferred. An unauthorized assumption of corporate functions is generally a wrong of which none but the sovereign will be allowed to complain, and whenever the sovereign has in any manner made known its willingness that such powers shall be exercised there can no longer be any complaint of their exercise, even on its part, unless it has in some competent manner withdrawn its assent. Therefore, though a corporation was irregularly formed and had, at least as against the sovereign, no right to exercise corporate franchises, yet such formation may be ratified either directly or impliedly, and upon such ratification, the corporation becomes one *de jure*. Therefore, if by any statute enacted after the assumption of corporate rights and powers by an association, the incorporation of the association is expressly ratified, or if not so ratified, there is language employed in a statute from which the existence of the corporation or the validity of its proceedings is justly inferible, any defect in its organization ceases to be material. The legislative recognition manifests the will of the sovereign and is equivalent to an express grant of corporate authority: *White v. Ross*, 4 Abb. App. 589; *State v. Steele*, 37 Minn. 428; *Barshor v. Dresael*, 34 Md. 503; *Kanawha Coal Co. v. Kanawha etc. Coal Co.*, 7 Blatchf. 391; *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621; *Goodrich v. Reynolds etc. Co.*, 31 Ill. 490; 83 Am. Dec. 240; *Grand T. R. Co. v. Cook*, 29 Ill. 237; *Koch v. North Avenue Ry Co.*, 75 Md. 222; *Central Agricultural etc. Ass'n v. Alabama etc. Ins. Co.*, 70 Ala. 120; *Larrabee v. Baldwin*, 35 Cal. 155.

*Collateral Attacks Upon Corporations.*—The existence of a corporation may be sought to be attacked either when it or its assignee claims and attempts to assert some right, and the existence of the corporation may be regarded as part of the plaintiff's cause of action, or when the defendant claims that he is not answerable because the liability sought to be enforced is but the liability of a corporation of which he is a member. No doubt decisions may be found applicable to both of these classes from which, if unexplained, the inference might be reasonably drawn that the right of a corporation to act may be questioned as in *quo warranto* and denied, if it had failed to substantially comply with the statutory prerequisites to its formation. These decisions are generally, but not universally, attributable either to the fact that there was no attempt to establish the existence of a corporation *de facto* by proving that the actual doing of business in good faith as a corporation, or to statutes permitting a collateral attack upon corporations in the class of suits in which the attack was successfully made. Thus in Iowa the statute prescribing what shall be done for the purpose of creating corporations, adds, "a failure to comply substantially with the foregoing requisites in relation to organization and publicity renders the individual property of the stockholders liable for the corporate debts." It follows from this provision that when suit is brought against persons and they seek to escape liability on the ground that the cause of action is really against a corporation of which they are but stockholders, their defense cannot be sustained otherwise than by the same proof which would be required if a corporation were attacked by *quo warranto*: *Clegg v. Hamilton etc. Grange Co.*, 61 Iowa, 121; *Heuer v. Carmichael*, 82 Iowa, 288. In some other cases in which the liability of the stockholders and officers was not so clear by the terms of any statute, it has been held that it was not until the corporation came into lawful existence that any power to act for it could arise, and therefore, if persons assuming to act as directors made promissory notes, professedly in that capacity, they were personally answerable thereon: *Hurt v. Salisbury*,

55 Mo. 311; *Walton v. Oliver*, 49 Kan. 107; *post*, p. 355. In these cases, the defects rendering the directors personally liable were in one the failing to file the articles of incorporation with the secretary of state, and in the other the failure to subscribe stock or take any measures towards the organization of the corporation after the articles had been regularly executed and filed. Generally persons seeking to avoid liability on the ground that they were acting as a corporation must show something in the nature of a charter, and hence, where there is no special charter and no attempt to obtain the right to act as a corporation under the general laws by the filing of articles of incorporation, the persons acting as associates have been held personally responsible: *Abbott v. Omaha etc. Co.*, 4 Neb. 416. So if the statute requires that a certain notice shall be published before the corporation commences to do business, the members have been held personally liable in the absence of such notice: *Bigelow v. Gregory*, 73 Ill. 197; *Heinig v. Adams etc. Mfg. Co.*, 81 Ky. 390; *Unity Ins. Co. v. Cram*, 43 N. H. 636. Whether persons doing business are acting merely as associates or as members of a corporation is often a question of intention, and perhaps the majority of the decisions to which we have referred were justifiable on the ground that as the persons whose liability was in question had not by completing their incorporation shown unequivocally that they intended to do business in a corporate capacity, those dealing with them had a right to assume that they were still acting on their own account. This is not true of all the cases, however, for there are some which, on their face at least, are not compatible with any other theory than that a substantial compliance with the statute is indispensable to authorize any action in a corporate capacity: *West v. Bullskin etc. Co.*, 32 Ind. 138; *O'Reiley v. Kankakee etc. Co.*, 32 Ind. 169; *Harris v. McGregor*, 29 Cal. 125.

In at least one state the statutes declare, "that the incorporation of any company claiming in good faith to be a corporation under this part and doing business as such or its right to exercise corporate powers shall not be inquired into collaterally in any private suit to which such corporation may be a party, but such inquiry may be had at the suit of the state on information of the attorney-general": Cal. Civ. Code, sec. 358. It may well be doubted whether this statute has added anything to the pre-existing law upon the subject. In other words, as we understand the decisions, the right of a corporation *de facto* to do business and to exercise corporate franchises is never open to inquiry in a collateral suit, but only in proceedings in the nature of *quo warranto*: *McFarlin v. T. T. Ins. Co.*, 4 Denio, 392; *Dutchess Mfg. Co. v. Davis*, 14 Johns. 238; 7 Am. Dec. 459; *Eaton v. Aspinwall*, 19 N. Y. 119; *Merchant's etc. Bank v. Stone*, 38 Mich. 782; *Stout v. Zulick*, 43 N. J. L. 602; *Cochran v. Arnold*, 58 Pa. St. 399; *Finch v. Ullman*, 105 Mo. 255; 24 Am. St. Rep. 383; *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 240; and a corporation such as falls within the statute which we have quoted is certainly a corporation *de facto*.

*Corporations de Facto, what Are.* — The only substantial doubt which can exist concerning the subject here under consideration is with respect to what is a corporation *de facto*, for there may doubtless be instances in which corporate powers have been assumed and exercised even for a considerable period of time without there being even a corporation *de facto*. Thus it is clear that where a corporation *de jure* cannot exist, a corporation *de facto* is also impossible. Hence if the purpose of the body assuming to be a corporation is against public policy or otherwise unlawful, or is one the carrying out of which by a corporation is unauthorized, then there cannot be a

corporation *de facto* for the purpose of carrying it on, and no assumption of corporate powers can avail to confer upon the parties the authority or the protection of a corporation *de facto*: *Evenson v. Ellingson*, 67 Wis. 634; *Eaton v. Walker*, 76 Mich. 579; *Chicora Co. v. Crews*, 6 S. C. 243. Probably a corporation *de facto* cannot exist from the mere assumption of corporate privileges, however long continued, unless the franchises have been exercised so long and so publicly as to warrant the presumption of the existence of some charter, or other authority, the evidence of which has been lost. In all of the cases falling within our observation there has been at least an attempt to comply with the statute controlling the creation of corporations. On the other hand, where there has been such an attempt the existence of a corporation *de facto* may generally be safely affirmed if there has been the exercise of corporate functions in apparent good faith. Thus where the statute required all articles of incorporation to have a certain affidavit annexed to them, and it was not so annexed, the judge pronouncing the opinion of the court, said, "I am of the opinion that under this and similar general acts for the formation of corporations if the papers filed by which the corporation sought to be created are colorable, but so defective that in a proceeding on the part of the state against it, it could for that reason be dissolved, yet by acts of user under such an organization it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution collaterally by any person": *Buffalo etc. R. R. Co. v. Cary*, 26 N. Y. 77; *Bushnell v. Consolidated etc. Co.*, 138 Ill. 73. "Where it is shown that there is a charter or a law under which a corporation with the powers assumed may lawfully be incorporated, and there is a colorable compliance with the requirements of the charter or law, the existence of a corporation *de facto* is established": *Stout v. Zwick*, 48 N. J. L. 601. "A corporation *de facto* exists when from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by the law when there is an organization with color of law, and the exercise of corporate franchises": *Snider etc. Co. v. Troy*, 91 Ala. 224; 24 Am. St. Rep. 887, and note 893; *Methodist etc. Church v. Pickett*, 19 N. Y. 482. "It is only where there has been an effort to conform to the forms of law in establishing a corporation and some formal defect exists merely as to the mode of complying with the law and the body is dealt with and acts as a corporation that it is regarded as one *de facto*": *Allen v. Long*, 80 Tex. 261; 26 Am. St. Rep. 735, and note 743. "Where the law authorizes a corporation, and there is an effort in good faith to organize the corporation under the law, and thereupon as a result of such effort, corporate functions are assumed and exercised, the organization becomes a corporation *de facto*, and as a general rule, the legal existence of such a corporation cannot be inquired into collaterally, although some of the required legal formalities may not have been complied with": *Hasselman v. United States M. Co.*, 97 Ind. 368.

"A corporation *de facto* presupposes a charter or a law authorizing the creation of such a corporation, that there has been an attempt in good faith to comply with its provisions, and that there has been user or the exercise of corporate powers under it. Against such a corporation, as a general rule, a collateral attack by third persons will not avail. The reason is that if rights and franchises have been usurped they are the rights and franchises of the sovereign, and he alone can interpose. Until such interposition the



public may treat those possessing and exercising the corporate powers under color of law as doing so rightfully. The rule is in the interest of the public, and is essential to the validity of business transactions with corporations": *Duggan v. Colorado M. & I. Co.*, 11 Col. 115. The cases affirming that neither the existence of a corporation nor its right to enter into a contract or to exercise a franchise which it has sought to enter into or to exercise can be inquired into collaterally are very numerous, and it would seem, upon principle, that the nature and character of the informality or defect is immaterial, provided, notwithstanding its existence, it is apparent that there was an attempt in good faith to create a corporation, and that in like good faith there has been an assumption and exercise of corporate functions: *Commissioners v. Bolles*, 94 U. S. 104; *White v. State*, 69 Ind. 273; *St. Louis v. Shields*, 62 Mo. 247; *Cincinnati etc. R. R. Co. v. Dunville etc. R'y Co.*, 75 Ill. 113; *Thompson v. Candor*, 60 Ill. 244; *Weaverille etc. Wagon Road Co. v. Trinity Co. Supervisors*, 64 Cal. 69; *Catholic Church v. Tobbein*, 82 Mo. 418; *Jersey City Gaslight Co. v. Consumers Gas Co.*, 40 N. J. Eq. 427; *Doyle v. San Diego Land etc. Co.*, 46 Fed. Rep. 709; *Larned v. Bent*, 65 N. H. 184; *In re Short*, 47 Kan. 250; *North v. State*, 107 Ind. 356; *Chicago etc. R. R. Co. v. Stafford County Comm'rs*, 36 Kan. 121; *East Norway Church v. Froislie*, 37 Minn. 447; *Oroville etc. R. R. Co. v. Plumas Co.*, 37 Cal. 354; *In re Shakopee Mfg. Co.*, 37 Minn. 91; *Wight v. Shelby R. R. Co.*, 16 B. Mon. 4; 63 Am. Dec. 522; *Society of Visitation v. Commonwealth*, 52 Pa. St. 125; 91 Am. Dec. 139. Therefore the existence of a corporation *de facto* is not disproved by showing that its articles of incorporation were not signed by the number of incorporators required by law: *Rondell v. Fay*, 32 Cal. 354; or did not state the place of residence of the directors: *Snider etc. Co. v. Troy*, 91 Ala. 224; 24 Am. St. Rep. 887; or that one of the signers apparently affixed his name as an officer of another association or corporation: *Keene v. Van Reuth*, 48 Md. 184; or that a certificate attached to such articles did not comply with the statute: *Lord v. Essex etc. Ass'n*, 37 Md. 320; or that such articles were not recorded in some office in which they should have been recorded, or though recorded, were copied into the wrong book: *Bushnell v. Consolidated Ice etc. Co.*, 138 Ill. 67; *Walton v. Riley*, 85 Ky. 413; or were not filed with the secretary of state as the statute prescribes: *Saunders v. Farmer*, 62 N. H. 572; *Portland etc. Turnpike Co. v. Bobb*, 88 Ky. 226; *Grand River Bridge Co. v. Rollins*, 13 Col. 4. Of the various defects in an attempted creation of a corporation perhaps the most serious is the failure to file the articles in the office of the county clerk or some other public office in which the law requires them to be deposited or filed. Certainly such failure is entitled to great weight in determining whether or not the persons exercising corporate powers in a corporate name were acting in good faith, but it is not necessarily conclusive of that question, for the failure to file such articles may be due to inadvertence or honest ignorance, and both the persons composing the membership of the corporation and all persons dealing with them may be without knowledge of any defect or irregularity in the proceedings for the formation of the corporation. There are decisions, however, which in effect affirm that in the absence of any filing of the articles of incorporation there is neither a charter nor a colorable attempt to obtain one by compliance with the general law, and therefore that the persons acting as a corporation are necessarily a mere association or partnership and can neither maintain nor defend an action on the ground that the association constituted a corporation *de facto*: *Abbott v. Omaha etc. Co.*, 4 Neb. 416. See also *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104; 41 Am. Rep. 85. We are inclined to



the opinion that these decisions are unsound, and that the failure to file the articles of incorporation, though indispensable to the creation of a corporation *de jure*, is not conclusive against the existence of a corporation *de facto*: *Bakersfield Town Hall Ass'n v. Chester*, 55 Cal. 99; *Granby etc. Co. v. Richards*, 95 Mo. 106.

*Estoppel to Deny Corporate Existence and Capacity.* — One of the reasons why the existence of a corporation *de facto* cannot be questioned otherwise than by *quo warranto* is that if any franchises have been usurped by it, they are the franchises of a sovereign by the usurpation of which the sovereign alone is injured and redress for which can be sought by the sovereign only, and that if the sovereign acquiesces and is indifferent, a private citizen is without remedy because he is without injury: *McFarlan v. Triton Ins. Co.*, 4 Denio, 397; *Duggan v. Colorado M. & I. Co.*, 11 Col. 115. In a large class of cases there is another, and perhaps, more potent reason. We refer to those cases in which the person seeking to deny the corporate existence has done something which renders such denial inequitable and therefore estops him from making it, and there doubtless may be cases of this class in which the corporate existence will not be suffered to be made an issue, although if the party were not estopped, he might be able to show that the assumed corporation had not even attained to the dignity and was not entitled to the privileges and remedies even of a corporation *de facto*.

If business has been done and corporate franchises exercised by an association of persons claiming to be a corporation and to be doing business as such, neither they nor the association will be permitted to question the corporate existence for the purpose of avoiding any contract entered into in the corporate name and apparently as a corporate act, nor of escaping any liability which would exist if the act done in the corporate name had been authorized by the pre-existence of corporate capacity: *Schenfler v. Grand Lodge A. O. U. W.*, 45 Minn. 256; *Foster v. Moulton*, 35 Minn. 458; *Society v. Morris Canal*, 1 N. J. Eq. 157; 21 Am. Dec. 41; *Rush v. Halcyon Steamboat Co.*, 84 N. C. 702; *Corey v. Morrill*, 61 Vt. 598.

A *Subscriber to the Stock of Corporation* may be sued either to enforce the payment of the amount of his subscription or to compel him to discharge his proportion of the corporate debts, if the statutes of the state impose personal liability upon stockholders, and in either event may seek to defend the action by showing that there is no corporation of which he could be a stockholder. If a contract of subscription has been entered into on the assumption that there is a corporation already existing with which the subscriber in effect contracts to pay the sum named in consideration that he shall become a stockholder to the amount of his subscription or payment, then, like other persons contracting with an assumed corporation, he is estopped from denying the capacity of the other contracting party to make and enforce such contract, and cannot in an action for such enforcement urge any defects in the organization of the corporation: *Stoops v. Greensburg etc. P. R. Co.* 10 Ind. 47; *Ensey v. Cleveland etc. R. R. Co.*, 10 Ind. 178; *Fort Wayne Turnpike Co. v. Deam*, 10 Ind. 563; *Chester etc. Co. v. Deves*, 16 Mass. 94; 8 Am. Dec. 128; *Wight v. Shelby R. R. Co.*, 16 B. Mon. 4; 63 Am. Dec. 522; *Busey v. Hooper*, 35 Md. 15; 6 Am. Rep. 350; *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; 86 Am. Dec. 128; *National etc. Ins. Co. v. Yeomans*, 8 R. I. 25; 86 Am. Dec. 610; *Anderson v. Newcastle etc. R. R. Co.*, 12 Ind. 376; 74 Am. Dec. 218; *Cravens v. Eagle Cotton Mills*, 120 Ind. 6; 16 Am. St. Rep. 298; *M. E. Church v. Pickett*, 19 N. Y. 485. "In the case of the associates in a corporation *de facto*, and those who have had dealings with it, there is a mutual estoppel,

resting upon broad grounds of right, justice, and equity. The first class are not suffered to deny their incorporation, nor the second to dispute the validity of their assertions of corporate powers. The state itself, it has been held in this state, may be precluded by its action or neglect from denying an incorporation, or from taking advantage of a forfeiture after long acquiescence": *Swartwout v. Michigan etc. R. R. Co.*, 24 Mich. 389, 395. If, however, the contract of subscription or the statute requires certain conditions precedent to the right to collect the subscriptions, these the corporation must establish, whether it is a corporation *de jure* or *de facto*: *Swartwout v. Michigan etc. R. R. Co.*, 24 Mich. 389, 395. If the contract of subscription is not made with a corporation assumed to be then existing, but is in the nature of an offer to take stock or to become a stockholder in a corporation to be formed, then the subscriber is not by such contract estopped from showing that the corporation which claims to have been formed and to be entitled to accept the offer and enforce the contract has not complied with the statute, and, therefore, is not in a condition either to accept or to enforce the subscription. It would be an unfair construction of the contract to say that by it the subscriber agreed to become a stockholder in a corporation *de facto* merely, whose exercise of franchises must be unlawful and liable to subject it to proceedings by *quo warranto* wherein its right to such exercise must be denied, its further proceedings enjoined, its business irrevocably destroyed, and perhaps a fine or other penalty imposed for its misconduct. Hence it is clear that such a subscriber is not estopped from denying the existence of a corporation *de jure*, unless he has participated in some corporate act or proceeding: *Schloss v. Montgomery etc. Co.*, 87 Ala. 411; 13 Am. St. Rep. 51; and his subscription cannot be enforced until a corporation *de jure* has been formed, such as must be presumed was contemplated when the subscription contract was executed: *Dorris v. Sweeney*, 60 N. Y. 463; *Indianapolis F. & M. Co. v. Herkimer*, 46 Ind. 142; *Williams v. Franklin T. A. Ass'n*, 26 Ind. 310; *Nelson v. Blakey*, 47 Ind. 38; *Thompson v. Reno Bank*, 19 Nev. 103; 3 Am. St. Rep. 797; *Marshall Foundry Co. v. Killian*, 99 N. C. 501; 6 Am. St. Rep. 539. If the action is against the stockholders to enforce their personal liability for their proportion of the corporate obligations, it is sufficient to show that there was a doing of business in an assumed corporate capacity, and that the defendants knowingly occupied the position of shareholders. They are then estopped from denying their liability on the ground that the alleged corporation was not regularly formed and had not the right to do business or incur the obligation for which the defendants are sought to be held answerable: *Rikhoff v. Brown's etc. Co.*, 68 Ind. 388; *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149; *Aultman v. Waddle*, 40 Kan. 195; *McDonnell v. Alabama etc. Ins. Co.*, 85 Ala. 401; *McCarthy v. Lavasche*, 89 Ill. 270; 31 Am. Rep. 83. Nor will such defendants be allowed to assail the law under which they and the corporation acted on the ground that it was unconstitutional and for that reason invalid: *McCarthy v. Lavasche*, 89 Ill. 270; 31 Am. Rep. 83; *McDonnell v. Alabama etc. Ins. Co.*, 85 Ala. 401.

If a contract is made by what purports to be a corporation, it is beyond controversy that in an action by such corporation or its assignee upon such contract, its force cannot be avoided nor its obligation denied because of any defect in the organization of the corporation, and that he who contracted with the assumed corporation is estopped from denying its corporate existence and capacity: *Pacific Bank v. De Ro*, 37 Cal. 538; *Jones v. Kokomo Building Ass'n*, 77 Ind. 340; *Merchants' etc. Bank v. Stone*, 38 Mich. 779; *Snider etc. Co. v. Troy*, 91 Ala. 224; 24 Am. St. Rep. 887, and note, 893; *Fresno Canal etc.*

*Co. v. Warner*, 72 Cal. 379; *Wood v. Kingston etc. Co.*, 48 Ill. 356; 95 Am. Dec. 554; *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405; *Camp v. Byrne*, 41 Mo. 525; *Congregational Society v. Perry*, 6 N. H. 164; 25 Am. Dec. 455; *Cochran v. Arnold*, 58 Pa. St. 399; *McBroom v. Lebanon*, 31 Ind. 268; *Spahr v. Farmers' Bank*, 94 Pa. St. 429; *Pattison v. Albany Building etc. Ass'n*, 63 Ga. 373; *Baker v. Neff*, 73 Ind. 68; *Boise City Canal Co. v. Pinkham*, 1 Idaho N. S. 790; *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101; *Butchers' etc. Bank v. McDoland*, 130 Mass. 264; *Toledo etc. R. R. Co. v. Johnson*, 55 Mich. 456; *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16; *Commercial Bank v. Pfeiffer*, 108 N. Y. 242; *Cravens v. Eagle etc. Co.*, 120 Ind. 6; 16 Am. St. Rep. 298; *Winget v. Quincy etc. Ass'n*, 128 Ill. 67; *French v. Donohue*, 29 Minn. 111; *Johnston etc. Co. v. Clark*, 30 Minn. 308; *New Haven Wire Co. Cases*, 57 Conn. 352.

It, however, the corporation is not seeking the enforcement of the contract, but, on the other hand, such enforcement is sought by the other contracting party in an action against the members of the corporation in which he insists that there was no corporation, and therefore that the persons who claimed to be stockholders were mere partners, and liable as such, the authorities are not equally harmonious. If the contract is such as recognizes the liability of the corporation, and it and other admissible evidence taken as a whole show that at the time the contract was made the plaintiff understood that he was contracting with a corporation and for a corporate liability, then the better view, in our judgment, is that he cannot recover, both because he is estopped by his contract, and because to permit his recovery as against a partnership is to give him the benefit and to impose on his adversaries the burden of a different contract from that which both he and they intended should be executed: *Merchants' etc. Bank v. Stone*, 38 Mich. 779; *Blanchard v. Kaull*, 44 Cal. 440; *Snider etc. Co. v. Troy*, 91 Ala. 224; 24 Am. St. Rep. 887; *Whitney v. Wyman*, 101 U. S. 392; *First Nat. Bank v. Almy*, 117 Mass. 476; *Fay v. Noble*, 7 Cush. 188; *Stout v. Zulick*, 48 N. J. L. 598; *Planters' etc. Bank v. Padgett*, 69 Ga. 159; *Vanneman v. Young*, 52 N. J. L. 403. Other decisions, controlled very largely by local statutes declaring that a corporation shall not do any business until certain prerequisites are complied with, have affirmed that an ineffectual effort to create a corporation, followed by the transaction of business in the corporate name, results in the personal liability as partners of the members or shareholders of the assumed corporation: *Garnett v. Richardson*, 35 Ark. 144; *Bigelow v. Gregory*, 73 Ill. 197; *Coleman v. Coleman*, 78 Ind. 344; *Ferris v. Thaw*, 72 Mo. 446; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104; 41 Am. Rep. 85; *Abbott v. Omaha etc. Co.*, 4 Neb. 416; *Hurt v. Salisbury*, 55 Mo. 311; *Walton v. Oliver*, 49 Kan. 107; *post*, p. 355; *Heinig v. Adams etc. Mfg. Co.*, 81 Ky. 300; *Unity Ins. Co. v. Cram*, 43 N. H. 636.

## HARRIS v. FOSTER.

[97 CALIFORNIA, 292.]

**LANDLORD AND TENANT—RENT, PAYMENT OF IN ADVANCE, WHEN DOES NOT PROTECT TENANT.**—Payment of rent in advance cannot protect a tenant against the demands of a mortgagee whose mortgage is of record, and who has recovered judgment foreclosing it, after giving proper notice of the pendency of his suit, and who, after such payment, becomes a purchaser of the mortgaged premises at a sale for the satisfaction of his judgment.

**COTENANCY.**—IF THE INTEREST OF ONE COTENANT IS SOLD AT AN EXECUTION SALE, a tenant holding under a lease from all of the cotenants must account to a purchaser at such sale for a moiety of the rents and profits under a statute entitling the purchaser at such a sale to recover the value of the use and occupation of the property from the date of the sale from a tenant in possession thereof.

**LANDLORD AND TENANT.**—TENANT CONTINUING IN POSSESSION after the expiration of his lease does not cease to be a tenant nor acquire any right to use the property without paying therefor.

*B. F. Thomas*, for the appellant.

*A. C. Freeman*, for the respondent.

DE HAVEN, J. On March 12, 1888, L. D. Stone and his daughter, Harriet, each owned an undivided half of the Sisquoc rancho, in Santa Barbara County. Upon that day the father mortgaged his interest therein to the plaintiff in this action. In January, 1890, the plaintiff commenced an action to foreclose this mortgage, and, at the same time filed and recorded a notice of the pendency thereof. Stone was thereafter declared insolvent, and one Bush was appointed his assignee, and as such was made a party to the foreclosure suit. Judgment of foreclosure was entered in that action September 1, 1890, and two days thereafter, Bush, the assignee of Stone and F. W. Burke, as the guardian of Stone's daughter, Harriet, executed to the defendant a lease of lots 4 and 6 of the Sisquoc ranch, giving him the right to pasture his stock thereon from that date until January 1, 1891, and the defendant went into possession under his lease, paying the rent in advance in accordance with its terms, and occupied the premises until February 1, 1891, and thereafter, until April 1, 1891, under an agreement made with the guardian of Harriet Stone, as to her undivided interest therein. On October 6, 1890, the land described in the mortgage made by Stone to the plaintiff was sold under the judgment of foreclosure, and the plaintiff became the purchaser at such sale, and as there was a failure to



redeem from this sale, he received the sheriff's deed therefor April 14, 1891.

This action was brought to recover from the defendant, as tenant in possession, one half the value of the use and occupation of the property from the date of the sale under the judgment of foreclosure until April 1, 1891.

The court below found the facts as above stated, and gave judgment in favor of plaintiff for one half the value of the use and occupation of the land from the date of his purchase until February 1, 1891, the value of its use during the time it was occupied by defendant under the lease made to him on September 3, 1890, by the assignee of Stone and the guardian of Harriet Stone, being the amount reserved in that lease. The defendant appeals, and claims that the findings do not sustain the judgment appealed from.

1. The defendant contends that as he leased the land before it was purchased by the plaintiff at the foreclosure sale, and paid to the then owners the rent in advance for the whole term, in accordance with the agreement contained in the lease, that he is not liable to the plaintiff, as successor in interest of one of his lessors, for any portion of the value of the use and occupation of the premises under that lease; and to sustain this position defendant cites section 1111 of the Civil Code, which is as follows:—

“Sec. 1111. Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenants; but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage thereby.”

The language of the section just quoted is plain, and, as held in the case of *Dreyfus v. Hirt*, 82 Cal. 621, the last clause thereof affords “protection to the tenant who pays rent to his landlord before notice of the grant of the reversion”; but it has no application to the facts as presented here. Not only was the mortgage of plaintiff on record, but a judgment foreclosing it, as against one of the defendant's lessors, had been entered before the defendant obtained his lease or paid any rent thereunder. This being so, it must be held that the defendant was not without notice of the rights of plaintiff under his mortgage and the judgment foreclosing it; but, on the contrary, that he accepted the lease and paid the rent with knowledge that plaintiff then had the right to have an undivided half of the land so leased sold to satisfy the judgment of foreclosure, and that “the purchaser, from the time of the

sale until a redemption," would be "entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof": Code Civ. Proc., sec. 707. The plaintiff having become the purchaser of the land under a decree foreclosing a mortgage made long before the date of defendant's lease, and of which mortgage the defendant had notice, it is no defense to this action that defendant paid the rent in advance. The lessor, to whose title plaintiff has succeeded, was not entitled to the rent accruing, or to the value of the use and occupation of the property, subsequent to the sale under the judgment of foreclosure, unless such lessor effected a redemption from the sale; and the payment of rent for the period extending beyond the date of such sale was made by defendant at his peril. This necessarily results from the well established rule that a subsequent grant or lease of mortgaged premises is subject to the prior mortgage, if the purchaser or lessee had either actual or constructive notice of such mortgage. If the law were otherwise, it would be in the power of the mortgagor to materially diminish the value of the mortgaged property as security for the debt for which the mortgage was given, by simply leasing it for a long period and collecting the rent in advance, or by leasing it for such period for a nominal rent. It was held in the case of *McDevitt v. Sullivan*, 8 Cal. 593, in accordance with the views we have here expressed, that where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant, that the purchaser under the mortgage sale can require the tenant to pay the rent over again.

We think the court below was clearly right in holding that the defendant was liable to the plaintiff for his proportion of the value of the use and occupation of the premises during the time defendant was in possession under the lease made to him by Stone's assignee and the guardian of the other cotenant.

2. The defendant continued in possession for one month after the expiration of the lease just referred to, and the court below found the value of the use and occupation for that period to be one hundred dollars, and also gave judgment against defendant for one half that sum. This ruling of the court was right. The defendant did not, by holding over, cease to be a tenant in possession, or acquire any right to use the plaintiff's property without paying for it.

As to the other points made by appellant, it is only neces-

sary to say that the findings are within the issues made by the pleadings, and fully sustain the judgment.

Judgment affirmed.

McFARLAND, J., and FITZGERALD, J., concurred.

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**LANDLORD AND TENANT—TENANT NOT PROTECTED BY PAYMENT OF RENT IN ADVANCE.** — A tenant who leases land after the filing of a *lis pendens* to foreclose a mortgage thereon, although he has paid rent for a year in advance, may be compelled to pay a reasonable rent to a receiver for the use of the premises after his appointment: *Gaynor v. Blewett*, 82 Wis. 313; *ante*, p. 47, and note.

**LANDLORD AND TENANT—HOLDING OVER—RIGHTS OF TENANT:** See extended note to *Daniels v. Brown*, 69 Am. Dec. 508. A tenant holding over after the expiration of his term cannot deny his landlord's title: *Emerick v. Taverer*, 9 Gratt. 220; 58 Am. Dec. 217, and note; but in such a case a tenancy by implication arises, and the tenant is subject to the conditions and covenants of the original lease and the landlord entitled to the rent after the expiration of the term: *Blumenberg v. Myres*, 32 Cal. 93; 91 Am. Dec. 560, and extended note; *Crommelin v. Thiess*, 31 Ala. 412; 70 Am. Dec. 499, and note; *De Young v. Buchanan*, 10 Gill & J. 149; 32 Am. Dec. 156, and note; *Haynes v. Aldrich*, 133 N. Y. 287; 28 Am. St. Rep. 636, and note.

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## SCARF v. ALDRICH.

[97 CALIFORNIA, 360.]

**GUARDIAN'S SALES.—PROCEEDINGS BY A GUARDIAN FOR THE SALE OF THE ESTATE OF HIS WARD ARE NOT ADVERSE,** but are in effect proceedings by him and for his benefit. The minor is in court by the filing of his petition and thereby submits his property to the jurisdiction of the court. The order of sale is not against or adverse to him, but is the granting of his request.

**GUARDIAN'S SALES.** — The fact that an order to show cause why a guardian should not be granted authority to sell the real property of his ward was set for hearing at a time less than four weeks after the making of such order, when the statute requires that such hearing shall not be less than four nor more than eight weeks from the time of making the order, does not render void the order of sale based upon the order to show cause, if the statute does not require any notice of the order nor of the application to sell his property to be served upon the minor.

**GUARDIAN'S SALES.** — A DEFECTIVE DESCRIPTION OF REAL PROPERTY IN A GUARDIAN'S PETITION for an order of sale and also in the order to show cause does not affect the jurisdiction of the court nor the validity of the sale if the property was sufficiently described in the order of sale.

**GUARDIAN'S SALES.** — IT IS THE EXECUTION OF THE DEED of the guardian and not the confirmation of the sale which vests title in the purchaser.

*Willis, Cole and Craig*, for the appellant.

*Elmer E. Rowell and C. W. C. Rowell*, for the respondent.

HAYNES, C. This action is to quiet title, and involves the validity of a sale of the premises in question by the guardian of the plaintiff to the defendant.

The complaint is in the usual form, alleging ownership in fee, that plaintiff is entitled to the possession, that defendant claims an interest adversely to the plaintiff, and that such claim is without right.

Findings and judgment passed for the plaintiff, and defendant appeals from the judgment upon the judgment roll, and a bill of exceptions setting out the evidence.

Elizabeth Wagner, the guardian of the plaintiff, filed a petition in the probate court on November 20, 1879, praying for an order to sell the premises in controversy. This petition set out facts showing the necessity for the sale of the premises, which consisted of a part of a lot in the city of San Bernardino, and no question is made as to its sufficiency, except as to the description of the premises sought to be sold.

Upon this petition the court, on the same day, made an order requiring all persons interested to show cause before the court, on the thirteenth day of December, 1879, why an order of sale should not be granted; and no objection having been made, an order of sale was granted on the day last named.

The premises were subsequently sold to the defendant under this order, and the sale was confirmed March 5, 1880, and on the next day the guardian executed and delivered to the defendant a deed of conveyance therefor.

The respondent's principal contention is, that the order to show cause did not conform to the statute; that, therefore, the court did not acquire jurisdiction, and that all subsequent proceedings were void, and did not divest the title of the plaintiff.

Section 1782 of the Code of Civil Procedure then provided (as it does now) that the time fixed in the order for the hearing should not be "less than four nor more than eight weeks from the time of making such order to show cause why an order should not be granted for the sale of such estate."

Sections 1783 and 1784 of the Code of Civil Procedure as they then existed were as follows:—

"Sec. 1783. A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least three successive weeks



in a newspaper printed in the county, or if there be none printed in the county, then in such newspaper as may be specified by the court or judge in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published.

"Sec. 1784. The probate court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner, and of the next of kin, and of all other persons interested in the estate who oppose the application."

This order was published four times, the first publication on November 21st, and the last December 12th. The statute requiring three weeks' publication was therefore complied with.

From the date of the order to and including the day of hearing, there was but twenty-three days, whilst there should have been not less than four weeks, or twenty-eight days, and for that reason respondent contends that the order was void, and that the court acquired no jurisdiction.

That the order was erroneous is evident; but the sole question is, whether the court had jurisdiction to order the sale; for whatever errors may have occurred in the proceedings, if the court acquired jurisdiction the sale of the real estate was not void, and the title passed to the purchaser.

It is contended by respondent that proceedings by a guardian for the sale of the ward's estate are adverse to the ward; that the order to show cause is in the nature of a summons; and that a substantial compliance with the statute is a prerequisite for obtaining authority to proceed.

Respondent's principal error lies in the first part of his contention, viz., that the proceedings are adverse to the ward; for in fact the proceedings are by the ward and for his benefit.

Our statute does not require that notice shall be given to or served upon the ward, thus emphasizing what is apparent from the nature and object of the proceeding, and clearly distinguishing it from a proceeding by an administrator to sell the real estate of the intestate to pay debts, which is clearly adverse to the heir, and therefore a valid and sufficient notice to the heir is essential to give the court jurisdiction over him as a party to the proceeding. But in the case of guardians' sales, the minor is in court by the filing of the

petition, and submits his property to the jurisdiction and order of the court. An order for the sale of the property is not an order against or adverse to the minor, but is a granting of his request. It is not a judgment *in personam*, but operates only on the property, and is therefore *in rem*.

In the case of *Gager v. Henry*, 5 Saw. 243, the order to show cause was directed to be published "for four successive weeks," while the proof of publication showed that it was only published three weeks. The court said: "This, at least, is a serious irregularity; and if the jurisdiction of the court did not attach upon the filing of the petition, but until due service of the prescribed notice of the time and place of the hearing on the petition, the subsequent proceeding would probably be void. . . . But the better opinion seems to be that the proceeding by a guardian to obtain a license to sell his ward's land is not one between adverse parties, and of which the court does not acquire jurisdiction until due service is made of the notice of application, but rather a proceeding *in rem* carried on by and in the interest of the ward through his legal representative,—his guardian." That court after citing several authorities, and among them *Pitch v. Miller*, 20 Cal. 381, concluded that the county court had acquired jurisdiction by the presentation of the petition, and therefore its judgment could not be questioned collaterally on account of any errors committed in the course of its subsequent proceedings.

In *Mohr v. Manierre*, 101 U. S. 418, a case originating in the state of Wisconsin, the guardian of a lunatic petitioned for the sale of his ward's property to pay debts. The order to show cause why the application should not be granted was required to be published at least four successive weeks. The order was not published for the full time. The order of sale was granted, and the property sold. After the recovery of the lunatic he brought a suit in ejectment to recover the land. The supreme court held: "1. That the publication of the notice of the hearing is only intended for the protection of parties having adversary interests in the property, and is not essential to the jurisdiction of the court; 2. That so far as the rights of the lunatic are concerned, the jurisdiction of the court attached upon filing the guardian's petition setting forth the facts required by the statute; 3. That, as against the lunatic, a license to sell is not rendered invalid by reason of an insufficient publication of notice of the hearing." See *syllabus*.

In another case, where property of a minor had been sold by guardian, the same court said: "In this form of proceeding, the guardian sufficiently and fully represented the infants, and no notice to them was required by the statute of Maryland or by any general rule of law": *Thaw v. Ritchie*, 136 U. S. 548. See also *Fitzgibbon v. Lake*, 29 Ill. 176; 81 Am. Dec. 302; *Mulford v. Beveridge*, 78 Ill. 458; *Mohr v. Porter*, 51 Wis. 487.

Respondent's citations from Freeman on Void Judicial Sales all refer to "proceedings in probate to obtain a sale of real estate as an independent adversary proceeding *in personam*"; but in the latter part of section 15 the author seems to concur in the views we have endeavored to express, and cites *Mohr v. Manierre*, 101 U. S. 418, and other cases.

*Haws v. Clark*, 37 Iowa, 356, cited by respondent, is not applicable. There the statute required notice to be served upon the minor, and to be returned and heard upon a regular term day. It was clearly in the power of the legislature to limit the exercise of jurisdiction by the court to a day in the regular term; and as to service of the notice upon the minor, the case can have no application here, as our statute does not require such notice.

*Kendall v. Miller*, 9 Cal. 592, and *De la Montagnie v. Union Ins. Co.*, 42 Cal. 292, were cases of the sale of personal property without any order of court. *Halleck v. Moss*, 17 Cal. 34), was a sale by executors upon insufficient notice. *Stilwell v. Swarthout*, 81 N. Y. 109, was an action by creditors of an estate against the administrators and heirs, and involved a question as to the validity of a sale of real estate by the administrators. The inapplicability of the foregoing cases cited by respondent is clear. The case of *Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617, cited by respondent several times, is not in point. That was an action in ejectment by a minor, by his guardian *ad litem*, to recover real estate. But in that case the land had been sold by the administrator to pay debts. Schellenberger was the general guardian of the infant as well as administrator of the estate. Section 159 of the probate act required a copy of the order to be served on the general guardian. It was contended that as Schellenberger was the petitioner and also the guardian, that he, as guardian, had notice; but it was held that Schellenberger could not represent both sides; that the minor had no guardian *quoad* the petition; and that, therefore, the knowledge of the guardian

was not equivalent to the notice required, the proceeding being hostile to the minor as heir of the estate. The question we are considering was not before the court in that case, and was not decided, but the reasoning of the court is entirely consistent with the view we have taken of the case at bar.

The petition of the guardian for the sale of these premises alleged that the property was unproductive, by reason of being in bad repair; that it was the only property of any character belonging to the minor; that there was no fund out of which the property could be put in repair, or to pay the taxes thereon; that it would be sold for taxes, unless sooner converted into money; that the minor was then but seven years of age; and that a sale was necessary to provide him with the common necessities of life.

These facts are nowhere contradicted in the record, and it may therefore be safely asserted that, if the guardian had not sold the property it would have been lost to the plaintiff by a sale for taxes, and that during his earlier years at least, he would have been compelled to subsist upon the charity of strangers or become an inmate of an almshouse. No question is made, either in the complaint or in the evidence, but that the full value of the property was realized, or that fraud of any character intervened, nor that he has not had the full benefit of the proceeds; though if it were otherwise, it would not affect the question here. While courts of equity are zealous in their efforts to protect the rights and property of infants, and all others who are not *sui juris*, they are equally unwilling, unless compelled by some strict rule of law, to make their incapacity a shield or ground for doing wrong. Certainly, in this case, there is nothing to commend the respondent to the sympathies of a court of equity to which he has resorted. It may be that the next of kin, or others interested in the estate of the minor (if there are such) are not bound, for want of proper notice; but that does not aid the plaintiff, nor would the court subserve the best interests of wards by making the titles of purchasers at guardians' sales so uncertain as to prevent the obtaining of a fair price when necessity compels a sale.

Another ground upon which respondent contends that the court had no jurisdiction requires notice, viz., that the petition and order to show cause were void because of an insufficient description of the real estate sought to be sold. The description was as follows: "A part of lot number five, in block num-



ber twelve, of the town of San Bernardino, Cal." In the order of sale, however, the description was specific, giving a precise starting point, and describing the premises by metes and bounds. In the complaint in this case, the starting point, instead of being "at the northeast corner of the lot owned by L. Caro," as in the order of sale, is fixed by reference to a certain corner of lot five. There is no allegation or evidence that the premises sold under the description given in the order of sale are not identical with those described in the complaint; and hence, if the court had jurisdiction to sell the premises described in the order, there can be no partial recovery by the plaintiff.

That the defective description in the petition and order to show cause did not affect the jurisdiction of the court, or the validity of the sale by the correct description, see *Fitch v. Miller*, 20 Cal. 352; *Estate of Boland*, 55 Cal. 312; *Richardson v. Butler*, 82 Cal. 174; 16 Am. St. Rep. 101; *Gager v. Henry*, 5 Saw. 239.

The case of *Wilson v. Hastings*, 66 Cal. 244, cited by respondent was one where the sale was by the executor of an estate, and as to the heir was an adverse proceeding, and hence is widely distinguished from this case, where the proceeding was *ex parte* by the minor, for his own benefit. There was no inconsistency between the general description in the petition and the definite description in the order of sale. The property mentioned in the petition is the property that was sold.

Other irregularities are pointed out by respondent which would have required a reversal of the proceedings upon appeal; but it is not necessary to notice them, as they occurred after the court acquired jurisdiction, and hence do not affect the validity of the sale upon collateral attack.

Counsel for respondent quotes the concluding part of a stipulation in the case, made to relieve plaintiff of the necessity of proving title to him prior to the guardian's sale, viz.: "And no question is made as to the title of plaintiff and his ownership in all of the premises described in the complaint up to and including March 5, 1880"; and contends that this stipulation "lets the defendant out," because, it is said, "if plaintiff was the owner up to and including March 5, 1880, the decree of confirmation cuts no figure whatever."

The obvious intention of the stipulation was to concede that prior to the time when title would have vested in the defendant under the sale to him if the proceedings were valid, the

plaintiff was the owner; thus leaving the sole question whether or not his title was divested by these proceedings. This is clearly shown by the body of the stipulation, which admits that the plaintiff was seised in fee "prior to the decree of confirmation, . . . and prior to the execution of the deed of Elizabeth Wagner, then guardian," etc.

This deed was made March 6, 1880, and as plaintiff's title was divested by the deed, and not by the confirmation of the sale, the stipulation, even as construed by respondent, cannot aid him: *Doe v. Jackson*, 51 Ala. 514.

All of the proceedings had in the probate court, except the petition, were objected to as offered by the defendant, and the objections were sustained by the court, as was also the objection to the deed made by the guardian to the defendant. As those objections are fully covered by what has been said, it is not necessary to notice them further.

The court erred in sustaining these objections, and the judgment should be reversed.

BELCHER, C., and TEMPLE, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed.

DE HAVEN, J., MCFARLAND, J., FITZGERALD, J.

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GUARDIAN'S SALES — WHETHER ADVERSE TO WARD. — Minors need not be made parties to a proceeding by their guardian to procure an order of sale of their property, as the application is for their benefit: *Fitzgibbon v. Lake*, 29 Ill. 165; 81 Am. Dec. 302, and note. The proceedings of a guardian to sell an infant's estate are not adverse proceedings to the infant, and will if regular bind the infant: *Gibson v. Roll*, 27 Ill. 83; 81 Am. Dec. 219, and note. See *Loyd v. Malone*, 23 Ill. 43; 74 Am. Dec. 179, and note.

GUARDIAN'S SALES — DESCRIPTION OF PROPERTY. — A petition for the sale of real estate by a guardian if defective in regard to the description of part of the land, is good for so much of the land as it correctly describes: *Frazier v. Steenrod*, 7 Iowa, 339; 71 Am. Dec. 447. A notice of sale by a guardian which correctly describes by government subdivisions land belonging to the ward, and published in the county where the land so described is situated, is not void though the description fail to name the county and state: *Richardson v. Farwell*, 49 Minn. 210.

GUARDIAN'S SALES — GUARDIAN'S DEEDS WITHOUT CONFIRMATION. — A guardian's deed to land sold by him is void and conveys no title unless the guardian makes a report of the proceedings and a confirmatory order is entered by the court authorizing the sale: *Penn v. Heisey*, 19 Ill. 295; 68 Am. Dec. 597, and note. A guardian's deed executed in pursuance of an unconfirmed guardian's sale passes no title: *Alexander v. Hardin*, 54 Ark. 430. See *Young v. Lorain*, 11 Ill. 624; 52 Am. Dec. 463.

## NORTON v. ATCHISON, TOPEKA, AND SANTA FE RAILROAD COMPANY.

[97 CALIFORNIA, 388.]

**JUDGMENT — VACATING. — AN AFFIDAVIT OF MERITS IS NOT ESSENTIAL to a motion to vacate a judgment if it appears that the court did not have jurisdiction to render it.**

**JUDGMENT — VACATING FOR CAUSE OTHER THAN MISTAKE OR EXCUSABLE NEGLIGENCE. — If a motion is made to vacate a judgment because it is against a foreign corporation and is based upon service of process on one on whom such service could not be lawfully made, such motion does not fall within the class in which the court is authorized to grant relief because of defendant's mistake or excusable neglect, and the time within which it can be made is not affected by the limitation of time imposed upon motions to vacate judgments because of such mistake or neglect.**

**A JUDGMENT MAY BE VACATED ON MOTION and without an independent suit, if such motion is made within a reasonable time and upon the grounds that the court pronouncing judgment had not acquired jurisdiction over the defendant.**

**JUDGMENT FOUNDED UPON FALSE RETURN OF SERVICE OF PROCESS may be vacated on motion interposed within a reasonable time.**

*William N. Fuller*, for the appellant.

*A. Brunson, and Hunsacker, Britt, and Goodrich*, for the respondent.

McFARLAND, J. This is an appeal by plaintiff from an order of the superior court granting a motion of defendant to quash the service of summons, to set aside and vacate the default of defendant, and to set aside and vacate the judgment which had been entered in the case in favor of plaintiff. The appeal was heard in department two, and the order of the court below was there, upon an opinion prepared by Belcher, C., affirmed. Upon a petition by appellant, urging strongly that there was no authority in the court to grant said motion, a hearing was ordered in bank. After a further and full consideration of the point made, we are satisfied that a correct conclusion was reached in department.

The respondent is a corporation formed under the laws of Kansas, and having its principal place of business in and being a resident of that state. The action, which is *in personam*, was commenced in San Diego County, and the sheriff of that county returned that he had personally served the summons, on the 19th of November, 1890, on K. H. Wade, general manager of defendant, "by delivering to said defendant, personally, in the County of San Diego, a copy of said summons,"

etc. No appearance having been made by respondent within ten days, its default was entered by the clerk on the first day of December, 1890. On the third day of December, 1890, judgment was entered by the court against defendant, the judgment reciting that defendant had been regularly served with summons. Within ten days thereafter, to-wit, on December 12, 1890, respondent, by its attorneys, served and filed a notice that "the defendant in the above-entitled action will appear for the purpose of this motion only, and for no other purpose, and will move the court to set aside and recall the execution heretofore issued in this case, and to set aside the judgment and default heretofore entered on the first day of December, 1890, and to quash service of summons herein, upon the ground that said service is not such as is authorized by law, and that said court has no jurisdiction of defendant to enter said default or judgment, and that the same is void." Affidavits were filed by both parties on the hearing of this motion, but appellant objected to the entertainment of any such affidavits on the part of respondent. On the 23d of January, 1891, the court granted a motion quashing the service of the summons, vacating the judgment, etc. From that order plaintiff appeals.

It is contended strenuously by appellant that such a motion can be maintained only when based upon section 473 of the Code of Civil Procedure; that this motion is not based upon that section, and is not accompanied by any affidavit of merits, which affidavit has been held to be necessary when proceeding under the section; and that, under that section, a party can be relieved only upon an offer to appear and plead to the merits. Appellant relies, on this point, upon *People v. Harrison*, 84 Cal. 608; *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448; *People v. Goodhue*, 80 Cal. 200; and some other cases cited. But the cases cited go no further than to hold that a motion to vacate a judgment cannot be made after the expiration of six months, or with respect to one ground for setting aside the default, after one year, unless it be void on its face. The recent case of *Jacks v. Baldez*, 97 Cal. 91, might also be cited in support of what appellant deems to be the correct position. But those authorities relate to cases which come clearly within, or should have been brought under, the provisions of said section 473. The main provision of that section is, that a court may relieve a party from a judgment taken against him "through his mistake, inadvertence, sur-



prise, or excusable neglect"; and it is quite clear that the provision just quoted has no application to the ground upon which respondent moved in the case at bar. Defendant here is not asking relief from its neglect or mistake or default of any character; its contention is, that the court has no jurisdiction over it, and no power to compel it to answer to the action. It does not ask to be allowed to come in and answer, but contends that, in its situation, it cannot be called upon to answer; therefore there can be demanded of it no affidavit of merits. In the cases cited the parties making application to set aside the judgment confessed some neglect or misconduct from which they sought to be relieved, and thus come clearly within the provisions of said section, and, of course, were compelled to comply with the provisions of the section, under the construction which the court had given them. Moreover, they were residents of the state, and within the territorial jurisdiction of her courts; while in the case at bar respondent is a nonresident, and beyond such jurisdiction, except so far as the statute of this state can provide and has provided for jurisdiction under special circumstances. It was clearly, then, the duty of the court to quash the service of the summons, when it appeared to it that the return of such service was false; and the vacating of the judgment was an incident which necessarily followed, provided that the proceeding by motion by which this result was sought to be accomplished was a proper one.

In Freeman on Judgments, commencing at paragraph 105, there is a chapter on "Vacating judgments under statutes." and various statutes of different states, similar to section 473 of our code, are reviewed, and the distinction between proceedings under those statutes and proceedings independent of them is stated; and in paragraph 108 the author says: "In all cases an affidavit of merits must be made and filed, except where it appears that the court had never acquired jurisdiction of the moving party, and that its judgment against him is void; but in this class of cases he is entitled to relief independently of those statutes." In *Bell v. Thompson*, 19 Cal. 707, the court makes this same distinction (section 68 of the practice act being at the time of that decision the same, substantially, as the present section 473 of the code), and also in *People v. Greene*, 74 Cal. 400, 5 Am. St. Rep. 448; in *Savings etc. Soc. v. Thorne*, 67 Cal. 53, and other cases. See also *Ladd v. Stevenson*, 112 N. Y. 325; 8 Am. St. Rep. 748;

and *Dobbins v. McNamara*, 113 Ind. 54; 3 Am. St. Rep. 626. In *Cowles v. Hayes*, 69 N. C. 410, the court in discussing a motion similar to that in the case at bar, say: "The motion is not made under section 133 of the Code of Civil Procedure; the plaintiff does not ground his claim to relief on his own mistake, inadvertence, surprise, etc.; but he puts it on the ground that the judgment of which he complains was irregular, and against the course and practice of the court."

Appellant contends that there should have been an independent action brought to set aside the judgment, but we do not think so. The general common-law rule is, that courts have power over their judgments during the entire term at which they were rendered, and may vacate them on motion: *Freeman on Judgments*, sec. 90, et seq. Many of the courts have vacated judgments after the expiration of the term; but it was established in California that such jurisdiction was exhausted at the close of the term, unless kept alive by some motion or appropriate proceeding during the term: *Bell v. Thompson*, 19 Cal. 706; *Shaw v. McGregor*, 8 Cal. 521; *Robb v. Robb*, 6 Cal. 21; *Baldwin v. Kramer*, 2 Cal. 582. Under our present system terms of court are abolished, and a motion to set aside a judgment would have to be made within a reasonable time: *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448; and perhaps, following the analogy of section 473, six months might be considered the extent of a reasonable time for any motion; but however that may be, there is no question in the case at bar as to reasonable time, because the motion was made within ten days after the judgment. It is admitted that a motion to vacate a judgment is a direct and not a collateral attack; and if, as we hold, a motion was the proper proceeding in this case, of course any fact going to show the invalidity of the judgment could be presented at the hearing of such motion. Where a return shows that a non-resident was personally served with summons within the state, and it is made to appear to the court that such return was false, it would be strange if within a reasonable time the court could not upon application set aside the service, or the false return of service, and vacate the judgment. There is no reason why in such a case the nonresident should be put to the necessity of an independent action.

We hold, therefore, that where a nonresident has not been personally served within the state, the court has power, within a reasonable time, when it finds that it has been deceived by

a false return of such service within the state, to quash the service of summons and vacate the judgment. This is as broad a statement of the rule as the facts of this case require; and so holding, we think that the order of the court below should be affirmed.

With respect to the question of fact, whether or not the respondent in the case at bar was served within the state, the evidence before the lower court was conflicting, and we would not be warranted in disturbing the finding of the court as to that fact. Upon this point we are satisfied with the said opinion prepared by Commissioner Belcher in Department.

The order appealed from is affirmed.

PATERSON, J., DE HAVEN, J., and HARRISON, J., concurred.

BEATTY, C. J., concurring. Before terms of court were abolished, it is clear that a default judgment entered upon a false return of personal service of summons could have been set aside upon motion made within the term. The abolition of terms cannot be held to have abolished the remedy by motion, but only the limitation of time within which the motion must be made; and if, under section 473 of the Code of Civil Procedure, a defendant may be relieved on motion from a default judgment taken against him through his mistake or excusable neglect, provided his motion is made within a reasonable time, not exceeding six months, *a fortiori* he should be relieved on motion made within the same time when he has been guilty of no neglect.

None of the decisions cited are in conflict with this view. They merely hold that judgment will not be vacated upon motion made after the lapse of the prescribed period, unless it is void upon its face, which is quite consistent with the proposition that a motion made within the statutory period may be granted as well when the defendant is wholly without fault as when he has been guilty of neglect, mistake, etc.

As to the conditions upon which the order should be made, the statute only requires the imposition of such terms as may be just; and when, as in this case, the court finds that the defendant has never been brought within its jurisdiction, it would not be just to require it to answer to the merits, or to make an affidavit of merits.

Upon these grounds I concur in the judgment.

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JUDGMENTS AGAINST FOREIGN CORPORATIONS — VACATING. — A judgment should be vacated on motion when it is against a foreign corporation and is

based upon service of process upon one who is shown by the affidavits not to have been its cashier, director, or managing agent: *Taylor v. Granite State etc. Ass'n*, 136 N. Y. 343; 32 Am. St. Rep. 749, and note.

JUDGMENTS. — PROPER MODE OF PROCEEDING TO VACATE a judgment is by a motion in the original action and not by a new and independent action: *Sullivan v. Shell*, 36 S. C. 578; 31 Am. St. Rep. 894; *Crocker v. Allen*, 34 S. C. 452; 27 Am. St. Rep. 831, and note; *Carter v. Rountree*, 109 N. C. 29; *Clark v. Deloach Mills etc. Co.*, 110 N. C. 111; *Grant v. Harrell*, 109 N. C. 78. See extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 104.

JUDGMENTS — FALSE RETURN OF SERVICE. — VACATING FOR: See *Cully v. Shirk*, 131 Ind. 76; 31 Am. St. Rep. 414, and note; *Reinhart v. Lugo*, 86 Cal. 395; 21 Am. St. Rep. 52, and note; *Dobbins v. McNamara*, 113 Ind. 54; 3 Am. St. Rep. 626, and note.

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## DRISCOLL v. MARKET STREET CABLE RAILWAY Co.

[97 CALIFORNIA, 553.]

STREET RAILWAYS when exercising due care are not responsible to a person who in a careless, reckless, absent-minded way runs suddenly in front of a moving car and is injured before there is time to stop it.

STREET RAILWAYS. — A PERSON IN CHARGE OF A STREET CAR HAS THE RIGHT TO ASSUME that people will not suddenly undertake to cross in front of it.

STREET RAILWAYS. — THE FAILURE TO RING A BELL AT A STREET CROSSING as required by a reasonable municipal ordinance is negligence and renders the company answerable to a person injured by an accident of which such failure was the proximate cause.

NEGLIGENCE CONTRIBUTORY, WHEN A QUESTION FOR THE JURY. — If a street railway car ran over a pedestrian at a street crossing, and there was a failure to ring the bell as required by a reasonable municipal ordinance, and the night was dark and foggy, the question whether the person injured was guilty of contributory negligence in attempting to cross in front of the car cannot be decided by the court as a matter of law, but should be submitted to the jury.

ORDINARY CARE is that degree of care which people of ordinarily prudent habits could be reasonably expected to exercise under the circumstances of a given case.

STREET RAILWAYS, CARE REQUIRED OF PEDESTRIANS AT CROSSINGS. — The care exacted of persons crossing ordinary steam railways running through the country at comparatively long intervals of time is greater and more strict than that exacted of persons crossing the streets of a crowded city over which street railways are operated.

STREET RAILWAYS CANNOT BE EXCUSED FROM RINGING A BELL at the crossing as required by a municipal ordinance because the hands of the gripman were necessarily otherwise engaged.

*Frank Shay*, for the appellant.

*Frank Sullivan*, for the respondent.

McFARLAND, J. On December 10, 1884, Alexander Driscoll was struck and killed by a car of defendant, at the inter-



section of McAllister and Larkin streets, in San Francisco; and his widow, as administratrix, brought this action to recover damages for his death. The jury returned a verdict for plaintiff in the sum of \$7,775, for which judgment was rendered. The defendant appeals from the judgment, and from an order denying a new trial. The only point urged by appellant is, that the evidence is insufficient to justify the verdict, the positions of appellant being that the evidence does not show that the accident was the result of any negligence of appellant, and does show that it was the result of the negligence of the deceased.

The question presented is certainly one of some difficulty. The rule is well established that this court will not disturb a verdict where there is a conflict of evidence on material points, and when there is evidence to support the verdict; but such conflict and such evidence must be real and substantial. When a jury catches at a mere semblance or pretense of evidence for the purpose of somewhat equalizing financial conditions by taking money from one party and giving it to the other without legal cause, the trial judge should, without hesitation, set the verdict aside; and in the event of his not doing so, this court will grant a new trial.

Street railroads are an established feature of modern city life. They are a convenience and a necessity to all classes of people, and are desired by all; but their operation on crowded streets is necessarily attended with considerable danger to pedestrians, a danger which all people are bound to know, and against which they should protect themselves by the use of at least reasonable caution. While, therefore, the owners of these railroads are to be held to due care in the management of their lines, they, when exercising such care, are not responsible in damages to a person who, in a careless, or reckless, or absent-minded way, walks suddenly in front of a moving car, and is injured before there is time to stop it. The person in charge of a car, with a clear track before him, has a right to assume that people will not suddenly undertake to cross in front of it; otherwise he could not make any headway, and no street-car line could be successfully operated, either for the profit of the owner or the convenience of the public; and the general rule is, that where the negligence of the injured party is a contributing, proximate cause of the accident, he cannot recover damages; but whether or not his negligence did so contribute in any particular case is gener-

ally one around which conflicting evidence will be gathered; and in such case a railroad company which was itself guilty of negligence at the time of the accident cannot often expect to be relieved from an unfavorable verdict.

Section 501 of the Civil Code provides that the speed of a street car shall not exceed eight miles an hour; and an ordinance of the city and county of San Francisco provides (substantially) that every car shall have attached to it a bell or gong of sufficient size and weight to be distinctly heard, when rung or sounded, at a distance of at least one hundred feet, and that the persons in charge of a car must keep the bell ringing, or the gong sounding, from a point twenty-five feet from a street crossing until the crossing shall have been passed.

In the case at bar, the deceased, at the time the car struck him, was walking northerly along the easterly crossing of McAllister Street where it intersects Larkin. On McAllister Street the appellant has two parallel tracks, on the northerly of which the cars going west run, and on the southerly the cars going east. The deceased was struck by a car going west, on the northerly track; and according to the custom of appellant, a car thus going comes to a standstill at a certain point called "stop," which is thirty-seven feet east of the center of the said crossing. After starting again it goes to a point called "let go," about five or six feet east of the crossing; and at the point "let go" the gripman suddenly releases the grip from the cable, and the car runs across Larkin Street from the impetus given by the cable, and without being attached to the latter. This is necessary, because the cable is crossed by another cable running along Larkin Street. The custom above stated was followed by the gripman of the car by which the deceased was killed.

There was some evidence that the car at the time of the accident was running faster than eight miles an hour, though such evidence was exceedingly slight. It is admitted that the rate of speed at which the cable itself ran was only eight miles; but two of the witnesses testified that after the car was released from the cable at the point "let go," it ran faster than the cable. The position of appellant that it was physically impossible for the car, after it was detached from the cable, to have run faster than the cable is hardly tenable; for there was a slight artificial down grade at that point for a few yards, one and seven eights inches from the "let go" to the

center of Larkin Street; but the testimony of the witnesses who swore to the increased speed was so unsatisfactory, and the increased speed itself so improbable, that a verdict founded on such speed alone as constituting negligence on the part of appellant could hardly be sustained.

But it is clear that the employees of appellant in charge of the car failed to ring the bell, as provided by said ordinance, and as due care required. There was a conflict of evidence as to whether or not the bell was rung at all until after the deceased was struck. Witnesses differed about it having been rung once just before or at the time the car started from the point "stop," thirty-seven feet away; but the evidence is uncontradicted (and the fact is admitted) that the bell was not rung after leaving said point until after the deceased had been struck. This was clearly negligence, because it was in violation of a reasonable ordinance, and also because the omission was, in itself, under the circumstances, careless: *Siemers v. Eisen*, 54 Cal. 418; *Higgins v. Deeney*, 78 Cal. 578; *Orcutt v. Pacific Coast R'y Co.*, 85 Cal. 291; *Shearman and Redfield on Negligence*, sec. 13.

It is true that failure to ring a bell or to comply with some other statutory requirement will not make a railroad company liable, if such failure is not the proximate cause of the accident, or if it was caused by the negligence of the injured party; and in the case at bar it is contended by appellant that it was the negligence of the deceased, and not the failure to ring the bell, that caused the injury. The contention is that upon the evidence, we must hold, as a matter of law, that the negligence of the deceased was the proximate cause of the injury; but, after a thorough examination of the record, we do not think that such contention can be maintained.

There is a conflict of evidence as to the actual conduct of the deceased and the circumstances under which he acted at the time of the accident. He was crossing McAllister Street from the south side, going north. It is beyond dispute that about that time another car of appellant came down McAllister Street, going east, and crossed said street on the south track, and stopped a few yards east of the crossing; although there is a conflict in the evidence as to the precise point which said car had reached when deceased started across the street. It was, however, clearly at a point where it was, to a greater or less extent (as it was farther east or west), an obstruction to the observation of the deceased. The jury had warrant in

the evidence to find that he started as soon as the east-bound car had passed the crossing; that the time was after daylight; and that the night was "dark and foggy," although there was a headlight on the car. The two tracks are about four and one half feet apart, and the deceased had nearly crossed the second or north track when the north side of the car struck him. One or two persons shouted to him to get out of the way, but it does not appear that he heard the warning.

Under these circumstances, — the appellant being in default for not giving the proper warning, — we think that the question whether deceased was guilty of contributory negligence was a proper one for the jury; that deceased cannot be held, as a matter of law, to have been so guilty; and that there was sufficient evidence to warrant the jury in finding that he was not. Counsel for appellant, in his very thorough and able brief, has cited a number of cases in which it was held that the plaintiff could not recover, because he had not exercised sufficient caution in attempting to cross a railroad track. Those were cases, however, where the accidents occurred on ordinary steam railroads running through the country at comparatively long intervals of time; and the rule there laid down can hardly be applied in all its strictness to street railroads in crowded cities, where a car that can be speedily stopped passes a crossing every two or three minutes, and where people necessarily cross the streets frequently and hurriedly: *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414; *Swain v. Fourteenth-Street R. R. Co.*, 93 Cal. 183; 1 Thompson on Negligence, 396, and cases there cited. Of course, if all people exercised the greatest care and caution in approaching and crossing railroad tracks, such accidents as the one here involved would rarely, if ever, occur; but the law does not expect or require such extreme care. Ordinary care is all that is required; and ordinary care is that degree of care which people of ordinarily prudent habits — "people in general" — could be reasonably expected to exercise under the circumstances of a given case; and considering all the evidence and circumstances in the case at bar, and particularly the fact that the deceased had a right to rely upon the usual and required signal of bell-ringing when a car is approaching a crossing, we cannot say that the jury abused its power in holding that the deceased was not guilty of contributory negligence. The judgment of the learned judge of the court below, who heard all the evidence and refused a new trial, is also



entitled to great consideration. It is, no doubt, what is sometimes called a "close case"; but, in our opinion, there is no such absence of substantial evidence to support the verdict as would warrant us in setting it aside.

There is nothing in the point that the gripman could not have rung the bell, because his hands were necessarily otherwise engaged. If it was not convenient for him to have performed that duty, the conductor should have done it; and it was no excuse that the conductor was temporarily absent from his post. Neither is there anything in the point that the ordinance requires, in terms, that the persons immediately in charge of the car, and not the company, shall give the warning.

The judgment and order appealed from are affirmed.

FITZGERALD, J., and DE HAVEN, J., concurred.

Hearing in bank denied.

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**STREET RAILWAYS. — A CHILD RUNNING IN FRONT OF A CABLE CAR CANNOT RECOVER** if the gripman operating the car was free from negligence: *Winters v. Kansas City etc. R'y Co.*, 99 Mo. 509; 17 Am. St. Rep. 591, and note; *Hestonville etc. R'y Co. v. Connell*, 83 Pa. St. 520; 32 Am. Rep. 472, and note. A person about to cross a street-railway track must look and listen to avoid walking directly in front of a moving car, and if he fails to do so he is guilty of contributory negligence and cannot recover for injuries received by being struck by the car: *Carson v. Federal Street etc. R'y Co.*, 147 Pa. St. 219; 30 Am. St. Rep. 727, and note; *Hinkle v. Richmond etc. R. R. Co.*, 109 N. C. 472; 26 Am. St. Rep. 581.

**STREET RAILWAYS — DUTY OF PERSON IN CHARGE OF CAR AT CROSSINGS.** A person in charge of a street car approaching a crossing must keep a vigilant watch for all persons approaching the track, and stop the car at the first appearance of danger: *Hays v. Granterville etc. R'y Co.*, 70 Tex. 602; 8 Am. St. Rep. 624; *Winters v. Kansas City etc. R'y Co.*, 99 Mo. 509; 17 Am. St. Rep. 591, and note. See also *Anderson v. Minneapolis etc. R'y Co.*, 42 Minn. 490; 18 Am. St. Rep. 525, and note.

**RAILWAYS — DUTY TO OBSERVE STATUTORY REQUIREMENTS. —** A railway company running trains over a track laid in the streets of a city, must observe the precautions to prevent accidents required by statute: *Railway Co. v. Wilson*, 90 Tenn. 271; 25 Am. St. Rep. 693; *Kutzenberger v. Lawo*, 90 Tenn. 235; 25 Am. St. Rep. 681, and note on the violation of an ordinance as evidence of negligence.

**NEGLIGENCE — ORDINARY CARE, WHAT IS. —** Ordinary care means that degree of care which an ordinarily careful person would exercise under like circumstances: *Winters v. Kansas City etc. R'y Co.*, 99 Mo. 509; 17 Am. St. Rep. 591; *Tetherow v. St. Joseph etc. R'y Co.*, 98 Mo. 74; 14 Am. St. Rep. 617, and note; *Dreher v. Fitchburg*, 22 Wis. 675; 99 Am. Dec. 91, and note; *Gunn v. Ohio etc. R. R. Co.*, 36 W. Va. 165; 32 Am. St. Rep. 842; and note.

## RILEY v. MARTINELLI

[97 CALIFORNIA, 575.]

**TRUSTS, CONSTRUCTIVE.** — If land is purchased in the name of one person but the consideration is paid by another, such land, though conveyed to the former, will be held by him in trust for the latter.

**A JUDGMENT OR EXECUTION LIEN ATTACHES ONLY TO THE REAL INSTEAD OF THE APPARENT** interest of the debtor, and a sale thereunder transfers no interest beyond that in fact held by the debtor, unless the purchaser buys in good faith and without any notice actual or constructive of some defect in the debtor's title.

**EXECUTION SALES.** — A JUDGMENT CREDITOR WHO PURCHASES AT A SALE UNDER HIS JUDGMENT and does not pay the purchase price otherwise than by a credit upon such judgment, is regarded as a purchaser in good faith and for value, and protected against all equities and defects in the title of which he has had no notice, actual or constructive.

**JURY TRIAL IN SUIT AT EQUITY.** — The refusal to give instructions to the jury in an equity case is not a cause of reversal if the court itself finds upon all the issues.

*Eugene Aram and Craig and Hawkins, for the appellant.*

*F. E. Baker, for the respondents.*

SEARLS, C. This action is brought to obtain a judgment decreeing Ellen L. Riley, the appellant, to be the owner of certain premises situate in Woodland, Yolo County; that a sheriff's sale thereof to defendant, F. Martinelli, be declared null and void, etc.

J. T. Riley, one of the defendants, and Ellen L. Riley, the plaintiff, were at the several dates herein mentioned husband and wife.

About January, 1880, plaintiff and her husband negotiated for the purchase of the premises in question, which negotiations culminated in the purchase and paying for the same by the plaintiff, who took a deed of conveyance therefor in the name of her husband, which deed was duly recorded in the office of the county recorder of the county of Yolo.

The purchase price of the land was \$375, and was paid by the plaintiff from her separate property. She also, according to her testimony, built a dwelling house upon the land, at an expense of one thousand dollars, which was also paid for by her out of her separate property.

Plaintiff and her husband, J. T. Riley, occupied the premises as a family residence up to the time of the levy of the execution hereinafter mentioned, and subsequent thereto, which was known to the defendant Martinelli, but there was nothing in the manner or method of the residence or occupa-

tion or use of the property which imparted or tended to impart notice to any person that plaintiff had or claimed to have any separate property, interest, or estate in or to said premises.

There was a private understanding between plaintiff and her husband, before the conveyance, that the title to the premises should be conveyed to the latter, and that thereafter, when plaintiff desired him to do so, he would convey to her. Plaintiff often requested her said husband to make such conveyance, but he failed and neglected so to do. Plaintiff stated to her friends that she claimed said premises as her property, but such claim was not openly proclaimed, was not known by the defendant Martinelli, or by the public generally.

Defendant Martinelli held a mortgage against property of the husband, J. T. Riley, other than the premises in question, which he foreclosed, and under which he sold, and there being a deficiency, judgment was docketed in his favor and against J. T. Riley, upon which judgment execution issued to the sheriff, who levied upon the premises in question in this action, and in due time, and after proper notice, sold the same as by law required, said Martinelli, the judgment creditor, becoming the purchaser for \$1,265.73, the amount of his judgment and costs.

A certificate of sale was issued to him as purchaser, and a duplicate thereof recorded in the office of the county recorder of the county of Yolo. The time for redemption expired July 10, 1891, and no redemption was made or had.

Before purchasing the property, Martinelli examined the records of the county, and found it stood in the name of the husband, J. T. Riley, and that there was a mortgage thereon executed by the latter.

The findings show that Martinelli, up to the time of his purchase, had no notice of any equitable claim of plaintiff in or to the premises. Martinelli received a sheriff's deed of the premises after the filing of the original complaint herein, but before the amended complaint was filed, viz., August 5, 1891.

As between the plaintiff, who is appellant here, and her husband, there is no question but that the latter held the legal title to the premises in trust for the former.

The doctrine is well established that where land is purchased in the name of one person, and the consideration is

paid by another, the land will be held by the grantees in trust for the person furnishing the consideration: *Bayles v. Baxter*, 22 Cal. 575; *Hidden v. Jordan*, 21 Cal. 92; *Millard v. Hathaway*, 27 Cal. 119; *Currey v. Allen*, 34 Cal. 254.

The doctrine is well established, also, that the lien of a judgment and execution attaches to the real, instead of the apparent, interest of the judgment debtor in and to his property, and that under ordinary circumstances a sale made under such lien transfers no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto, and before the sale: *Freeman on Executions*, sec. 335; *Freeman on Judgments*, secs. 356, 357; *Frink v. Roe*, 70 Cal. 296.

"The purchaser at an execution sale takes his title subject to such liens, easements, and equities as it was subject to in the hands of the defendant in execution, unless he can show that he is a purchaser in good faith, and without any notice, actual or constructive, of the existence of such lien, easement, or equity": *Freeman on Executions*, sec. 336.

This doctrine does not, however, reach the point under consideration in this case. We may concede that the rule enunciated above applies to a third party purchasing at a sale under execution, and the question still remains: Does the judgment creditor, who purchases at his own sale, and pays no money, but credits the amount of his bid on his judgment, stand in the same position as a third party, who has purchased at a like sale, and paid a money consideration?

In other words, is the judgment creditor who bids at his own sale, and as the effect thereof satisfies his judgment in whole or in part, a purchaser for value in that sense which entitles him to protection? The authorities are by no means uniform on the question.

In Iowa, in *Gower v. Doheney*, 33 Iowa, 36, a case in which the judgment debtor held lands under an implied trust, in pursuance of which, subsequent to the judgment, he conveyed to the *cestui que trust*, the latter failed to record his deed, and the lands were purchased by the judgment creditor at execution sale, without notice of the deed or of the equitable estate, and it was held that the execution creditor took his title freed from the equity.

The decision was based upon the equitable theory that where one of two innocent parties must suffer, the loss should fall upon that party who has been guilty of the first negligence.



Other cases in Iowa hold that when a creditor merges his judgment into a title, without notice, actual or constructive, of private equities, he becomes a purchaser, and is entitled to protection equally with any subsequent *bona fide* purchaser.

In Indiana the court held both ways on the question: See *Vitito v. Hamilton*, 86 Ind. 137, and *Carnahan v. Yerkes*, 87 Ind. 62.

In the latter case it was held that "an execution creditor who bids off property at a sale upon his own execution, and applies the bid to the payment of his own judgment, is not regarded as a *bona fide* or innocent purchaser."

It is sufficient to say that a large number of cases to like effect are to be found, and holding, with more or less uniformity, that a plaintiff purchasing at a sale under his own writ takes subject to all equities against the defendant in execution, whether he has notice of them or not. This view is founded upon the theory that to constitute a person a *bona fide* purchaser within the meaning of the law, he must, upon the faith of the purchase of the property, have advanced for it a valuable consideration, and that a creditor, antecedent to his purchase, who pays for the purchase by a credit on his own demand, has parted with no consideration on the faith of the purchase, and is not such a *bona fide* purchaser as is entitled to protection against equities of which he has no notice.

It is believed, however, that the current of modern authority tends to the doctrine that a judgment creditor purchasing at his own sale equally with a third party making a purchase under the execution, is protected against latent equities of which he had no notice; and we can see no good reason for the distinction to which we have alluded.

If A advances money to B, which is not paid, and he obtains judgment, issues execution, levies upon the property of B, attends the sale, and being the highest bidder, purchases the property, it is difficult to see why he is in a different position from any other purchaser. In such a case the law seizes the property and sells it to the highest bidder, and the judgment creditor takes it, not in his capacity as creditor, but as purchaser. The law of this state, with a view, no doubt, of benefiting the debtor by causing his property to bring the best attainable price, permits and encourages the creditor, alike with others, to purchase at sales under execution, and having done so, the fact that he advanced the purchase price

ast month or last year should not militate against his rights or alter his *status* in the eye of the law.

It has repeatedly been held in this court that a conveyance in consideration of the cancellation of a pre-existing indebtedness is a conveyance for a valuable consideration within the meaning of section 1214 of our Civil Code: *Foorman v. Wallace*, 75 Cal. 552; *Gassen v. Hendrick*, 74 Cal. 444; *Schluter v. Harvey*, 65 Cal. 153; *Frey v. Clifford*, 44 Cal. 335.

In this state, we think the question has been settled in consonance with this view.

In *Hunter v. Watson*, 12 Cal. 377 (Baldwin, J., delivering the opinion of the court, Field, J., concurring), it was said: "But a judgment creditor purchasing at his own sale, without notice, is a *bona fide* purchaser within the act. The cases are not agreed upon this subject, but the weight of authority and the reason of the rule are as we have stated it."

The act referred to in the foregoing quotation was the recordation act of 1850.

Section 1107 of our Civil Code is as follows: "Every grant of an estate in real property is conclusive against the grantor, also against everyone subsequently claiming under him, except a purchaser or encumbrancer who, in good faith and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded." In *Foorman v. Wallace*, 75 Cal. 552, it was held that a sheriff's certificate of sale of real property "is the evidence of the equitable interest which the purchaser has in the land, and is an instrument whereby an interest or title is created within the meaning of section 1107 of the Civil Code"; and cites in favor of the proposition *Page v. Rogers*, 31 Cal. 301.

*Foorman v. Wallace*, 75 Cal. 552, held, also, that the filing and recording of the certificate of sale imparted constructive notice to all the world, and that the right acquired thereunder was prior and paramount to the title of a prior unrecorded deed, of which the holder of the sheriff's certificate had no notice at the date of recordation.

The plaintiff here cannot be said to be in a better position than she would have been had she held an unrecorded conveyance of the property. It was in her power for many years to have enforced her equitable right to the property; but having failed to do so until a sale thereof, and recording of the evidence of such sale under an execution against her husband, who was the ostensible owner thereof, and in whose name the

title was recorded, she comes too late to ask for relief against one clothed with the legal title and an equal equity.

There is nothing in the views herein expressed in conflict with either of the decisions in *Breeze v. Brooks*, 71 Cal. 169. In that case Patrick Brooks was the equitable owner of land, the legal title to which stood in the name of John Brooks. The latter obtained credit from the plaintiffs in the cause, who believed him to be the owner. John Brooks conveyed the legal title to Patrick, the owner of the equity, who caused his deed to be recorded. Subsequently, the plaintiffs brought suit against John, on their demand, obtained judgment, sold the land under execution, became the purchasers, and in due time obtained a sheriff's deed, under which they sought to subject the land to their claim.

There they sought to show that Patrick Brooks was estopped by his acts in the premises from asserting title.

Here the estoppel comes from the effect of our recording act, which establishes what the court has held to be a salutary and binding rule.

At the trial the court submitted to a jury the following single issue and question, against plaintiff's objection and exception, to wit: "Did Martinelli, on January 10, 1891, have notice that the property belonged to Mrs. Riley?"

To which the jury answered "No."

Counsel for plaintiff asked the court to submit to the jury the questions, in substance: 1. Whether, at the date of his purchase, Martinelli had actual notice that the plaintiff claimed the property, etc., which was substantially submitted. 2. Whether, at the said date, he had constructive notice of such fact, which was refused by the court.

Counsel then asked certain instructions in reference to actual and constructive notice, substantially as defined in sections 18 and 19 of the Civil Code, which were refused by the court, and the refusal excepted to. We think the court, on its own motion, instructed the jury as to the question submitted as far as was necessary.

It was an equity case, and the court adopted the answer of the jury, it is true, in its findings of fact, but it proceeded at length to find upon all the issues in the case. This being so, the refusal to give instructions is not cause for a reversal of the case: *Hewlett v. Pilcher*, 85 Cal. 542. The evidence was sufficient to warrant the findings.

There was no error in striking out the testimony of the wit-

ness Balzari as to declarations made to him by the plaintiff in reference to her ownership of the property, because it was not proposed to bring knowledge of such declarations home to defendant Martinelli.

Again, the finding of the court as to plaintiff's ownership of the property cured the error, if any there was.

Upon a review of the whole record, it is believed the cause was fairly tried and properly decided, and that the order overruling the motion for a new trial and the judgment should be affirmed, and we so advise.

BELCHER, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

GAROUTTE, J., HARRISON, J., PATERSON, J.

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**TRUSTS — RESULTING, WHEN ARISE.** — If real property is purchased and a conveyance is taken in the name of one party, while the purchase money is paid by another, a resulting trust arises from the transaction in favor of the person thus paying the purchase money: *Champlin v. Champlin*, 136 Ill. 309; 29 Am. St. Rep. 323, and note with cases collected; *Watson v. Murray*, 54 Ark. 499; *Puckett v. Benjamin*, 21 Or. 370; *McDevitt v. Frantz*, 85 Va. 922; *Whyland v. La Roque*, 105 N. C. 301; *Burns v. Ross*, 71 Tex. 516; *Brotherton v. Weatherby*, 73 Tex. 471. See also extended note to *Neill v. Keese*, 51 Am. Dec. 751.

**TRIAL BY JURY IN CASES IN EQUITY:** See *Saint v. Guerrerio*, 17 Col. 448; 31 Am. St. Rep. 320, and note; and *Lynch v. Metropolitan etc. R'y Co.*, 129 N. Y. 274; 26 Am. St. Rep. 523, and note.

**JUDGMENTS — LIEN OF — TO WHAT INTEREST ATTACHES.** — A judgment is a lien upon the actual and not the apparent interest of the defendant: *Burke v. Johnson*, 37 Kan. 337; 1 Am. St. Rep. 352, and note. An execution sale of property under a writ against one who is not its owner, though it is levied on while in his possession, cannot divest the title of the true owner: *Heberling v. Jaggard*, 47 Minn. 70; 28 Am. St. Rep. 331, and note. See extended note to *Filley v. Duncan*, 93 Am. Dec. 346, for a full discussion of this subject.

**JUDGMENT CREDITOR PURCHASING AT HIS OWN SALE — WHETHER A BONA FIDE PURCHASER.** — For a discussion of the subject see *Booe v. Morgan*, 130 Ind. 305; 30 Am. St. Rep. 237, and note.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ILLINOIS.**

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**MORE v. BENNETT.**

[140 ILLINOIS, 69.]

**TRADE, RESTRAINT OF.** — ALL COMBINATIONS, whether of capitalists or of workmen, for the purpose of influencing trade in their special favor by raising or reducing prices are so far illegal that agreements to combine cannot be enforced by the courts.

**TRADE, RESTRAINT OF.** — AN AGREEMENT BETWEEN MEMBERS OF AN ASSOCIATION OF STENOGRAPHERS to be bound by a schedule of prices to be fixed by the association, and not to compete with each other by taking or offering to take a less price, is contrary to public policy and nonenforceable.

ASSUMPSIT by plaintiffs against defendants to recover damages for a breach of the rules and by-laws of the Chicago Stenographers' Association, of which all the parties were members. The complaint disclosed the fact that the association had been formed to promote the interests of stenographers and to establish and maintain uniform rates for the work, that a schedule had been adopted, and that the defendants, contrary to the rules of the association, had cut rates as against the other members thereof, whereby the plaintiffs had been damaged in various respects set out in the complaint. A demurrer interposed by the defendants was sustained and the plaintiffs appealed.

*Matz and Fisher*, for the appellants.

*J. L. Bennett*, for the appellees.

BAILEY, J. The question is raised by counsel and discussed at some length, whether membership in the Chicago Law Stenographic Association established a contractual relation between

the plaintiffs and defendants which gives to the plaintiffs a right of action against the defendants, for a violation of any of the rules of said association, as for a breach of contract; and, also, whether the only remedy for a violation of said rules is not that provided by the by-laws of the association, viz., a fine, to be imposed upon the offender, after a trial and conviction before an arbitration committee, duly appointed for that purpose. But as we view the case, it will be unnecessary for us to consider these questions, since, admitting that the constitution and by-laws of the association were in the nature of a contract as between the members, *inter se*, we are of the opinion that the contract thus established is so far obnoxious to well settled rules of public policy as to render it improper for the courts to lend their aid to its enforcement.

Whatever may be the professed objects of the association, it clearly appears, both from its constitution and by-laws, and from the averments of the declaration, that one of its objects, if not its leading object, is to control the prices to be charged by its members for stenographic work, by restraining all competition between them. Power is given to the association to fix a schedule of prices which shall be binding upon all its members, and not only do the members, by assenting to the constitution and by-laws, agree to be bound by the schedule thus fixed, but their competition with each other, either by taking or offering to take a less price, is punishable by the imposition of fines, as well as by such other disciplinary measures as associations of this character may adopt for the enforcement of their rules.

The rule of public policy here involved is closely analogous to that which declares illegal and void contracts in general restraint of trade, if it is not indeed a subordinate application of the same rule. As said by Mr. Tiedeman: "Following the reason of the rule which prohibits contracts in restraint of trade, we find that it is made to prohibit all contracts which in any way restrain the freedom of trade or diminish competition, or regulate the prices of commodities or services. All combinations of capitalists or of workmen for the purpose of influencing trade in their especial favor, by raising or reducing prices, are so far illegal, that agreements to combine cannot be enforced by the courts": Tiedeman on Commercial Paper, sec. 190.

Many cases may be found in which the doctrine here stated has been laid down and enforced. Thus in *Stanton v. Allen*,

5 Denio, 434, 49 Am. Dec. 282, where an association among the whole or a large part of the proprietors of boats on the Erie and Oswego canals was formed under an agreement to regulate the price of freight and passage by a uniform scale to be fixed by a committee chosen by themselves, and to divide the profits of their business according to the number of boats employed by each, with provisions prohibiting the members from engaging in similar business out of the association, it was held that, as the tendency of such agreement was to increase prices and to prevent wholesome competition, as well as diminish the public revenue, it was against public policy and void by the principles of the common law.

In *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258, the proprietors of five several lines of boats engaged in the business of transporting persons and freight on the Erie and Oswego canals, entered into an agreement in which, "for the purpose of establishing and maintaining fair and uniform rates of freight, and equalizing the business among themselves, and to avoid all unnecessary expense in doing the same," they agreed to run for the residue of the season of navigation at certain rates of freight and passage then fixed upon, but which should be changed whenever the parties should deem expedient, and to divide the net earnings among themselves according to certain fixed proportions, and it was held, in a suit on the agreement against a party who failed to make payment according to its terms, that the agreement was a conspiracy to commit an act injurious to trade, and was illegal and void.

In *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159, five coal companies in Pennsylvania entered into an agreement in New York to divide two coal regions of which they had control; to appoint a committee to take charge of their interests, and decide all questions, and appoint a general agent at a certain point in the state of New York, the coal mined to be delivered through him, each company to deliver its proportion at its own cost at the different markets at such time and to such persons as the committee should direct, the committee to adjust all prices, rates of freight, etc., and settlements to be made between the several companies monthly, and it was held in a suit brought by one of said companies against another, to enforce a liability arising under said contract, that the contract was in violation of a statute of New York making it a misdemeanor to conspire to commit any act injurious to trade or commerce, and was also against public

policy and therefore illegal and void, the court laying down the rule, among other things, that every association formed to raise or depress prices beyond what they would be if left without aid or stimulus, was criminal.

In *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171, a contract was entered into by all the grain dealers in a certain town, which, on its face, indicated that they had formed a partnership for the purpose of dealing in grain, but the true object of which was to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, costs of storage, and expense of shipment at such town, and it was held on bill filed for an accounting and distribution of profits, that such contract was in restraint of trade and consequently void on grounds of public policy. In discussing the principles involved, this court said: "While these parties were in business in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts for with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection."

The doctrine of the foregoing decisions may, in our opinion, be fairly applied to the facts in the present case. While some of the cases cited involve elements not present here, the determining circumstance in all of them seems to have been a combination or conspiracy among a number of persons engaged in a particular business to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would have been if left to the influence of unrestricted competition. All such combinations are held to be contrary to public policy, and the courts therefore will refuse to lend their aid to the enforcement of the contracts by which such combinations are sought to be effected.

Counsel seek to distinguish this case from those cited by the circumstance alleged in the second count of the declaration that but a small portion of the law stenographers of Chicago belong to said association. An analogy is thereby sought to be raised between the contract in this case and those



contracts in partial restraint of trade which the law upholds. We think the analogy thus sought to be raised does not exist. Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its good will, with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint to be valid must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased; but in the present case there is no purchase or sale of any business, nor any other analogous circumstance giving to one party a just right to be protected against competition from the other. All of the members of the association are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists, the only reason put forward being that under the influence of competition as it existed prior to the organization of the association, prices for stenographic work had been reduced too far, and the association was organized for the purpose of putting an end to all competition, at least as between those who could be induced to become members. True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association, but so far as it goes it is precisely of the same character, produces the same results, and is subject to the same legal objection.

It may also be observed that by the constitution of the association any reputable stenographer regularly engaged in law reporting in Cook County is eligible to membership, and if all or a major part of the stenographers in said county engaged in that business are not already members, it is because the association has not yet fully accomplished the purposes of its organization. We can see no legal difference between the restraint upon competition which it now exercises and that which it will exercise when it is in a position to dictate terms to all who are engaged in the business, and to all who may wish to obtain the service of law stenographic reporters.

We are of the opinion that the demurrer to the declaration was properly sustained, and the judgment will therefore be affirmed.

Judgment affirmed.

**CONTRACTS IN RESTRAINT OF TRADE:** See generally notes to *Pike v. Thomas*, 7 Am. Dec. 743-746; *Angier v. Webber*, 92 Am. Dec. 751-765; *Callahan v. Donnelly*, 13 Am. Rep. 173-176; *Smalley v. Greene*, 35 Am. Rep. 269-272; *Tardy v. Creasy*, 59 Am. Rep. 686-693. On page 763 of the note to *Angier v. Webber*, 92 Am. Dec. 751-765, several cases are collected, sustaining the doctrine that contracts between producers or dealers for the purpose of controlling the market and enhancing the price of a certain commodity are invalid. To the same effect are *Santa Clara etc. Mill Co. v. Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211; *Texas etc. R'y Co. v. Southern Pac. R'y Co.*, 41 La. Ann. 970; 17 Am. St. Rep. 445; *People v. Chicago Gas etc. Co.*, 130 Ill. 268; 17 Am. St. Rep. 319; *Pacific Factor Co. v. Adler*, 90 Cal. 110; 25 Am. St. Rep. 102; *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690; *Anderson v. Jett*, 89 Ky. 375. "Combinations to control prices are against public policy, and void, because they have a mischievous tendency, and are injurious to the best interests of the state, which require that all legitimate business shall be open to competition; that the current price of commodities shall be controlled by the law of supply and demand; that the laws of commerce shall flow in their accustomed channels, and not be diverted by combinations to control prices fixed by the arbitrary decision of interested parties": *Lorejoy v. Michels*, 88 Mich. 156. In *Gloucester Isinglass etc. Co. v. Russia Cement Co.*, 154 Mass. 92, 26 Am. St. Rep. 214, the general rule was declared to be subject to the qualification that agreements for the avoidance of competition were not invalid, where the articles to be sold were not of prime necessity or staple commodities.

## WETHERELL v. O'BRIEN.

[140 ILLINOIS, 146.]

**BAILMENT AND DEBT, DISTINCTION BETWEEN.** — When an identical thing is to be restored, though in an altered form, the contract is one of bailment, but when the obligation is to restore other things of the like kind, and equal in value, it becomes a debt.

**BANKS AND BANKING.** — WHEN THERE IS AN ORDINARY GENERAL DEPOSIT in the bank, there is an implied undertaking on its part to restore, not the same funds, but an equivalent sum whenever it is demanded.

**BANKS AND BANKING — SPECIAL DEPOSIT, WHAT IS NOT.** — If one goes to a savings bank with money, stating that he wishes to have it loaned on a real estate mortgage, and the banker undertakes to so loan it when an opportunity offers, but it is turned over to the cashier of the bank and mingled with other money, and a pass book is issued showing the deposit of the money in the savings department of the bank, this is not a special deposit, though the banker was told that the money was to be left with him until it could be loaned, and that he should take care of it until he could find a place to loan it on a real-estate mortgage.

**BANKS AND BANKING — DEPOSITOR WHEN A GENERAL CREDITOR MERELY.** When money delivered to a bank, though for some specific purpose, as for instance investment in a mortgage security, has been mingled with the funds of the bank, there is no reason why the depositor should be preferred above any other creditor. Though the money was deposited by a trustee, yet because it can no longer be identified as a distinct

fund and is so mixed up with other funds that it cannot be separated, the beneficial owner can no longer reach it.

**TRUSTS.** — WHERE A TRUSTEE HAS CONVERTED A TRUST FUND INTO MONEY, AND HAS MINGLED it with his other moneys so that it cannot be separated from the latter, the beneficial owner occupies the position of a general creditor of the estate, and cannot follow the funds into the hands of an assignee for the benefit of creditors.

*E. L. Barber and Gibbons and Kavanagh, for the appellant.*

*C. M. Hardy, for the appellee.*

MAGRUDER, C. J. Melville T. Roberts conducted a banking business in Chicago. His bank was called and known as the Thirty-first Street Bank. He failed, and made an assignment for the benefit of creditors on June 27, 1890. The assigned estate passed into the control of the county court of Cook County under the assignment law of this state.

Therefore, the sum of nineteen hundred dollars came into the hands of Michael Gerrity, as the executor of the estate of John O'Brien, deceased. On February 17, 1890, Gerrity and Ellen O'Brien, the widow of the deceased, went together to the bank of Roberts, and there left the said money in the manner hereinafter stated.

On March 5, 1891, said Ellen O'Brien filed her petition in the county court in the matter of the estate of said Roberts, alleging that in February, 1890, she left with and intrusted to Roberts at his bank nineteen hundred dollars, to be safely kept by him in trust for the heirs of said John O'Brien until it should be invested by him in good and sufficient real estate security, in pursuance of an order of the probate court; that Roberts, when he assigned, had already made negotiations to loan the money, and a mortgage to secure the same was to be executed on June 30, 1890; that she did not deposit the money with him as a banker, but left it with him as a broker, and as her agent, in trust for the specific purpose aforesaid; that she is not a creditor of the insolvent, and that the money so intrusted to him forms no part of the fund due or to be distributed to his creditors through the orders of the county court. The petition prays that the assignee may be directed to pay her at once the sum of nineteen hundred dollars out of the money in his hands.

The assignee answered the petition, alleging that the money was deposited under the agreement that at some future time the insolvent might loan it out upon real estate security, but that, in the meanwhile, it was to be deposited in the savings

department of the bank to draw interest; that the deposit was made with the insolvent as a banker, and was entered regularly upon the books in the savings department of the bank, and was to draw interest the same as any other savings account. The answer denies that the money was deposited in trust for the specific purpose stated, but alleges that it was a matter of convenience as to when the money was to be loaned, and that the insolvent turned over to his assignee less than one hundred dollars, and that petitioner is a general creditor, and has no greater rights than any other of the general creditors.

After proofs taken and hearing had, the county court entered a decree sustaining the theory of the petition, finding that the money passed into the hands of the assignee coupled with and subject to said trust, and remains under his control in trust, and that the creditors of the insolvent are not entitled to any distributive share of it, and ordering that the assignee pay said sum to the petitioner's solicitor. The appellate court has affirmed the decree of the county court, and the case is brought here by appeal.

The facts shown by the evidence are substantially as follows: When Gerrity and Mrs. O'Brien went to the bank on February 17th, she had the money, and delivered it into the hands of Roberts. A conversation occurred between Gerrity and Roberts in the bank outside of the counter, behind which was Mooney, the cashier. Mrs. O'Brien did not take part in the conversation, and apparently did not hear it. Gerrity told Roberts that Mrs. O'Brien wanted him to loan the money out as soon as he could upon a good real estate mortgage; that she wanted to leave it with him until it could be so loaned; that he should take care of it until he could find a place to lend it. Gerrity says he told Roberts that she wanted no interest while it was in his hands, but Roberts does not remember that anything was said about interest. When the money was handed to Roberts, he made out a deposit ticket in the presence of Gerrity, and handed the ticket and the money through the window to Mooney, the cashier. The deposit ticket or slip had upon it the words: "Deposited for account of Ellen O'Brien"; also the day of the month, the amount, the number of the savings account, an initial of Roberts's name, and an abbreviation of the word "savings," showing that the account was to go into the savings department. Mooney handed to Mrs. O'Brien, and she accepted, a



pass book, upon the inside of which was the following: "Dr. Thirty-first Street Bank in acc't with Ellen O'Brien, Cr. February 17. To cash, M. \$1,900.00." Upon the cover of the pass book was the following: "Thirty-first Street Bank, Chicago, Illinois. In account with Ellen O'Brien," and a notice as to the mode of checking out money. The cashier took the money, and entered and posted it in the savings department in accordance with the deposit slip. Gerrity saw Roberts in May, and suggested buying building society stock; but Roberts discouraged this, and advised the real estate loan, though he had not yet made such a loan. On June 15th or 16th Gerrity saw Roberts again, and he then said he thought he had made a mortgage loan, and that the mortgage was to be executed upon the 30th, but the loan was not effected before the failure on the 27th. There was no evidence of any order by the probate court for the investment of the money in a real estate mortgage; but Gerrity was allowed to state that the probate judge told him to make such an investment.

Under the facts as thus stated, the appellee is not entitled to be paid in full in preference to the other creditors, but must share with them in the assigned estate. There was here no case of bailment or special deposit. When the identical thing delivered is to be restored, though in an altered form, the contract is one of bailment; but when the obligation is to return other things of the like kind and equal in value, it becomes a debt: *Loneragan v. Stewart*, 55 Ill. 44. The parties did not contemplate that the same identical money received by Roberts or his bank was to be kept for the appellee, and returned to her. Nor was the money delivered to Roberts or the bank as a special deposit. The deposit was a general one. In the presence of appellee or her agent, Gerrity, the money was handed over to the cashier of the bank, and she received in return therefor a bank or pass book, in which the money was credited to her account and charged to the bank. The relation of creditor and debtor was thereby established between herself and the bank. The entries in a bank or pass book are evidence of indebtedness: *Schalucky v. Field*, 124 Ill. 617; 7 Am. St. Rep. 399. Where there is an ordinary general deposit with a bank, there is an implied undertaking on its part to restore, not the same funds, but an equivalent sum whenever it is demanded: *Brahm v. Adkins*, 77 Ill. 263. Where such a pass book as that given to the

appellee is held by a depositor, the latter has the right to check against the fund deposited. Although it may have been true that Roberts was to buy a bond and mortgage for the appellee when an opportunity offered to do so, yet it would have been necessary for the appellee to surrender her bank book when the mortgage was turned over to her, or to give the bank her check for the amount of the deposit in exchange for the mortgage. It would not have been prudent for the bank to part with the mortgage without taking up the evidence of indebtedness against itself furnished by the outstanding bank book. It is therefore clear that appellee controlled the deposit until the mortgage investment should be obtained.

When money which is delivered to a bank, even though it be for some specified purpose, as, for instance, investment in a mortgage security, has been mingled with the funds of the bank, as was done here, there is no reason why the depositor should be preferred above any other creditor. Where a trustee changes the form of the trust property, the right of the beneficial owner to reach it and compel its transfer may still exist if the property can be identified as a distinct fund, and is not so mixed up with other moneys or property that it can no longer be specifically separated. "If the trust property has been transferred to a *bona fide* purchaser for value without notice, or has lost its identity, the beneficial owner must, and under other circumstances he may, resort to the personal liability of the wrong-doing trustee": 2 Pomeroy's Equity Jurisprudence, sec. 1058. Where a trustee has converted a trust fund into money and mingled it with his other moneys, so that it cannot be separated from the latter, the beneficial owner occupies the position of a general creditor of the estate, and cannot follow the fund into the hands of an assignee for the benefit of creditors: *Illinois etc. Sav. Bank v. Smith*, 21 Blatchf. 275, and cases there cited. Its identification is a prerequisite to the exercise of the right to follow it: 2 Story's Equity Jurisprudence, sec. 1259. While it may not be necessary to point to the particular pieces of money or the particular bank bills that were deposited with the trustee, if the trust property be money, yet there must be a preservation of the distinctness of the trust fund. The means of ascertaining the identity of the fund fails where the money has "been mixed and confounded in a general mass of property in the bank of the same description": *Doyle v. Murphy*, 22 Ill. 502; 74 Am. Dec. 165; *School Trustees v. Kirwin*, 25 Ill. 73. We have said in the

recent case of *Union Nat. Bank v. Goetz*, 138 Ill. 127, 32 Am. St. Rep. 119, "that trust funds can only be pursued when they can be clearly distinguished from other property held by the trustee or by those representing him."

In the present case the proof shows that the savings ledger of the bank contains an entry of the appellee's account taken from the deposit slip. The cashier testifies: "There was no difference between this deposit and any other deposit in the savings department; it came in just the same and was entered just the same as any other savings account." It so remained for over four months, and was paid out with the other moneys of the bank from time to time, in the regular course of business, upon the checks of depositors. It is clear that it was impossible when the assignment was made to identify the money of the appellee as a separate trust fund, distinct from the other moneys of the bank.

The judgment of the appellate court and the decree or order of the county court are reversed, and the cause is remanded to the latter court, with direction to proceed in accordance with the views here expressed.

Judgment reversed.

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**BANKS AND BANKING — GENERAL AND SPECIAL DEPOSITS.** — A deposit of money in a bank is regarded as a general deposit, in the absence of evidence to the contrary. It creates the relation of debtor and creditor, and gives the bank the right to mingle the money with its own funds; while a special deposit creates the relation of bailor and bailee, leaving the right of property in the bailor, and imposing on the bank the duty of returning the original money or thing received; *Alston v. State*, 92 Ala. 124. Bank and depositor are debtor and creditor, where funds are deposited in the bank to be used in the usual course of business; *Murine Bank v. Chandler*, 27 Ill. 525; 81 Am. Dec. 249; *Schmidt v. Barker*, 17 La. Ann. 261; 87 Am. Dec. 527; *Matter of Franklin Bank*, 1 Paige, 249; 19 Am. Dec. 413; *Lynch v. First Nat. Bank*, 107 N. Y. 179; 1 Am. St. Rep. 803; *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350; 10 Am. St. Rep. 669; *Shipman v. Bank*, 126 N. Y. 318; 22 Am. St. Rep. 821; *Janin v. London etc. Bank*, 92 Cal. 14; 27 Am. St. Rep. 82; and note to *National Bank of Newburgh v. Smith*, 23 Am. Rep. 50-52. The bank does not assume to become a fiduciary as to the money deposited, nor does it agree to hold it in trust for the depositor; *Huwes v. Blackwell*, 107 N. C. 196; 22 Am. St. Rep. 870. The transaction cannot be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period at interest; *Law's Estate*, 144 Pa. St. 499. The rule that, when deposits are received by a bank, unless they are special deposits, they belong to it as a part of the general funds, applies where the deposit is of trust money, unless the act of depositing it is a misappropriation of the fund; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324. A certificate given by a bank that an administrator had "deposited" in his office a sum of money payable to his order or the order of his attorney, "on return of this certificate, twelve months after date,

with interest," evidences not merely a deposit, but a loan or investment of the money: *Baer's Appeal*, 127 Pa. St. 360; but when the deposit is of something else than money, this relation of debtor and creditor cannot arise from the mere fact of deposit, as on an implied contract: *First Nat. Bank v. Greenville Nat. Bank*, 84 Tex. 40.

**TRUSTEES. — RIGHT OF CESTUI QUE TRUST TO FOLLOW TRUST PROPERTY,** as long as it can be identified: See *Huckabee v. Billingsley*, 16 Ala. 414; 50 Am. Dec. 183; *Lathrop v. Bampton*, 31 Cal. 17; 89 Am. Dec. 141; *Farmers' etc. Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215; *First Nat. Bank v. Hummel*, 14 Colo. 259; 20 Am. St. Rep. 257; *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332. Where the property of the beneficiary has become mingled with that of the trustee, the only remedy of the beneficiary, in case of the trustee's death or insolvency, is that of a creditor of the estate: *Neely v. Rood*, 54 Mich. 134; 52 Am. Rep. 802; *Rouch v. Caraffa*, 85 Cal. 436. In *Gaffney's Estate*, 146 Pa. St. 49, the evidence was that a decedent in his lifetime made a bank deposit to the credit of himself as "trustee for P. M.," and at the time of his death the deposit so stood, both upon his pass book, and upon the books of the bank. It was held that, *prima facie*, P. M. was entitled to the fund, though the pass book might not have been delivered to her.

## RAMBERG v. WAHLSTROM.

[140 ILLINOIS, 182.]

**COTENANCY. —** One tenant in common is not permitted, in equity, to acquire an interest in the property hostile to that of the others, and therefore a purchase by one tenant in common of an encumbrance on the joint estate, or an outstanding title to it, is held, at the election of the other tenants in common within a reasonable time, to inure to the equal benefit of all upon their contributing their proportion of the consideration actually paid.

**COTENANCY. — A TENANT IN COMMON OF A LEASEHOLD ESTATE MAY PURCHASE THE ENTIRE ESTATE** of his landlord, without incurring any obligation to his cotenants to share in the benefit of the purchase, because the estate so purchased is not adverse to the leasehold estate, and the property acquired by the purchasing cotenant is not inconsistent with the terms of the lease.

*Hiram Barber and E. U. Fliehmann*, for the appellant.

*M. A. Delany and William H. Mohrmann*, for the appellee.

**SCHOLFIELD, J.** Appellant and appellee were tenants in common, for a term of years, of a certain lot in the city of Chicago. Eight days before the term expired appellant purchased and obtained from their landlord a deed of the fee of the premises, and he attempted to assert certain rights in regard to the leasehold property by virtue of that deed. The circuit court decreed that appellant, being a tenant in common for a term of years, could not, in equity, without the consent of ap-



pellee, become the owner of the fee, and that he therefore held the title of the fee in trust for appellee as well as for himself, upon contribution being made by appellee for one half the amount paid for the fee. In this we think there was error. The rule is, as contended by counsel for appellee, that tenants in common stand in such confidential relations in regard to one another's interest, that one of them is not permitted, in equity, to acquire an interest in the property hostile to that of the other, and that therefore a purchase by one tenant in common of an encumbrance on the joint estate, or an outstanding title to it, is held, at the election of the other tenant in common, within a reasonable time, to inure to the equal benefit of both, upon his contributing an equal part of the consideration actually paid: *Bracken v. Cooper*, 80 Ill. 221.

But this rule is limited, by its own terms, to the acquisition of hostile interests, and so here, if appellant had purchased a title adverse to the title of the landlord of appellant and appellee, or an encumbrance upon that title, whereby the term of appellant and appellee would be affected, the rule should be enforced; but there is no hostility between the title of the landlord and that of his tenant, and no conveyance by the landlord of the fee can possibly affect the rights of the tenant in possession, the purchaser and grantee of the fee simply taking the place of the grantor. It is immaterial that appellant may have claimed what he is not entitled to assert under this deed. He has, by virtue of it, no rights that his grantor did not have, and he has acquired thereby no rights to the leasehold property inconsistent with the terms of the lease. As to the fee held by the landlord, tenants in common for a term of years can owe no different duty to each other than they do in respect to any other distinct estates, for their privity does not extend to the estate remaining in their landlord. The reason for the rule not existing in such cases, the rule itself can have no application: See *Freeman on Cotenancy*, sec. 155.

The decree is reversed, and the cause is remanded for further proceedings consistent with this opinion.

Decree reversed.

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COTENANCY. — A cotenant cannot purchase an encumbrance or an outstanding title and set it up against the others for the purpose of depriving them of their interest; *Weaver v. Wible*, 25 Pa. St. 270; 64 Am. Dec. 696; *Venable v. Beaulchamp*, 3 Dina. 321; 28 Am. Dec. 74; *Brittin v. Handy*, 20 Ark. 331; 73 Am. Dec. 497; *Reinhart v. Bradshaw*, 19 Nev. 255; 3 Am. St.

Rep. 886; *Carpenter v. Carpenter*, 131 N. Y. 101; 27 Am. St. Rep. 569. Such a purchase will inure to the benefit of all the cotenants, but they will be compelled to contribute their respective ratios to the consideration paid: *Lloyd v. Lynch*, 23 Pa. St. 419; 70 Am. Dec. 137; *Weaver v. Wible*, 25 Pa. St. 270; 64 Am. Dec. 696; *Tisdale v. Tisdale*, 2 Sneed, 596; 64 Am. Dec. 775; *Sneed v. Atherton*, 6 Dana, 276; 32 Am. Dec. 70; *Brittin v. Handy*, 20 Ark. 381; 73 Am. Dec. 497; *Venable v. Beauchamp*, 3 Dana, 321; 28 Am. Dec. 74; *Titsworth v. Stout*, 49 Ill. 78; 95 Am. Dec. 577; *Dray v. Dray*, 21 Or. 59; but a tenant in common may recover the whole estate against a stranger: *McFarland v. Stone*, 17 Vt. 165; 44 Am. Dec. 325.

## LARMON v. KNIGHT.

[140 ILLINOIS, 232.]

**TRUSTS NOT WITHIN THE STATUTE OF FRAUDS.** — If a husband prevails upon his wife, who is then fatally ill, to convey certain of her property to him by promising that if she will do so he will procure a loan thereon, and with the proceeds will redeem the property from a previous judicial sale thereof, and will then hold it for the benefit of her children, the trust thereby created is not an express trust which must be evidenced by a writing to be enforceable. A court will regard the failure or refusal to hold the property for and to convey it to the children as a fraud, and will therefore decree that it is held in trust for and shall be conveyed to them.

**A TRUST EX MALEFICIO ARISES WHENEVER** a person acquires the legal title to property by means of an intentional false or fraudulent verbal promise to hold the same for a certain specific purpose, as, for example, to convey it to another or to reconvey it to the grantor, and having thus obtained the title, retains and claims the property as his own.

*W. W. Gurley*, for the appellants.

*George L. Paddock*, for the appellees.

SCHOLFIELD, J. This is a contest between children of a common father but of different mothers, in regard to the title to certain real estate in the city of Chicago. Philip Larmon was twice married. The defendants are the children of his first and the complainants of his last marriage. His last wife, Louisa Larmon, the mother of the complainants owned the property in controversy in her own right, free from the control of her husband, and her title thereto was established by decree of court in a suit to which he was a party, and that, too, largely upon his testimony. Subsequently, the property was sold under a decree of a competent court, and bought by another person, and she failed to redeem within the time provided by law for making redemption; but she then made an agreement with such pur-

chaser, whereby he sold the certificate of purchase to her for a consideration named, to be paid within a stipulated time. After the making of this agreement, and before the expiration of the time within which she was allowed to make payment, she executed a deed of the property, and assigned the certificate of purchase to her husband, Philip Larmon. The deed and assignment of the certificate of purchase purported to be absolute and without any conditions. Soon after executing this deed and assignment she died. After her death Philip Larmon effected a loan of \$30,000 on the property, and with the proceeds of this loan, and \$7,636 of money belonging to her estate, he paid the amount due upon her agreement with the purchaser of the property, and obtained a deed of it to himself. Philip Larmon subsequently died intestate, leaving the mortgage upon the property unpaid, and without having made any transfer of the title to the property. The complainants allege that Philip Larmon held the title to the property as trustee for them, as heirs at law of Louisa Larmon, deceased. The defendants deny the trust, and plead the statute of frauds. The court, on hearing, decreed that the bill be dismissed.

The ruling of the court below was upon the assumption that the trust, if proven, was an express trust, and therefore obnoxious to the statute of frauds, and upon that assumption the ruling was unquestionably correct, for the proof of the trust is oral only. But we cannot concur in the view that the case presented is that of an express trust. The evidence is, that Philip Larmon made repeated requests that his wife, Louisa, should place her title in him, and that she peremptorily refused to do so, until, being upon her deathbed, and being sensible that she would be unable to make the payment required by her contract with the purchaser of her property, and realizing that her children would be without other means, and that, one of them being a minor, it would be difficult, if not impossible, for them to raise the money after her death wherewith to comply with her contract, she finally yielded to the persistent request of Philip Larmon to transfer the property to him, to enable him to redeem it and hold it for her children, and accordingly transferred the property to him for that purpose.

Nelson Monroe, the attorney for Louisa, among other things, testified: "I said to her (i. e., Louisa Larmon,) this: that if she would make the conveyance, Mr. Larmon assured me he

would take the title and would manage it,—take up this, make a loan, redeem from this certificate, and save the property for her children. She had repeated several times that she had held the property because she had seen so much trouble, and property frittered away, that she wanted to hold it so that it could not be taken away from her children; she wanted to save it for them. She said something about that time,—at that part of the conversation,—if I would have Mr. Larmon make a will as soon as might be, so that her children—for the benefit of her children—so that her children would get it. I told her I would endeavor to do so,—to have him make such a will. There was no more said then that is necessary to tell. We were there quite a while in the room, but that was the substance of it; and when I assured her that if she made the conveyance, signed and executed the deed to Mr. Larmon, it would have the effect to save the property for her children, and that if she did not do it the property might be lost, she thereupon executed the deed.” And again he testified: “On the third day of May Mr. Larmon came to my office and told me that if Mrs. Larmon died it would leave the property in bad shape. She had worked all these years to save the property, and he wanted me to go down and tell her to convey to him,—let him manage it for the benefit of her children. I went down and made that statement to Mrs. Larmon. I told Mr. Larmon I would go down and have her make the conveyance, so as to save the property.”

It is not claimed that this testimony is contradicted. There is no offer to prove that there was any consideration paid by Larmon to his wife as the consideration for which she put the property in his hands. Aside from the testimony of Monroe, there is enough in the record to raise the presumption that the transaction was without any valuable consideration passing from him to her. By the necessities of her situation, Mrs. Larmon was compelled to put the control of her property in some one who could speedily raise money upon it where-with to meet her engagement, in order to regain title to it, and her husband, by his representations that he would do this and save the property for her children, induced her to not put it in the hands of others, but in his hands; but for that representation he could not have obtained her title. He undertook to do for her what she was unable, by reason of her fatal sickness, to do for herself, and what she was induced to believe



that her children, by reason of the minority of one, could not do after her death.

It is said in Hill on Trustees, 4th Am. ed., p. 234: "Where a person by means of his promises, or otherwise by his general conduct, prevents the execution of a deed or will in favor of a third party with a view to his own benefit, that is clearly within the first head of frauds, as distinguished by Lord Hardwicke, viz., that arising from facts or circumstances of imposition; and the person so acting will be decreed to be a trustee for the injured party, to the extent of the interest of which he has been thus defrauded." Among other illustrations the author, on the same page, gives the following: "And in another case, where the wife of a copyholder prevented her husband from vesting the copyhold in his son after his death, by promising, herself, to make it over to him if he appointed her his successor instead of the son, she was decreed to be a trustee for the son, notwithstanding the statute of frauds, on the ground of fraud." It would seem to be equally within the principle for the person, by means of his promises, to induce a party not to let real estate descend as it would otherwise have been left by him to descend, for the injury, in the case mentioned, to the legatee or grantee, cannot be different or greater than is the injury to the heir, if he is, by like means, deprived of what would otherwise have been his inheritance; and the rule is thus stated in 2 Pomeroy's Equity Jurisprudence, sec. 1055: "A second well settled and even common form of trusts *ex maleficio* occurs whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose, as, for example, a promise to convey the land to a designated individual, or to reconvey it to the grantor and the like, and having thus fraudulently obtained the title, he retains, uses, and claims the property as absolutely his own, so the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit." See, to like effect, 1 White and Tudor's Leading Cases in Equity, 4th Am. ed., pt. 1, p. 352, and cases cited in note. The editors there say that where the conveyance is gratuitous, — where one obtains a gift of property on the faith of a parol assurance that he will dispose of it, either wholly or in part, in a particular way, — equity will enforce performance of the agreement.

It was not indispensable here to prove that the husband,

when he had the wife's title put in his name, told anybody that he did not intend to keep his promise. That may be inferred from the circumstance that he did not comply with his promise, although there was nothing intervening to prevent it. He is presumed to have intended to do, when he obtained the property, what he finally did do.

In our opinion the parol evidence was admissible, notwithstanding the plea of the statute of frauds, and it established a trust *ex maleficio* in Philip Larmon: *Williams v. Vreeland*, 29 N. J. Eq. 417; *Brison v. Brison*, 75 Cal. 525; 7 Am. St. Rep. 189; *Wood v. Rabe*, 96 N. Y. 426; 48 Am. Rep. 640. Those claiming as his heirs succeed him as such trustee: Perry on Trusts, sec. 171.

The decree is reversed and the cause is remanded to the circuit court of Cook County, with direction to that court to enter a decree in conformity with the prayer of the bill.

Decree reversed.

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**TRUSTS. — STATUTE OF FRAUDS** does not apply to trusts that arise by implication or construction of law: *Maddox v. Rowe*, 23 Ga. 431; 68 Am. Dec. 535; *Osborne v. Endicott*, 6 Cal. 149; 65 Am. Dec. 498; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26; 79 Am. Dec. 673; *Brison v. Brison*, 75 Cal. 525; 7 Am. St. Rep. 189; *Roby v. Colehour*, 135 Ill. 300; *Hays v. Gloster*, 88 Cal. 560.

**TRUSTS EX MALEFICIO.** — That such trusts arise whenever a person acquires the legal title to property by false and fraudulent promises to hold it for a certain specified purpose: See *Sweet v. Jacobs*, 6 Paige, 355; 31 Am. Dec. 252; *Groves v. Fulsome*, 16 Mo. 543; 57 Am. Dec. 247; *Gilpatrick v. Glidden*, 81 Me. 137; 10 Am. St. Rep. 245; *Nordholt v. Nordholt*, 87 Cal. 552; 22 Am. St. Rep. 268; *Ragsdale v. Ragsdale*, 68 Miss. 92; 24 Am. St. Rep. 256; *Brison v. Brison*, 75 Cal. 525; 7 Am. St. Rep. 189; *Carter v. Gibson*, 29 Neb. 324; 26 Am. St. Rep. 381; *Cutler v. Babcock*, 81 Wis. 195; 29 Am. St. Rep. 882; *Hays v. Gloster*, 88 Cal. 560; *Alariz v. Casenare*, 91 Cal. 41; *Brown v. Doane*, 86 Ga. 32. Thus where a party by voluntarily assuming a confidential relation, as that of a trustee, to save the homestead of another, and by means of confidence thus inspired, obtains the title thereto and refuses to perform his promises, the law will raise a constructive trust, which a court of equity will enforce, and the statute of frauds will have no application: *Gruhn v. Richardson*, 128 Ill. 178. See further the note to *Thompson v. White*, 1 Am. Dec. 258. But a mere verbal promise by the grantee in a deed for land, absolute on its face, that he will hold for the use of the grantor and will reconvey on request or on a specified contingency, is void under the statute, and the subsequent repudiation of such promise by the grantee is not such a fraud as authorizes a court of equity to grant relief by enforcing the trust, in the absence of fraud, imposition, or mistake at the time the deed was executed: *Brock v. Brock*, 90 Ala. 86. Compare *Barr v. O'Donnell*, 76 Cal. 469; 9 Am. St. Rep. 242; *Champlin v. Champlin*, 136 Ill. 163; 29 Am. St. Rep. 323, and note, 327, 328.

## **RICHELIEU HOTEL CO. v. INTERNATIONAL MILITARY ENCAMPMENT CO.**

[140 ILLINOIS, 248.]

**FRAUD AND CIRCUMVENTION IN PROCURING THE EXECUTION OF AN INSTRUMENT CANNOT BE ESTABLISHED** by showing failure of or fraud in its consideration, where there is no pretence that any trick, device, or artifice was resorted to to procure such execution, nor that the party signing it did not know or understand what he was doing.

**PRACTICE. — IF THE GENERAL ISSUE IS PLEADED**, and a stipulation entered into and an order of the court thereon made to the effect that the defendant shall have the right to prove any matter which would be admissible if specially pleaded, the defendant cannot be prejudiced by the sustaining of a demurrer to a special plea interposed by him.

**PRACTICE. — VARIANCE BETWEEN A PLEADING AND AN INSTRUMENT OFFERED IN EVIDENCE** thereunder cannot be urged for the first time on appeal.

**CORPORATIONS. — A SUBSCRIPTION OF MONIES TO BE PAID TO A CORPORATION NOT YET EXISTING** is enforceable by it after it comes into existence. Such a subscription is in the nature of a continuing offer, which ripens into a binding obligation when the corporation, being fully organized, accepts such offer.

**CORPORATIONS. — NOTICE OF THE ACCEPTANCE BY A CORPORATION OF A SUBSCRIPTION FOR ITS BENEFIT**, made before it was organized, is not necessary. Such acceptance may be inferred from the conduct of the corporation in retaining the subscription paper in its possession and expending large sums of money on the faith of it.

**CORPORATIONS—SUBSCRIPTION PAPER—DOLLAR MARK, ABSENCE OF.**—When it appears from a subscription paper that the subscribers agree to pay certain sums of money, and the amount which each is to pay is expressed in figures, it will be presumed, in the absence of evidence to the contrary, that they represent dollars.

**CORPORATION TO CONDUCT HOTEL BUSINESS, POWERS OF.**—A corporation incorporated to conduct a general hotel business, has power to subscribe a sum of money to be used by another corporation about to be formed for the purpose of carrying on an international military encampment in the city in which the subscribing corporation conducts its business.

**CORPORATION, POWERS OF. — A CORPORATION ORGANIZED TO CARRY ON A HOTEL BUSINESS** has, as incident to its powers, the power to adopt and promote all reasonable expedients directly calculated to increase the number of its patrons, such as advertising, employing agents to solicit patronage, running omnibuses and other vehicles to convey guests to and from the hotel, and other similar expedients.

**SUBSCRIPTION, CONSIDERATION FOR.**—When money is expended, labor bestowed, and materials furnished on the faith of a subscription paper, a consideration sufficient to sustain it exists, and it becomes irrevocable.

**PLEADING — DENYING THE EXECUTION OF AN INSTRUMENT BY A CORPORATION.**—If an instrument sued upon purports to be signed by a corporation by its president, his authority to execute it cannot be put in issue under the statute of Illinois except by a plea, verified by an affidavit denying the execution of such instrument.

**SUBSCRIPTION TO A CORPORATION ABOUT TO BE FORMED.** — Notice to a subscriber of a sum of money to be paid to a corporation to be formed, that his subscription has been accepted by it, is not necessary if it has in fact accepted and acted upon such subscription.

*S. K. Dow and Josiah Burnham, for the appellant.*

*Cratty Brothers, for the appellee.*

**BAILEY, J.** This was an action of *assumpsit*, brought by the International Military Encampment Company, for the use of Robert E. Jenkins, receiver, against the Richelieu Hotel Company, upon the following contract:—

“Whereas, in pursuance of the wishes of a large number of the prominent citizens of Chicago, an association, of which ex-Governor John L. Beveridge is president, has been formed for the purpose of inaugurating and carrying out an international military encampment, on a large scale, in or near Chicago, in September or October, 1887, which is the semi-centennial year of the city; and

“Whereas, the successful carrying out of the said encampment and celebration is expected to be of great benefit to the city and its business, and can only be properly and creditably accomplished by the expenditure of large sums of money;

“Now, therefore, we, the undersigned, do hereby subscribe the sums set opposite our respective names, and agree to pay the same to the treasurer of the ‘International Military Encampment Company of Chicago, Illinois,’ upon the call of the directors of the said company, the sum so subscribed and paid to be used at the discretion of the said directors in carrying out the said encampment and celebration, and in the event of the amount of money so subscribed being deemed by the directors to be insufficient for carrying out said encampment in all its details, the subscriptions hereto made shall not be binding upon the subscribers:—

NAMES.	AMOUNTS.
Palmer House (two thousand) . . . . .	2,000
The Richelieu Hotel Co., H. V. Bemis, president . . .	1,000
McCoy’s Hotel, William McCoy . . . . .	500
Leland Hotel, Warren F. Leland . . . . .	1,000
Briggs House, Frank Murran . . . . .	3,000
Commercial Hotel, C. W. Dabb & Co. . . . .	500
Drake, Parker & Co. . . . .	1,500
H. M. Kinsley . . . . .	500
Thompson’s Restaurant, A. Cummings . . . . .	500



NAMES.	AMOUNTS.
Willoughby, Hill & Co. . . . .	500
Charles Kern . . . . .	300
H. H. Kohlsaat . . . . .	500
Rector's Oyster House . . . . .	150
Wm. Werner & Co. . . . .	200
E. B. Smith . . . . .	200
Lansing and Sickler . . . . .	200
Race Brothers . . . . .	150
A. Booth and Son . . . . .	100
Sturekow and Kadish (Vienna Bakery) . . . . .	100
A. B. Young, Anna House . . . . .	50
E. A. Bachelder, Southern Hotel . . . . .	200
J. W. Boardman & Co., Hotel Woodruff . . . . .	200
Albaugh House, Albaugh and Carr . . . . .	150
Hotel Brevoort, Field and Hubbard . . . . .	200
J. M. Haslett & Co., Deming Hotel . . . . .	100
C. Pirrung, Massasoit Hotel . . . . .	100
Raggio Brothers, St. Charles Hotel . . . . .	100
E. Philbrick and Son, Clarendon House . . . . .	100

*Restaurants.*

Batchelder's Restaurant . . . . .	150
Gault House, Roders and Welch . . . . .	200
City Hotel, W. F. Orcutt . . . . .	100
Columbus Hotel, S. S. Buckley . . . . .	100
Washington Hotel, M. J. Henderson (if there) . . . . .	100
Farwell House, E. S. Pinney . . . . .	100
Hotel Royal, R. E. Gallup . . . . .	100
Mrs. M. J. Spiking (pay in September) . . . . .	100
D. A. Darley . . . . .	100
Thos. A. Dean (conditionally on being in business) . . . . .	100
Thos. S. Brown, pay in July and August . . . . .	100
N. D. Laughlin, Laughlin's European Hotel . . . . .	100
Garden City, George E. Macshane . . . . .	100
Brockway and Milan . . . . .	150
J. D. Fanning, Revere House . . . . .	100
W. J. Kuhns and Son . . . . .	100

The declaration consists of three special counts. In the first count said subscription paper or contract is set out in *hæc verba*, except that all the signatures and amounts subscribed, other than those of the defendant, are omitted. In the second count said instrument is set out as being, in legal

effect, a contract by the defendant to pay the plaintiff the sum of one thousand dollars, upon the terms and conditions, and upon the consideration therein stated. The third count sets out the body of said instrument *in hæc verba*, and avers that it was signed by the defendant, by the name and style of "The Richelieu Hotel Company, H. V. Bemis, President, \$1000," no reference being made to the subscriptions of the other subscribers. Each of the counts avers an acceptance of said subscription by the plaintiff, the performance on its part of the conditions therein prescribed, and a proper call by it upon the defendant for the amount of said subscription.

The defendant appeared and pleaded *non assumpsit*. Afterward, by leave of the court, an additional plea was filed, purporting to be a plea of fraud and circumvention in procuring the execution by the defendant of said subscription. The fraud and circumvention alleged consisted, in substance, of divers representations and promises by the plaintiff to the defendant as to the nature and extent of the proposed international military encampment, and the number of officers, troops, musicians, etc., who would thus be brought together, and also of a promise by the plaintiff that the defendant's hotel should be and become the headquarters of the officers of the United States, of the several states and of foreign governments participating in said encampment, and the subsequent failure on the part of the plaintiff to keep its said promises by holding a military encampment such as it had represented, or by causing the Richelieu Hotel to become the headquarters of the officers commanding the troops at said encampment. To said plea, a special demurrer setting up, among other things, that the matters stated in said plea did not amount to fraud and circumvention, was sustained.

The defendant, by leave of the court, then filed a further plea, setting up a total failure of the consideration of said subscription. To that plea a demurrer was interposed, and while said demurrer was pending, by agreement of the parties made in open court, an order was entered in the cause that all evidence might be introduced, under the general issue, which might be well pleaded. The demurrer to said additional plea was thereupon sustained, the court, at the same time and as a part of the same order, repeating the order already entered by agreement, as to the admission of evidence under the general issue.

Upon the issues thus formed, a trial was had before the

court and a jury, resulting in a verdict finding the issues for the plaintiff and assessing its damages at nine hundred dollars, and the court, after denying the defendant's motion for a new trial, entered judgment on the verdict. On appeal by the defendant to the appellate court, said judgment was affirmed, and the present appeal is from said judgment of affirmance, the appellate court having granted a certificate that the case, although involving less than one thousand dollars, involved questions of law which, on account of principal and collateral interests, should be passed upon by this court.

It is insisted that the trial court erred in sustaining demurrers to said pleas. We think it clear that the first additional plea was insufficient. It attempted to set up as a defense fraud and circumvention in procuring the execution by the defendant of the instrument sued on, but the fraud set up relates solely to the consideration of said instrument, and not to procuring its execution. There is no pretense that any trick, device, or artifice was resorted to by the plaintiff to procure the defendant's signature to said instrument, or that the defendant, at the time it was signed, did not know precisely what it was doing, and did not sign the instrument knowingly and understandingly, and with the intention of executing precisely the instrument it did execute. The rule is well settled that this defense can be sustained only by evidence of fraud or covin in relation to the execution of the instrument, and not by evidence of fraud in relation to the consideration on which it is based: *Woods v. Hynes*, 1 Seam. 103; *Mulford v. Shepard*, 1 Seam. 583; 33 Am. Dec. 432; *Adams v. Wooldridge*, 3 Seam. 255; *Latham v. Smith*, 45 Ill. 25; *Shipley v. Carroll*, 45 Ill. 285; *Depuy v. Schuyler*, 45 Ill. 306; *Clarke v. Johnson*, 54 Ill. 296; *Elliott v. Levings*, 54 Ill. 213; *Easter v. Minard*, 26 Ill. 494; *Hendrix v. The People*, 9 Ill. App. 42.

Whether the decision of the court sustaining the demurrer to the second additional plea was erroneous or not, it seems clear that the defendant was in no way prejudiced by it. If it be conceded that a defendant to a suit on a non-negotiable instrument, in order to avail himself of the defense of a total failure of consideration, must specially plead it, the order of court entered by agreement of the parties, giving the defendant a right to prove any matter which would be available if specially pleaded, under the general issue, placed the defendant in quite as advantageous a position as it would have been in if its plea of failure of consideration had been sustained.

The order of court entered by agreement of the parties was at least as effectual for the purpose for which it was entered, as a mere stipulation of the parties to the same effect would have been. In *Carpenter v. First Nat. Bank*, 119 Ill. 352, we held that where the parties had stipulated that defenses which could properly be set up by special plea might be introduced under the general issue, the case stood in the same condition as though the general issue, and special pleas properly presenting such defenses, had been pleaded. The defendant was thus accorded an opportunity of availing itself of the defense attempted to be set up by its plea, just as fully and effectually as it could have done if the demurrer had been overruled.

The next point made is, that the subscription contract should have been excluded on account of a material variance between said instrument and the instrument set out in the declaration. The variance now pointed out is this: The declaration describes said instrument as an agreement by which the defendant undertook and promised to pay the plaintiff, for the consideration therein named, the sum of one thousand dollars, setting out the contract of subscription with the defendant's signature and subscription only appended thereto, while the instrument offered in evidence bears the signatures and subscriptions of a large number of other parties besides the defendant, and said instrument, so far as the defendant's subscription is concerned, contains no sign or dollar mark indicating that said subscription was for the sum of money alleged or for any sum of money.

Without pausing to determine whether what is now thus pointed out constituted a material variance, it is sufficient to say, that at the time the subscription paper was offered and admitted in evidence, it was not objected to on the ground of variance, nor was any variance between it and the declaration pointed out or even suggested. Its admission in evidence was objected to on several other specific grounds, but this objection was not made. Under our present practice, if a party wishes to insist upon a variance between the allegation and proof, he must point out the variance specifically, if for no other purpose, for that of enabling the opposite party to so amend his pleading as to make it conform to the evidence offered, and thus avoid defeat upon a point in no way involving the merits of the controversy: *Lake Shore etc. Ry Co. v. Ward*, 135 Ill. 511; *St. Clair Ben. Soc. v. Fietsam*, 97 Ill.



474. It is manifestly too late to raise a question of variance for the first time on appeal.

The next contention is, that the plaintiff was no party to said contract of subscription, and that no suit thereon in its name can be maintained. Although said contract is without date, the evidence tends to show that it was executed by the defendant some time in March, 1887, and it was admitted at the trial that the plaintiff did not become fully incorporated until April 25, 1887. It is insisted, therefore, that at the time the subscription was made, the International Military Encampment Company was a mere voluntary association, and that the right of action, if any exists, is in that association, or its treasurer, and not in the corporation afterwards organized under the same name.

In support of this contention appellant further insists that at the time the subscription was made, there was no intention on the part of the promoters of said military encampment to form a corporation, and that their organization as a corporation was an afterthought, and there is some evidence lending countenance to that theory. On the other hand, there seems to us to be evidence, to be derived in part from the phraseology of the subscription contract, but mainly from the surrounding circumstances, tending to show that it must have been the original intention of the promoters of said enterprise to carry it on by means of a corporation to be organized as soon as the requisite subscriptions should be obtained, under the name adopted in the subscription contract. It thus appears that the question here suggested was a mere question of fact, which, by the judgment of the appellate court, is conclusively settled adversely to the appellant, and for all the purposes of this appeal it must be assumed that the formation of a corporation under the name adopted was contemplated from the first.

The case then, as presented here, is one of a subscription, not to an existing, but to a contemplated corporation, and the question is, whether such subscription is enforceable by the corporation after it comes into being. Questions of this character most frequently arise in case of preliminary subscriptions to the capital stock of corporations not yet organized, and it is held that such subscriptions are in the nature of continuing offers to take stock upon the organization of the corporation, and they ripen into binding contracts when the corporation, after becoming a corporate body, accepts the offer:

*Cross v. Pinckneyville Mill Co.*, 17 Ill. 54; *Tonica etc. R. R. Co. v. McNeely*, 21 Ill. 71; 2 Beach on Corporations, sec. 512, and numerous decisions cited in note.

The same principle is held to be applicable to other preliminary contracts. Thus in *Johnston v. Ewing Female University*, 35 Ill. 518, it was held that a subscription for the building of a university, made prior to its incorporation, but in contemplation thereof, was legal and binding upon the party making it. So in *Snell v. Trustees of M. E. Church*, 58 Ill. 290, it was held to be no defense to a suit to enforce a subscription to aid in building a church, that at the time of the subscription the society was not incorporated.

But it is said that the evidence fails to show an acceptance of the subscription by the plaintiff after its incorporation. Whether such acceptance took place or not is a mere question of fact which is not open for consideration here. It may be said, however, that no formal acceptance was necessary, an acceptance being inferable from the conduct of the plaintiff in retaining the subscription in its possession and expending large sums of money on the faith of it, and these facts the evidence tends to prove.

But it is claimed that before any valid acceptance took place the defendant recalled its offer, and thus put an end to its liability. Whether such withdrawal took place, and whether it occurred before the plaintiff had accepted the subscription, are of course questions of fact not reviewable here. The evidence tends to show that on the thirteenth day of September, 1887, and nearly five months after the plaintiff's incorporation, Bemis, the defendant's president, met one of the plaintiff's officers, and notified him that the defendant withdrew from its subscription, at the same time producing and delivering to said officer his, Bemis's, check for one hundred dollars, and telling him that that was all the defendant could do; but the evidence also tends to show that long before this attempted revocation, the plaintiff, on the faith of this and other subscriptions, had expended considerable, if not large, sums of money, and had incurred divers liabilities in attempting to secure the attendance at the proposed military encampment of bodies of foreign troops, and in making other preparations for said encampment. The judgment of the appellate court has settled the fact that the plaintiff's acceptance of the subscription was prior to the defendant's attempted

withdrawal, so as to preclude all investigation of that question here.

It is also contended that said subscription contract is void for uncertainty, there being no dollar mark or other character showing what was meant by the figures "1000," and therefore that it is wholly uncertain what subscription was intended. This contention we think cannot be sustained. It is clear from the terms of the instrument that the subscription was payable in money, and that money was intended to be subscribed, and nothing else. The terms of the subscription, after reciting that the proposed enterprise could be creditably accomplished only "by the expenditure of large sums of money," are, "We, the undersigned, do hereby subscribe the sums set opposite our respective names, and agree to pay the same, . . . the sums so subscribed and paid to be used by said directors, . . . and in the event the amount of money so subscribed shall be deemed by the directors to be insufficient," etc. The subscription being in money, of which one dollar is the unit, the number expressed in figures must be taken, *prima facie*, to be the number of such units subscribed. The subscription of 1000 in money must, *prima facie*, be taken to be a subscription of \$1000. This view seems to have been adopted in *Hunt v. Smith*, 9 Kan. 140, in which the court says: "Whenever figures are used intending to represent money, such figures must of course be understood to represent dollars, unless a different intention is clearly expressed."

A number of decisions in this state are referred to as holding a contrary doctrine, but those are all cases of judgments, and most of them are cases of judgments for the sale of lands for taxes, and it was there held that a judgment expressing a sum in figures, without any dollar mark or other equivalent word or character was void, upon the principle that all judgments for money should be certain, and find the sum for which they are rendered, and that failing to do so, they are fatally defective. The amount for which a judgment is rendered should be precisely fixed and determined, and should not be left to construction; but this rule manifestly does not apply to contracts. Their construction, for the purpose of arriving at the intention of the contracting parties, is always admissible, and in applying the rules of construction, everything within "the four corners" of the instrument may be considered. If from the whole instrument the intention of the parties can be discovered, that intention will be supported,

however imperfectly it may be expressed in portions of the contract.

It is next urged that said subscription by the defendant is *ultra vires*. It may be inferred from the name of the defendant corporation that it was organized for the purpose of maintaining and operating a hotel. It also appears from those portions of the defendant's certificate of incorporation read in evidence that the object for which it was incorporated was "to conduct a general hotel business."

In our opinion a subscription for the purpose for which the one in question was made was not beyond the corporate powers as thus shown. The establishment and holding in or near the city of Chicago of an international military encampment upon the plan proposed by the plaintiff was a scheme likely to bring to the city large numbers of strangers who, while in the city, would necessarily require hotel accommodations, and would thus largely increase the patronage of the various hotels in the city, the defendant's among the rest. Power to carry on the hotel business necessarily carries with it, as an incident, the power to adopt and promote all reasonable expedients directly calculated to increase the number of patrons of the hotel, such as advertising, employing agents to solicit patronage, running omnibuses and other vehicles to convey guests to and from the hotel, and other similar expedients. Donations of money to enterprises calculated to bring to the city large numbers of visitors from abroad would seem to fall within the same reason.

Perhaps no better practical confirmation of this view can be found than that furnished by this subscription paper, by which the proprietors of most of the leading hotels and restaurants of the city subscribed large sums of money to help secure the holding of the proposed encampment. It is scarcely to be presumed that these men were willing to give their money for the mere purpose of having a military encampment held. Such exhibition of itself was no more to them than to other members of the community. They doubtless subscribed upon business principles and from a business standpoint, and because they believed that by doing so they could best promote their own business enterprises. In view of the practical judgments of these men thus expressed, the courts will hardly undertake to say that the objects of the subscription were so foreign to the business which the defendant was incorporated



to carry on as to call for an application of the doctrine of *ultra vires*.

The point is made that said subscription was without consideration and therefore void. A consideration may consist of a benefit to the promisor or of a detriment to the promisee. Whether said subscription in fact resulted in a benefit to the defendant or not, it worked a detriment to the plaintiff in that, on the faith of it, the plaintiff expended money in the promotion of the enterprise for which it was made. In *Hudson v. Green Hill Seminary*, 113 Ill. 618, in discussing the consideration of a subscription to a seminary, we said: "His promise to pay was a mere offer until acted upon; but when money was expended, or materials furnished, or labor bestowed on the faith of it, it became irrevocable and binding as a promise to pay, and this, although at the time the writing was executed, the corporation was only in contemplation. The real consideration upon which the plaintiff is entitled to recover in such cases is, that it has expended money, furnished materials, or bestowed labor, upon the faith of the promise in writing, and not any special benefit derived or expected to be derived by the promisor from the corporation."

Several questions are raised upon the rulings of the court in the instructions to the jury, most of which, however, are substantially disposed of by what we have already said. Complaint is made of the refusal of the court to give to the jury the defendant's second, third, fourth, fifth, sixth, and eighth instructions and in modifying its seventh instruction.

The second instruction was, in substance, that if at the time the subscription was signed, the plaintiff had not been organized as a corporation, there was no contract relation between the parties, and the plaintiff could not recover. That this is not the law sufficiently appears from what has been already said.

The third instruction was to the effect that, if at the time the subscription was signed, the plaintiff was organized and existing as a corporation for profit, under the laws of this state, then the subscription was without consideration and void. We are unable to see how the question of the sufficiency of the consideration was necessarily dependent upon the fact, if it was a fact, that the plaintiff was incorporated for the purpose of holding a military encampment for profit. The sufficiency of the consideration depended upon whether the plaintiff expended money or incurred liabilities on the

faith of the subscription, and that might be the case just the same, whether the plaintiff was organized under the statute for pecuniary profit, or not for pecuniary profit.

The fourth instruction sought to raise a question as to the authority of Bemis, the defendant's president, to execute the subscription paper in its behalf so as to bind it. As no plea verified by affidavit, denying the execution of said instrument by the defendant, was filed, the authority of Bemis to sign the paper was not in issue. Under the provisions of the thirty-third section of the practice act, no defendant is permitted to deny, on trial the execution of any instrument in writing, upon which any action may have been brought, without having filed a plea, verified by affidavit, denying its execution. In *Dwight v. Newell*, 15 Ill. 333, this section was held to apply to an instrument signed for a corporation by parties purporting to act for it, and the rule was there laid down, that unless a plea verified by affidavit, putting in issue the authority of the parties signing the instrument was filed, its execution was admitted.

The fifth instruction held that if the plaintiff was a corporation organized under the laws of this state, and if the objects of its organization, as expressed in its articles of incorporation, was to conduct a general hotel business, and that only, the contract sued on was *ultra vires* and void. The unsoundness of this proposition has already been sufficiently shown.

The sixth instruction held that the subscription in question was incomplete in law, until notice to the defendant of its acceptance by the plaintiff, and that until such notice, the defendant had a right, at any time, to withdraw from said subscription, and that if it gave the plaintiff notice of its intention to withdraw before it had received notice of the plaintiff's acceptance, the subscription was not binding. We know of no rule of law which made said subscription inchoate and incomplete, though accepted and acted upon by the plaintiff after its organization, until notice to the defendant of its acceptance by the plaintiff, and counsel has referred us to no authority which so holds. We think the instruction was properly refused.

The eighth instruction was as follows: "The jury are further instructed that the plaintiff was bound to make out its case by a preponderance of the evidence upon every material point, and the jury are the sole judges of the weight and preponderance of the evidence; and if in weighing the evi-

dence the jury think that the evidence upon any point necessary to a recovery by the plaintiff is evenly balanced, or preponderates ever so slightly in favor of the defendant, they, the jury, should find for the defendant."

This instruction, in laying down the rule that the burden was on the plaintiff to make out its case by a preponderance of the evidence, announced a correct proposition of law; but its application of that rule to the issues before the jury was such as was likely to mislead them. The case, as submitted to the jury, did not consist solely of issues upon the declaration, but also included affirmative issues raised by the defendant, such as that raised by the defense of accord and satisfaction, of fraudulent representations, and of failure of consideration, and as to those issues the burden of proof was on the defendant; but the instruction held that if on any point necessary to a recovery by the plaintiff the evidence preponderated in favor of the defendant or was equally balanced, the verdict must be for the defendant. The plaintiff could recover only by having every point or issue found in its favor, and that of course included those as to which the burden of proof was on the defendant; and so the instruction seems to throw the burden of proof, even as to them, on the plaintiff.

The defendant's seventh instruction was given by the court to the jury as follows, the modification complained of consisting of the insertion of the words "then and there":—

"If the jury believe from the evidence that the president of the defendant corporation, after the signing of the contract of subscription offered in evidence, and before notice of any call for the payment of said subscription, notified the plaintiff or its agents that the stockholders of the defendant corporation, or some of them, were dissatisfied with said contract, and that said president then offered the plaintiff the sum of one hundred dollars in satisfaction of said contract, and that said plaintiff, by its officers or agents, then and there accepted such sum of money in satisfaction of said contract, then there is no further liability on said contract, and the jury should find for defendant."

We are unable to perceive any substantial objection to said modification, especially as there is no evidence of any acceptance of said one hundred dollars by the officers or agents of the plaintiff in satisfaction of said contract, outside of the evidence of what occurred at the time the one hundred dollars

was paid by Bemis to an officer of the plaintiff. If that money was ever accepted by the plaintiff in satisfaction of the subscription, such acceptance, so far as the evidence shows, was then and there, to wit, at the time the money was paid.

The defense set up, based upon the alleged representations and promises made to the defendant by the agents of the plaintiff at the time the subscription was made, presents mere questions of fact in relation to which the evidence is conflicting, and which are not reviewable here. So, also, of the defense of accord and satisfaction sought to be made out from the occurrences at the time the one hundred dollars was paid was held by the appellate court, as well as by the jury in the trial court, not to be proved. Whether it was or not is a question of fact as to which the judgment of the appellate court is final.

After carefully considering the entire record, we are of the opinion that it is free from substantial error, and the judgment of the appellate court will therefore be affirmed.

Judgment affirmed.

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**NEGOTIABLE INSTRUMENTS — FRAUD AS A DEFENSE.** — To avoid payment of a note on the ground of fraud, the fraud must extend to the whole consideration: *Harlin v. Read*, 3 Ohio 285; 17 Am. Dec. 594. Defendant may show that the note was given to plaintiff in consideration that he would surrender certain accepted drafts in plaintiff's favor, and that, after receiving the note, plaintiff refused to deliver up the drafts until partial payment had been made thereon, acceptances erased, and receipt in full had been given to acceptor: *Shepard v. Hawley*, 1 Conn. 367; 6 Am. Dec. 244; but where a surety was induced to renew a note upon the representation of the payee that the consideration of the original note was for money paid to the principal maker over the counter of a bank by the payee, when in fact the consideration was for money paid by the payee for the benefit of the principal maker to another party for the purchase price of an interest in a patent right, no such fraud or deceit is shown as to bar the recovery on the note by the payee against the surety: *Acker v. Warden*, 47 Kan. 51.

**CORPORATIONS. — SUBSCRIPTIONS PRIOR TO THE ORGANIZATION OF A CORPORATION** inure to its benefit after it is formed: *Griswold v. Trustees*, 26 Ill. 41; 79 Am. Dec. 361; *Edinboro' Academy v. Robinson*, 37 Pa. St. 210; 78 Am. Dec. 421. Such subscriptions are in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, become as to each subscriber a contract between him and the corporation: *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654; *Minneapolis etc. Machine Co. v. Davis*, 40 Minn. 110; 12 Am. St. Rep. 701; and an action may be maintained by the corporation when formed to recover the subscriptions: *Marysville Electric Light etc. Co. v. Johnson*, 93 Cal. 538; 27 Am. St. Rep. 215; *Athol Music Hall Co. v. Carey*, 116 Mass. 471; *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Inter-*



*national Fair etc. Ass'n v. Walker*, 83 Mich. 386; 88 Mich. 62; *Curry Hotel Co. v. Mullins*, 93 Mich. 318; but the liability of a subscriber may be qualified by a subsequent agreement between him and the corporation: *Minneapolis Industrial Exposition v. Brown*, 43 Minn. 77. A subscription paper by which the subscribers "promise to pay the trustee of the hotel to be built at St. Joseph the sums set opposite our names, to be taken as stock at twenty-five dollars per share," is insufficient in and of itself to form a contract; and when two of the subscribers afterwards refused to sign a more formal paper, and the corporation, having been organized, built the hotel with full knowledge of the refusal, it was held that the subscriptions could not be recovered: *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182.

**NEGOTIABLE INSTRUMENTS — ABSENCE OF DOLLAR MARK.** — An order drawn for "37.89" without any "\$" is not void, as being unintelligible; but the court will intend that the figures are used as whole numbers and decimals to express the national currency of the United States: *Northrop v. Sunborn*, 22 Vt. 433; 54 Am. Dec. 83. A note beginning "\$409.68 cents," and proceeding with a promise to pay "four hundred and nine 68-100 in currency," omitting the word "dollars," will be construed as a promise to pay such amount in dollars and cents: *Petty v. Fleishel*, 31 Tex. 169; 98 Am. Dec. 524.

**CORPORATIONS, POWERS OF.** — A corporation has a right to conduct its legitimate business by all means necessary to effect its object, and, within its prescribed range, can do whatever a natural person could do: *Killingsworth v. Portland Trust Co.*, 18 Or. 351; 17 Am. St. Rep. 737; *Wright v. Hughes*, 119 Ind. 324; 12 Am. St. Rep. 412; but powers not expressly granted cannot be exercised unless they are necessary to carry into effect those specifically conferred: *Chicago Gas etc. Co. v. People's Gas etc. Co.*, 121 Ill. 530; 2 Am. St. Rep. 124; *Pittsburg etc. Ry Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517. An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it: *People v. Chicago Gas etc. Co.*, 130 Ill. 268; 17 Am. St. Rep. 319; *Elevator Co. v. Memphis etc. R. R. Co.*, 85 Tenn. 703; 4 Am. St. Rep. 798. Where the corporation is confined to one business it cannot lawfully engage in enterprises foreign to that business: *People v. River Raisin etc. R. R. Co.*, 12 Mich. 389; 86 Am. Dec. 64; *Tennessee etc. Transportation Co. v. Kavanaugh*, 93 Ala. 325; *Simmons v. Troy Iron Works*, 92 Ala. 427. In construing a grant of corporate authority, the fact that a particular power is omitted from those enumerated in the charter, is to be given the effect of a prohibition against its exercise, unless there is an imperative implication of its inclusion: *Groff's Appeal*, 128 Pa. St. 621. A contract entered into by a town company, incorporated "for the purchasing of lands, the surveying and platting of town sites and selling town lots and other lands," in which it was agreed that, if R. would remove a bank, a barn, and a restaurant located elsewhere to the town site, the town company would convey to him certain lots in the town and pay him the sum of \$1,000, tends directly to enhance the value of the remaining property of the corporation, and is not necessarily *ultra vires*: *Sherman Center Town Co. v. Russell*, 46 Kan. 382.

## CHICAGO ANDERSON PRESSED BRICK COMPANY v. REINNEIGER.

[140 ILLINOIS, 234.]

**MASTER AND SERVANT — MINOR EMPLOYEES.** — If a boy employed in a factory in which dangerous machinery is used is of sufficient age, intelligence, and discretion to understand and appreciate the risks to which he is exposed, and is informed of the dangerous nature of the work in which he is employed, then he must be held to have assumed the ordinary hazards and perils of such employment and cannot recover for an injury which is the result thereof.

**MASTER AND SERVANT — INEXPERIENCED EMPLOYEES.** — Employers owe it as a duty to inexperienced employees to point out the dangers of which they themselves have, or ought to have, knowledge and to give such warnings as may lead to the avoidance of injury by the exercise of reasonable care. Most especially should this duty be performed where the dangers and the means of avoiding them are not apparent, or fully within the comprehension of the servant.

**MASTER AND SERVANT — QUESTIONS FOR THE JURY.** — Whether a servant was such a person as was entitled to have special instructions concerning risks to which he was exposed and the means of avoiding them, and whether the duty of instructing him was discharged by his employer, are matters for the jury to determine from all the facts and circumstances of the case. The burden is on the servant to prove the existence and breach of such duty.

**MASTER AND SERVANT. — IF A MINOR EMPLOYEE KNOWS AND APPRECIATES THE DANGER** and peril of the work in which he is engaged, and then chooses to engage in it, he must assume all risks to which he thus exposes himself and cannot recover for an injury resulting to him therefrom. If, on the other hand, from his youth and inexperience, he did not know and appreciate such dangers and his employer knew, or had reason to know, the peril and danger to which he was exposed and did not explain or give notice thereof, and he, while not guilty of negligence on his part, is injured because he failed to understand and appreciate the danger to which he was exposed, then his employer is answerable.

**NEGLIGENCE — ORDINARY CARE.** — In determining whether a minor employee was, when injured by dangerous machinery, exercising ordinary care, the jury may take into consideration his age, intelligence, and discretion, and his knowledge of, or inexperience with, machinery. The same degree of care is not required of a mere boy of inexperience and immature judgment as of a person of mature years.

**MASTER AND SERVANT. — AN INFANT SERVANT MUST BE MADE TO UNDERSTAND** and appreciate the perils incident to the work upon which he is engaged, and any instruction or explanation which is not sufficient to make him so understand and appreciate will not exonerate the master from liability for injuries received by such servant from such perils because of his not understanding and appreciating them.

**EVIDENCE IN REBUTTAL.** — If witnesses for defendant testified that it was impossible for plaintiff's hand to have been drawn under a certain framework in the manner testified by him, it is proper in rebuttal to receive evidence of other witnesses to the effect that they knew it was possible and that they had seen similar occurrences take place,

*S. M. Millard, A. C. Barnes, and Hiram Barber, for the appellant.*

*Freeman and Walker, for the appellee.*

MAGRUDER, C. J. This is an action for damages for a personal injury brought in the circuit court of Cook County by Morris Reinneiger, a boy who sues by his next friend, against the appellant, the Chicago Anderson Pressed Brick Company. The trial below resulted in a judgment for three thousand dollars for the plaintiff, the appellee here; and the judgment has been affirmed by the appellate court.

The injury occurred on November 17, 1888, while appellee was in the employ of the appellant company. On that day he was at work upon one of appellant's brick machines, when his hand was caught by a part of the machine and so crushed as to necessitate an amputation of the arm below the elbow.

A portion of the brick-pressing machine consisted of a circular table or disc, which revolved horizontally around its center. In the table are eight pairs of molds, which receive the clay from which the bricks are made. As the table revolves on its center, the molds are brought under a spout, from which the pulverized clay is dropped into them as they pass successively under it. About eleven or twelve inches from the feed spout is the frame, made of an upright casting of heavy iron, containing what is called the "plunger." The plunger is a heavy iron or steel beam, impelled by steam, sliding up and down within the frame, and fitting into the mold beneath, into which it descends with great power, and forms the bricks by pressing the clay into the molds. Each mold, after passing under the spout and being there filled with clay, passes on under the plunger. The boy was required to oil and insert a piece of metal called a "gib," used to give an ornamental shape to the brick, into the empty mold before it reached the feed spout, and then to step into the space between the feed spout and plunger, and with his hand brush off the superfluous clay from the mold, after it left the feed spout and before it reached the plunger. During these operations, the table had an intermittent, rotary motion, stationary during the feeding and pressing, and then revolving on to the right to bring the next pair of molds into proper positions for being filled and pressed.

It is claimed by the appellee that his hand, while he was engaged in removing the surplus clay from the mold and pressing what was left to make it even, was carried forward under

the frame and thence on under the plunger, and that the danger of the hand being thus caught was inherent in the mode of operating this kind of a machine, and that the hand was particularly liable to be caught in the machine on which the boy was at work because of its alleged defective character. On the other hand, the appellant claims that the boy must have reached around to the opening in the frame, and placed his hand under the plunger with the idea that he could remove it before the plunger descended.

The plaintiff did not request the giving of any instructions, but the court gave an instruction of its own motion, a portion of which is claimed by the appellant to have been erroneous. By it the jury were told that if a boy employed in a factory where dangerous machinery is in use "is of sufficient age, intelligence, and discretion to understand and appreciate the risk to which he is exposed, and if he is informed of the dangerous nature of the work in which he is engaged, then he must be held to have assumed the ordinary hazards and perils of such employment, and cannot recover for an injury which is the result of the ordinary peril and danger of his employment."

We think that the instruction correctly states the law: *Hinckley v. Horazdowsky*, 133 Ill. 359; 23 Am. St. Rep. 618; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; 3 Am. Rep. 506; *Grizzle v. Frost*, 3 Fost. & F. 622. It is a general rule that when a contract of employment is made with a minor he assumes the ordinary hazards of such employment in the same manner as an adult assumes them: *Gartland v. Toledo etc. Ry Co.*, 67 Ill. 498. But the rule is modified in case of young persons of inexperience and immature judgment, who are not capable of fully understanding and appreciating the perils to which they are exposed. They are entitled to recover for injuries which result from such perils unless they have been instructed how to avoid them. Employers owe it as a duty to such inexperienced servants to point out the dangers of which they themselves have, or ought to have, the knowledge, and to give such warnings as may lead to the avoidance of injury by the exercise of reasonable care. More especially should this duty be performed where the danger and the means of avoiding it are not apparent, or fully within the comprehension of the servant: 1 *Shearman and Redfield on Negligence*, 4th ed., secs. 218, 219.

Whether the plaintiff below was such a person as was en-



titled to demand of the defendant the performance of the duty here indicated, and whether the defendant actually discharged its duty towards him in this regard, were matters for the jury to determine from all the facts and circumstances of the case. The burden was upon the plaintiff to prove the existence and breach of such duty: *Sullivan v. India Mfg. Co.*, 113 Mass. 399. None of the instructions given hold that the burden of proof in this respect was not upon the plaintiff. Nor do we agree with counsel for the appellant that there was no testimony in the case which justified the submission to the jury of the question whether or not plaintiff was entitled to a modification in his favor of the general rule above stated.

The evidence tended to show that appellee was only sixteen years old; that he had worked for appellant about a year in 1887 and 1888, but only five or six times upon a machine like this; that he had not been hired for any particular service, but with the exception of the five or six times aforesaid, had been at work as a common laborer wheeling brick in a wheelbarrow from the press to the kiln and cleaning them; that at the end of the year he had left appellant's service and remained away three or four months; that he had only been at work for appellant about three weeks after his return before the accident; that he had not been put at work upon the machine which caused the injury until the day the accident occurred, and had only been so at work for a very short time before the accident; that there was space enough between the bottom of the frame and the surface of the table for the hand and wrist to pass under the frame; that this particular machine had a "jerky" motion, not noticed in others of the same manufacture, so that it would suddenly pull the mold and the hand upon it under the frame; that the "gib" in use when the accident occurred was of a larger size than the "gibs" which the plaintiff had handled before, and required the removal of a greater surplus of clay; that the space between the feed spout and the plunger was only about eleven or twelve inches, so that plaintiff could not stand in front of the table, but was obliged to stand with his side to it; that within the space of ten or fifteen seconds, while the mold with the "gib" in it was passing from the feed spout to the plunger, the boy was required to remove about two handfuls of clay from the mold and press the remainder evenly in the corners, judging by the eye of the exact quantity to be removed, so that the brick should not be spoiled when pressed by the plunger;

that the boy was put at work upon the machine in question on the day of the accident by appellant's foreman; that appellant's pressman had charge of the machine and managed it while it was running; that the pressman was supposed to keep his eye on the boy and to see that he did not get into danger; that the pressman told the boy to look out and be careful and not get too close to the plunger, and to take his clay out in time; that if a pressman left a machine "for a minute or so," he would tell the boy at work to be careful; that plaintiff was not allowed to move the lever to stop the machine; that just before the accident, while the machine was in motion and the plaintiff was at work, the pressman told him that he was going to dinner, and after he had turned his back upon the machine and taken three or four steps the accident occurred; that the disc performed a revolution in one minute and fifty-five seconds, turning a brick out of the push-out at the opposite side from the feed spout at the end of every revolution; that only five or six bricks had been turned out when the injury was inflicted. While the evidence tends to show that certain general cautions and instructions were given to the boy as to the use of the machine, yet it does not show that he was informed of the extra labor made necessary by the use of so large a "gib," or of the tendency of this machine to move with a jerk, so as suddenly to pull the mold under the frame.

The portion of the instruction given by the court of its own motion which followed the quotation above made from it was authorized by the evidence and correctly set for the principles of law applicable thereto. It was as follows:—

"In this case, if you believe from the evidence that the plaintiff, at and before the time of the injury, knew and appreciated the danger and peril of the work in which he was engaged at the time of the injury, and understood the same, and then chose to engage in the work which exposed him to such perils and danger, he cannot recover, and your verdict should be not guilty; and in determining the question whether or not the plaintiff knew, appreciated, and understood the perils and dangers of the work in which plaintiff was engaged, you will consider the evidence as to plaintiff's age, as to his previous experience with the machine in question or similar machinery, and all other evidence bearing upon said issue. If, on the other hand, you find and believe from the evidence that the defendant company and its officers knew, or had

reason to know, the peril and danger to which plaintiff was and would be exposed while in the work and employment in which he was engaged at the time of the injury, and did not explain or give notice of such danger or peril to the plaintiff, and if you further find that at the time of the injury the plaintiff was not guilty of negligence and was exercising ordinary care, and that from his youth and inexperience he failed to know, understand, or appreciate, and in fact did not know, understand, or appreciate the risk or danger or peril to which he was exposed in the work in which he was engaged at the time of the injury, and that in consequence he was injured, then the defendant is liable, and you should find the defendant guilty."

We do not think the instruction is erroneous as assuming that the machine was a dangerous one. It assumes that the work upon which appellee was engaged was attended with hazard and danger, but only in the sense in which any employment requiring the use of heavy machinery propelled by steam is hazardous. It is true that appellant introduced some testimony to show that the act of removing the superfluous clay from the mold was not necessarily attended with difficulty or danger, but it was admitted that there was danger in being near and working upon such machinery as was here in use. The appellant proved that its foreman and pressman were in the habit of warning the boys to keep out of "danger." The very theory upon which both sides tried the case and asked instructions, namely, that the employee assumes the "ordinary hazards and perils" of his employment implies that such "hazards and perils" exist.

The court modified an instruction asked by the defendant which announced that if the plaintiff, in the exercise of ordinary care and caution, might have seen the danger and avoided it, and his omission to do so directly contributed to the injury, then he was guilty of such negligence as would prevent a recovery—by stating to the jury, that in determining what was ordinary care on the part of the plaintiff, they might take into account his age, intelligence, and discretion, and his knowledge of, or experience with machinery, etc. Appellant claims that, by the modification, the jury were told that want of intelligence and discretion on the part of the appellee would excuse contributory negligence on his part. Such was not the effect of the modification, especially when read in connection with the other instructions which were given. The same de-

gree of care is not expected or required of a mere boy of inexperience and immature judgment, as is required from a person of mature years: *Chicago etc. Ry Co. v. Eininger*, 114 Ill. 79. The modification could not have done the defendant any injury in view of the fact that the court gave at the request of the defendant the following instructions:—

1. "The court instructs the jury that the burden of proving negligence rests on the party alleging it, and where a person charges negligence on the part of another as a cause of action, he must prove the negligence by a preponderance of evidence; and in this case, if the jury find that the weight of the evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover, and the jury should find the issues for the defendant.

2. "The court instructs the jury that where a person has attained such an age as to be capable of exercising judgment and discretion, he is held to such a degree of care as might reasonably be expected of one of his age and mental capacity. And the simple fact that a minor, however young, has been injured by another, or while in his employ, does not cast liability on the latter. It must further appear that the latter was guilty of negligence or some wrong in violation of a duty to the minor, and that the injury proceeded therefrom, otherwise the child can have no compensation for such injury.

3. "If the jury believe, from the evidence, that the plaintiff, previous to undertaking the kind of work in which he was engaged at the time of the injury, was cautioned and advised by the defendant, or one of its servants, of the dangers involved in such work, and that the plaintiff, at the time of such injury, had attained such age as to be capable of exercising such judgment and discretion as to know and avoid such dangers, and that the plaintiff then undertook to do such work, and was injured by disregarding the instructions and advices he had received, the plaintiff cannot recover."

Appellant also assigns as error, that the court modified the fifth, sixth, and seventh instructions asked and given for the defendant by adding to the requirement, that plaintiff had sufficient intelligence to comprehend the movements of the machine on which he was working, the further requirement that he knew and understood and appreciated the same. The modification was not erroneous. Such knowledge on the part of the infant servant necessarily results from the explanation, which it is the duty of the master to give him, of the hazards



and dangers connected with the business. If it is the duty of the master to give the infant, whom he takes into his service, such instructions and precautions graduated to his youth, ignorance, and inexperience, as are necessary to make him aware of his danger, and to place him in the same situation with reference to it as though he was an adult, then it must be made to appear that such infant understands, as well as that he has the capacity to understand, before he can be denied the right of recovery: 2 Thompson on Negligence, p. 977. Of course, it will be assumed that he understands if he has been instructed, but he may have the capacity to understand and yet may never have been instructed. Such is the doctrine of the text-books. "It is the master's duty to warn him (the servant) of any danger incident to the business, and if, with such knowledge, he chooses to assume the risk and is capable of appreciating the hazards . . . the master is then absolved from liability for injuries resulting from the ordinary hazards": Wood's Master and Servant, sec. 349, p. 718. "The master must warn such young servants against the dangers, to which their employment exposes them, and he must put this warning in such plain language as to be sure that they understand it and appreciate the danger": 1 Shearman and Redfield on Negligence, 4th ed., sec. 219.

There was no error in refusing the instruction as to the right of recovery under the first count of the declaration, because it assumes that the plaintiff was directed to remove the clay from the molds by the foreman. The foreman ordered the plaintiff to go to work upon the machine, but the directions as to the details of the work were given to him by the pressman, who had charge of the machine. The instruction was calculated to confuse the jury by attributing to the foreman what had been done by the pressman; and it incorrectly represents the first count as designating the foreman alone, whereas it refers to "a certain then foreman or servant of the defendant." There is the same objection to the instruction as to the right of recovery under the second count. Both these instructions are also objectionable as singling out, each of them, a single circumstance as constituting a basis for the right of recovery, and giving such circumstance an undue prominence over all the other facts disclosed by the testimony. Such instructions have often been condemned by this court.

There was no error in refusing to submit to the jury the written questions of defendant's attorneys calling for special

findings of fact, because it can be seen, that answers to said questions most favorable to the defendant would not have constituted a finding inconsistent with the general verdict: *Chicago etc. Ry Co. v. Dunleavy*, 129 Ill. 132.

It is claimed that the court erred in admitting certain testimony introduced by the plaintiff upon the rebuttal. Witnesses for defendant had sworn that the boy's hand could not have been drawn under the framework incasing the plunger in the manner stated by him, mainly upon the alleged ground that there was not space enough between the bottom of the frame and the surface of the disc to admit the hand. The testimony offered in rebuttal was that of other workmen, who had worked upon that machine or a similar one, and who swore that the hand could be drawn, while remaining in the mold, sideways under the framework to the plunger, and that such occurrences had actually taken place. We do not see why the evidence was not competent, as being in rebuttal of what defendant had sought to show as to the impossibility of receiving the injury in the manner claimed by the plaintiff.

The judgment of the appellate court is affirmed.

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MASTER AND SERVANT — YOUNG OR INEXPERIENCED SERVANT — ASSUMPTION OF RISKS. — Minor employees who understand that an employment is dangerous, and nevertheless engage in it voluntarily, cannot recover, notwithstanding their youth: *Kehler v. Schwenk*, 151 Pa. St. 505; 31 Am. St. Rep. 777, and note; *South West Imp. Co. v. Smith*, 85 Va. 306; 17 Am. St. Rep. 59, and note; *White v. Wittenmann Lithographic Co.*, 131 N. Y. 631. Minor employees assume the ordinary risks of their service which are obvious to them, or which have been pointed out to them in a manner suited to their youth and inexperience: *Smith v. Irwin*, 51 N. J. L. 507; 14 Am. St. Rep. 699, and note; *Campbell v. Eveleth*, 83 Me. 50; *Pratt v. Prouty*, 153 Mass. 333; *Texas etc. Ry Co. v. Brick*, 83 Tex. 598. A minor employee properly instructed concerning the dangers of his employment stands on the same plane as other servants with respect to the dangers of the employment: *Fisk v. Central Pac. R. R. Co.*, 72 Cal. 33; 1 Am. St. Rep. 22, and extended note.

MASTER AND SERVANT — MASTER'S DUTY TO INSTRUCT YOUNG AND INEXPERIENCED SERVANTS. — In an action by a young and inexperienced servant against his master, the want of specific instructions as to the dangers of the service is recognized as a source of liability against the master: *Kehler v. Schwenk*, 151 Pa. St. 505; 31 Am. St. Rep. 777, and note; note to *Wayner v. Jayne Chemical Co.*, 30 Am. St. Rep. 750. It is a master's duty to instruct an inexperienced servant in reference to dangerous machinery: *Ingerman v. Moore*, 90 Cal. 410; 25 Am. St. Rep. 133, and note with cases collected; *Texas & Pac. Ry Co. v. Brick*, 83 Tex. 598; *New Albany etc. Mill v. Cooper*, 131 Ind. 363; *King v. Ford River Lumber Co.*, 93 Mich. 172.

MASTER AND SERVANT — INEXPERIENCED SERVANT — QUESTION FOR JURY. Whether a minor knew that his employment was dangerous, and the extent

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of the danger, and had discretion enough to understand it before undertaking the employment, are questions of fact for the jury: *Texas & Pac. R'y Co. v. Brick*, 83 Tex. 598; *Connors v. Grilley*, 155 Mass. 575; *Wynne v. Conklin*, 86 Ga. 40; *International etc. R'y Co. v. Hinzie*, 82 Tex. 623; *Ingerman v. Moore*, 90 Cal. 410; 25 Am. St. Rep. 133.

## HATCH v. KIZER.

[140 ILLINOIS, 583.]

**SPECIFIC PERFORMANCE** of a contract to convey real property will not be decreed when it is shown that it was entered into through a misapprehension of both parties in believing that the legal title was vested in the vendor, and it appears that this defense can be interposed by the vendor when it is the purchaser who is seeking a decree for specific performance.

**SPECIFIC PERFORMANCE** — **LACHES.** — Great delay in complying with a contract for the purchase of real estate or in filing a bill to enforce the rights of a party to such contract, amounts to an abandonment of it on his part, and forbids the interference of equity in his behalf; hence the specific performance of a contract for the purchase of realty will not be ordered if the complainant has delayed for eight years after the time he was entitled to a conveyance by the terms of his contract before he filed his bill for specific performance.

*H. S. Mecartney*, for the appellant.

*George Scoville*, for the appellee.

**WILKIN, J.** On the eight day of October, 1890, appellant filed his bill in chancery in the circuit court of Cook County, against appellees, to specifically enforce the performance of the following contract: —

“This agreement, made this eleventh day of December, 1882, by and between John Kizer . . . and George H. Chisholm:

“Witnesseth: That for and in consideration of the sum of \$500, — \$25 of which the second party hereby pays to the first party, and receipt of which is hereby acknowledged, and the remainder, of \$475, the second party hereby agrees to pay on or before four (4) months from date of this instrument, — the first party hereby covenants and agrees, upon the payment of the said sum of \$500, to deed, by good and sufficient warranty deed, in fee simple and free and clear of all encumbrance whatever, except as to taxes, as stated below, one hundred and five lots, situated in Kizer and Williams’s subdivision of the north-east quarter of the north-east quarter of section thirty-one (31), in township thirty-seven (37), north, range fifteen (15), east of the third principal meridian, in town of Hyde Park, Cook

County, state of Illinois. Party of the second part agrees to assume all taxes now due, and unpaid by said party of the first part. It is understood by the parties hereto that the one hundred and five lots hereby referred to are now owned by said Kizer, as shown by an abstract displayed by first party to second party.

"To the fulfillment of this covenant we bind ourselves, heirs, administrators, and assigns.

JOHN KIZER. (Seal.)

GEO. S. CHISHOLM. (Seal.)

"Witnessed by PLEASANT AMICK."

By an indorsement on said contract it is shown to have been filed for record in the recorder's office of Cook County, July 26, 1884. The bill alleges performance of the contract on the part of Chisholm, and a refusal by Kizer to convey said real estate. The latter, by his answer, among other things, alleged in defense, laches, uncertainty in the description of the premises in said contract, that he had not the legal title to said premises as was understood by both parties when the contract was made, and that the complainant had failed to pay said \$475 within the time limited in said contract. There was a hearing in the circuit court, and a decree entered dismissing the bill at complainant's cost, from which complainant below prosecutes this appeal.

We think the decree of the circuit court should be affirmed on either one of several grounds. In the first place, the contract itself, together with the abstract referred to in it, shows that the agreement between the parties was entered into under a mutual misapprehension as to the title to said lots. It shows that both parties understood that the legal title was in Kizer. It is not claimed that such mistake was the result of fraud or misconduct on the part of Kizer. He furnished an abstract of the title in connection with the agreement, which showed that the legal title was in another, although he honestly believed it was in himself. As the title proved to be in a third party, Kizer could not perform the contract on his part, neither could he have required Chisholm to do so. Whatever might have been the rights of the parties in an action for a breach of the contract, a court of equity would not, on the admitted facts, decree a specific performance of it. The rule is that such a decree will not be entered unless the agreement has been made with "perfect fairness, and without misapprehension, misrep-



resentation or oppression": *Frishy v. Bullance*, 4 Scam. 299; 39 Am. Dec. 409; *Bowman v. Cunningham*, 78 Ill. 48. "To entitle a party to a decree for a performance of the agreement, it must be reasonable, fair and equitable. If wanting in any of these particulars, specific performance should never be granted, for it is only on the principle that it is unjust and inequitable to permit the contract to remain unexecuted, that a court of chancery assumes jurisdiction to enforce it": *Tamm v. Lavalley*, 92 Ill. 263; *Woods v. Evans*, 113 Ill. 186; 55 Am. Rep. 409.

Again, the defense of laches is complete. "It is the settled doctrine of courts of equity in England, and of this court, that great delay of either party, unexplained, in not performing the terms of a contract, or in not prosecuting his rights under it by filing a bill, or in not prosecuting his suit with diligence when instituted, constitutes such laches as would forbid the interference of a court of equity, and so amount, for the purpose of specific performance, to an abandonment, on his part, of the contract": Fry on Specific Performance, 218, quoted with approval in *Hough v. Coughlan*, 41 Ill. 134. Eight years elapsed between the time when Chisholm was entitled to a deed by the terms of the contract described in the bill, and the bringing of this action. True, Chisholm himself filed a similar bill in the circuit court of Kane County about one year after the contract was made; but without any legal excuse, so far as this record shows, he neglected to prosecute it, and about the time of the filing of the present bill dismissed it of his own motion. The attempted explanation for this delay is, that Kizer from time to time said he would "fix it up." There is no preponderance of evidence in favor of the complainant as to this explanation, if it were otherwise sufficient. Kizer swears that from the time it was discovered that the title to said lots was not in him, he told Chisholm that he could not make a deed, and offered to repay him the twenty-five dollars. If, as is now said, it was the duty of Kizer to make a deed regardless of the outstanding title, Chisholm should have prosecuted his suit in Kane County to that end. The failure to prosecute his action after it was begun was as fatal to his right to a specific performance of the contract as would have been his laches in bringing the suit: *Hough v. Coughlan*, 41 Ill. 134; *Sebring v. Sebring*, 43 N. J. Eq. 59. There is also a failure in this case to show by a clear and satisfactory preponderance of the evidence that there has been a compliance with the terms of the

contract on the part of Chisholm or his assignee. See *Ralls v. Ralls*, 82 Ill. 243; *Rutherford v. Sargent*, 71 Ill. 339.

It is said in the argument, that complainant below was entitled to a decree for a quitclaim deed at least. That is not the relief prayed for in the bill, nor is it shown that Chisholm or the complainant at any time offered to accept such a deed. Courts will not, however, specifically enforce a contract on terms not expressed in the agreement.

We think the decree of the court below is in conformity with the law and evidence of the case, and should be affirmed.

Decree affirmed.

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**SPECIFIC PERFORMANCE — EFFECT OF MISTAKE.** — An agreement induced by a mistake of fact of one of the parties will not be specifically enforced against him: *Frisby v. Bailance*, 4 Scam. 287; 39 Am. Dec. 409, and note; *Chute v. Quincy*, 156 Mass. 189; *Campbell v. Durham*, 86 Ala. 299; *Trigg v. Read*, 5 Humph. 529; 42 Am. Dec. 447, and note; *Meaux v. Helm*, Sneed, 252; 2 Am. Dec. 716. In actions for the specific performance of contracts for the sale of lands, equity will look to the intention of the parties: *Thornburgh v. Fish*, 11 Mont. 53. See *Vail v. Tillman*, 2 Wash. 476.

**SPECIFIC PERFORMANCE — EFFECT OF LACHES.** — Specific performance of a contract for the purchase of lands will not be decreed at the instance of the buyer when he has been guilty of laches or unnecessary delay: *Johnston v. Jones*, 85 Ala. 286; *Meilling v. Trefz*, 48 N. J. Eq. 638; *Penrose v. Leeds*, 46 N. J. Eq. 294; *Knox v. Spratt*, 23 Fla. 64; *Requi v. Snow*, 76 Cal. 590. A party seeking specific performance must show that he has not been guilty of laches or negligence, but that he has taken all proper steps toward a performance on his part: *Rogers v. Saunders*, 16 Me. 92; 33 Am. Dec. 635, and note; *Green v. Corelland*, 10 Cal. 317; 70 Am. Dec. 725, and note; *Bryan v. Lofftus*, 1 Rob. 12; 39 Am. Dec. 242; *Patterson v. Martz*, 8 Watts, 374; 34 Am. Dec. 474, and note; *Northrup v. Stevens*, 39 Minn. 105.

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## COVINGTON v. NEFTZGER.

[140 ILLINOIS, 608.]

**LUNATICS, ACTIONS BY, WHO MAY BRING.** — A bill in equity purporting to be by a lunatic by his next friend, and seeking to set aside a deed of such lunatic should be dismissed. No person can maintain such a suit on behalf of a lunatic unless he has authority to act for him and to bind his estate, and this authority his next friend does not possess.

*Mulkey and Sawyer*, for the plaintiff in error.

*James E. Courtney*, for the defendant in error.

CRAIG, J. This was a bill in equity, brought in the name of George W. Covington, by his next friend, Alexander Covington, to set aside a certain deed executed on or about the

first day of March, 1871, by the said George W. Covington, which purported to convey certain premises therein described, situated in Pope County. The ground relied upon in the bill to set aside the deed is, that George W. Covington, at the time the deed was executed, was insane, and that he has remained insane ever since. A general demurrer was interposed to the bill, which the court sustained, and the bill was dismissed.

There is but one question of any importance presented by this record, and that is whether the action was properly brought in the name of George W. Covington, the insane person, by his next friend. In Story's Equity Pleading the author (sec. 64) says: "The care and commitment of the custody of the persons and estates of idiots and lunatics are, in England, the special prerogative of the crown, . . . and whenever one is, by an inquisition, found to be an idiot or lunatic, the person holding the great seal commits the custody of the person and estate of such idiot or lunatic to some suitable person or persons, who is or are called the committee or committees of the idiot or lunatic. In all such cases, the idiot or lunatic must sue by the committee or committees of their estates, all of them being made parties plaintiff." In section 65 it is said: "In some of the states in America the courts of equity are intrusted with the like authority to appoint committees for idiots and lunatics, and in such cases the idiots and lunatics sue by their committees. In other states idiots and lunatics are by law placed under guardians appointed by other courts. In such cases, the idiots and lunatics sue and defend by the proper guardians, unless some other is specially appointed for that purpose."

A very interesting case on this subject is *Ortley v. Messere*, 7 Johns. Ch. 139, where a bill was filed in the name of the committee alone, to set aside an act of the lunatic. A demurrer was interposed to the bill, on the ground that the lunatic should have been joined as a party with the committee. Chancellor Kent, in delivering the opinion of the court, said: "It is not necessary for the lunatic herself to be a party plaintiff with her committee to set aside an act done by her while she was under mental imbecility. The same objection was made in the case of *Attorney-general v. Parkhurst*, 1 Ch. Cas. 113, and overruled by the lord keeper . . . In another case (*Ridler v. Ridler*, 1 Eq. Cas. Abr. 279) the bill was by a lunatic and his committee, . . . and a demurrer was put in

because the lunatic was a party with his committee, and the demurrer was overruled. It would seem, therefore, to be immaterial, and but matter of form. The lunatic may be joined with the committee, or omitted, according to these cases. . . . The general practice, however, is to unite the lunatic with the committee, as was done in *Addison v. Dawson*, 2 Vern. 678; but there does not appear to be any use in it, or any necessity for it, as the committee have the exclusive custody and control of the estate and rights of the lunatic. The lunatic may be considered as a party by his committee, and, like trustees of an insolvent debtor, the committee hold the estate in trust, under the direction of the court."

It will be observed that the principle upon which the chancellor held that the committee was the proper party to bring the action was, because they have the exclusive custody and control of the estate and rights of the lunatic, and it is obvious that a person not clothed with authority to bind the lunatic or control his estate ought not to be permitted to file a bill to set aside or impeach an act of the lunatic: *Nichol v. Thomas*, 53 Ind. 42. A person suing as next friend has no authority to bind the lunatic or his estate. He is a mere volunteer, clothed with no authority from any court. He may be liable for costs, but he does not control the lunatic or his estate in any manner whatever, and it would be a dangerous rule to hold that such a person might, at his own will or discretion, come into court for the purpose of impeaching a transaction in which he has no interest, as trustee or otherwise, and over which he has no control. The rule on this subject is well expressed in *Dorsheimer v. Roorback*, 18 N. J. Eq. 439, where it is among other things said: "The rule is a wise one. It should never be permitted that any volunteer should, by styling himself the next friend of an idiot, bring suit for him, and lose or jeopard his rights."

We think it is a well settled principle, that the person who brings a bill to avoid the deed of an insane person must have power to act for such person, and bind him and his estate: *Nichol v. Thomas*, 53 Ind. 42. The lunatic or insane person cannot do this himself. He has no disposing mind. He can do no binding acts himself while his insanity continues. The lunatic may act on regaining his sanity, as held in *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; or his heirs may act after his death: *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 19 Am. Dec. 71; or his committee, guardian, or conservator



may bring a bill during his insanity; but we do not think, after giving the subject such investigation as we have been able to do, that a bill can be maintained in the name of the lunatic or insane person, by his next friend. Provision might be made by statute, under which a bill might be brought by a next friend in a case like the one involved; but we have no statute authorizing such a practice where real estate is involved. Chapter 86 of our Revised Statutes of 1874 provides for the appointment of conservators for insane persons. Section 5 of the act provides that such conservator shall have the care and management of the real and personal estate of his ward and the custody of his person, unless otherwise ordered by the court. Section 13 declares "he shall appear for and represent his ward in all suits and proceedings, unless another person is appointed for that purpose, as conservator or next friend," while section 5 of the chancery act provides that suits in chancery may be commenced and prosecuted by infants, either by guardian or next friend, and by conservators on behalf of the persons they represent. While the statute does not determine in whose name a suit of this character shall be brought, the language used seems to point to the conclusion that the conservator was the proper person to bring the action.

We have, however, been referred to *Lane v. Schermerhorn*, 1 Hill, 97, as an authority in support of the position of counsel for plaintiff in error. That was an action at law brought by certain persons, as a committee of a lunatic, to recover money due and owing to the lunatic, and the court held that an action for money had and received to the use of a lunatic cannot be maintained in the name of the committee. Whatever may be the rule at law in an action to recover money does not affect the question here, as this is a proceeding in equity, and as we understand the question, it rests upon a different principle.

*Jones v. Lloyd*, L. R. 18 Eq. Cas. 265, has also been cited. That was a bill brought by a certain person described as a person of unsound mind, by his next friend, against a partner, for the protection of property in which he was interested as a partner, and on demurrer to the bill the demurrer was overruled. But while the court overruled the demurrer, it expressly declined to decide whether a decree for final distribution could be made without the appointment of a committee on lunacy, as is apparent from a quotation from the opinion, as follows:

"I do not say, it is not necessary for me to say, at the present moment, whether he will or will not obtain a final decree without application to the jurisdiction on lunacy."

The court required Covington, the next friend, to file bond for costs, but this cannot be construed as an order authorizing him to sue as next friend.

We think the judgment of the circuit court was correct, and it will be affirmed.

Judgment affirmed.

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INSANE PERSONS — ACTIONS BY — WHO MAY BRING. — Insane persons may sue by their next friend when they have no general or testamentary guardian: *Smith v. Smith*, 106 N. C. 498; *Reese v. Reese*, 89 Ga. 645; *Howard v. Howard*, 87 Ky. 616. An action on a judgment recovered by a lunatic in one state, suing by *prochein ami* may be maintained in another state by the lunatic suing by the same next friend: *Cook v. Thornhill*, 13 Tex. 293; 65 Am. Dec. 63, and note. When a bill for the partition of lands is filed in the interest of a lunatic, it must be filed in his name by his guardian, or he must be joined as a complainant with his guardian: *West v. West*, 90 Ala. 458.

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## ROBINSON v. BREWSTER.

[140 ILLINOIS, 649.]

**A WILL SHOULD POSSESS FOUR REQUISITES.** It should be: 1. In writing signed by the testator or attested with his mark; 2. Attested by two credible witnesses who sign it as such in the presence of the testator and by his request; 3. Proved by the oath of such witnesses or of one of them to have been subscribed by the testator and by them; and, 4. The testator should be of sound mind when he executed the will.

**WILLS. — THE MARK OF A TESTATOR** to his will is just as effective as when he signs his name.

**WILLS. — WITNESSES TO A WILL NEED NOT SUBSCRIBE ANY FORMAL CLAUSE OF ATTESTATION.**

**WILLS. — PAROL DECLARATIONS OF A TESTATOR** made before or after the execution of a will cannot be admitted in evidence for the purpose of invalidating it, but may be received for the purpose of showing his knowledge of its contents when it is claimed that he was imposed upon by not being informed thereof.

**WILLS. — A TESTATOR IS PRESUMED TO HAVE KNOWN THE CONTENTS** of a will when his execution of it is proved in such manner as the statute requires.

**EVIDENCE, ERROR IN RECEIVING WHEN MAY BE DISREGARDED. —** If testimony only tends to establish what in its absence is a legal presumption, it may be irrelevant, but cannot work any injury when no evidence is offered tending to rebut such presumption.

**WILLS. — THAT A TESTATOR INTENDED AN INSTRUMENT EXECUTED BY HIM TO BE HIS WILL** is sufficiently manifested by his telling a third person

that he was making his will and requesting such third person to witness it and signing it a few moments afterwards.

**WILL, WHAT IS.**—A writing duly signed by the person executing it and attested by witnesses which declares that he, in consideration of one dollar, as well as his affection, assigns and sets over to his daughter all his property, real and personal, to have the same after his death, is a will.

BILL to set aside the will of Joseph Robinson. An issue was made up and submitted to the jury as to whether the paper in controversy was the last will of the decedent, and a verdict was returned in favor of the will. The alleged will was as follows: "Know all men by these presents, That I, Joseph Robinson, for the consideration of one dollar, to me in hand paid, as well as my affection, do hereby assign and set over to my daughter, Eliza Jane Brewster, all of my property, both personal and real, to have the same after my death.

“Witness my hand and seal this 7th day of May, 1877.

"Attest: "J. S. Post,  
"E. McCLELLAN."

JOSEPH <sup>his</sup> X ROBINSON. [Seal.]  
mark.

*W. C. Johns*, for the plaintiffs in error.

*W. T. Cassius, and Buckingham and Schroll, for the defendants in error.*

MAGRUDER, C. J. 1. As to the execution of the instrument admitted to probate as the will of Joseph Robinson, deceased. There is a concurrence of the four requisites which have been held to be necessary in order to entitle a will to probate *Canatsey v. Canatsey*, 130 Ill. 397. 1. The instrument is in writing and was signed by Joseph Robinson. McClellan swears that he saw Robinson make his mark, and a signature is just as effective where the testator makes his mark, as where he signs his name: *Doran v. Mullen*, 78 Ill. 342. 2. The instrument is attested by two credible witnesses, McClellan and Post. The subscribing witnesses signed the instrument in the presence of Robinson and at his request, and their names are written opposite or under the word "attest." It is not indispensable that the witnesses should subscribe any formal clause of attestation: 1 Redfield on Wills, 4th ed., p. 232, sec. 6, and note 14. 3. McClellan, one of the subscribing witnesses, swears that he and Post, the subscribing witnesses, were present when Robinson signed the instrument, and that he, McClellan, saw Robinson sign it, and that it was so signed by him in the presence of the two subscribing witnesses. The two subscribing witnesses do not declare on oath in this case that they

were present and saw the testator sign the instrument in their presence, because one of them died before the will was admitted to probate in the county court; but section 6 of the act in regard to wills provides that "in all cases where any one . . . . of the witnesses to any will . . . . shall die . . . . so that his . . . . testimony cannot be procured, it shall be lawful . . . . to admit proof of the handwriting of any such deceased . . . . witness, . . . . and such other secondary evidence as is admissible in courts of justice to establish written contracts generally, in similar cases." Here it was proven that the signature of J. S. Post, as subscribed to the instrument, was in the handwriting of said Post, and that the instrument itself was in his handwriting, and that he was present and superintended the execution of the instrument. We think that the proof required by section 6 was furnished, and that under that section the will was as much entitled to probate as though the deceased witness had been present.

4. It is proven by the testimony of McClellan that he believes Robinson to have been of sound mind and memory when he signed the instrument. We are of the opinion that the execution of the instrument was properly established by proof.

2. It is claimed by the plaintiffs in error that the court below erred in admitting evidence of the declarations of the testator, made before and subsequent to his execution of the instrument in question. It is also claimed that the court erred in instructing the jury that the presumption of the testator's knowledge of the contents of the instrument arising from the fact that he signed it, might be considered by them "in connection with all the other evidence in the case in determining the question as to whether he actually knew the contents of the paper at the time he executed it."

The parol declarations of a testator made before or after the execution of the will cannot be admitted for the purpose of invalidating the will: *Dickie v. Carter*, 42 Ill. 376. It has been held, however, that declarations of a testator made subsequently to the execution of a will may sometimes be admitted merely for the purpose of showing his knowledge of its contents in cases where it has been charged that he was imposed upon by not being informed of such contents: 1 Redfield on Law of Wills, 4th ed., p. 567, c. 10, secs. 14, 15. In the present case we think that the evidence of such declarations might well have been omitted, but we do not think that they could have done the complainants any harm. Where the



execution of a will by the testator is proven, as was done in this case, in such manner as the statute prescribes, it will be presumed that the testator knew its contents: 1 Redfield on Law of Wills, 4th ed. p. 567, c. 10, sec. 14, note 61. Our statute of wills does not require that the party executing a will shall make a declaration that it is his will: *Dickie v. Carter*, 42 Ill. 376. In this case, however, the proof does show that the testator told McClellan he was making his will and wanted McClellan to witness it. The paper in controversy was produced to McClellan a few minutes after he was asked to go to Post's office to witness a will. It is true that the instrument was not read over to Robinson at the time of its execution, nor did he then formally declare in words that it was his will; but it is not necessary to prove that the testator knew the contents of the will. Such knowledge is presumed from the fact of his execution of it: *Doran v. Mullen*, 78 Ill. 342; *Keithley v. Stafford*, 126 Ill. 507.

In the case at bar, the complainants introduced no proof whatever to rebut the presumption of knowledge arising from the execution of the instrument. If, therefore, the evidence of subsequent parol declarations tending to show knowledge of its contents had not been introduced, the jury would have been justified in finding that Robinson knew the contents of the paper from the fact that he signed it. The evidence of the declarations was merely cumulative and in aid of the presumption arising from the execution. There is no proof that any fraud or imposition was practiced upon Robinson, or that anything was done to conceal from him the nature or meaning of the instrument which he was signing. Where testimony only tends to establish what, in the absence of proof, is a legal presumption, it may be irrelevant, but it can certainly work no injury in the absence of any proof tending to rebut or overthrow such presumption: *Powell v. McCord*, 121 Ill. 330; *In re Will of Bonse*, 18 Ill. App. 433.

3. As to the form of the instrument. "A last will and testament may be defined as the disposition of one's property, to take effect after death": 1 Redfield on Law of Wills, 4th ed., p. 5, c. 2, sec. 2, par. 1. The instrument in controversy is a disposition of property to take effect after death. It is testamentary in character, and wholly executory. The daughter was not to have or become the owner of the estate until her father's death. The vesting is deferred both in interest and possession until the death of the maker. The statement to

McClellan, that he was making his will, and the request to McClellan that he come and witness the will, made as such statement and request, were only a few moments before signing the paper, so as to be really a part of the *res gestæ*, indicate that it was Robinson's intention to make this instrument his will: *Frew v. Clarke*, 80 Pa. St. 170; *Johnson v. Yancey*, 20 Ga. 707; 65 Am. Dec. 646; *Badgley v. Votrain*, 68 Ill. 25; 18 Am. Rep. 541; *Olney v. Howe*, 89 Ill. 556; 31 Am. Rep. 105; *Roth v. Michalis*, 125 Ill. 325; *Comer v. Comer*, 120 Ill. 420.

4. The instructions given conform to the views herein expressed. The only one of the given instructions which is complained of has already been noticed. Counsel for plaintiffs in error urge it as error that the court below refused to give instructions numbered five and six asked by the complainants. Upon a careful comparison of these refused instructions with those that were given, as they are set forth in the record, we find that all which is material in the former is expressed in the latter.

The decree of the circuit court is affirmed.

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WILLS — REQUISITES OF. — A will must be subscribed by at least two disinterested witnesses: *Simmons v. Leonard*, 91 Tenn. 183; 30 Am. St. Rep. 875; and the testator must be possessed of sufficient intelligence to appreciate what he was doing: *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85, and note; *Converse v. Converse*, 21 Vt. 138; 52 Am. Dec. 58, and note; *Constock v. Hallyne Ecc. Soc.*, 8 Conn. 254; 20 Am. Dec. 109; *Clark v. Fisher*, 1 Paige, 171; 19 Am. Dec. 402, and note; and it must be signed by the testator: *Simmons v. Leonard*, 91 Tenn. 183; 30 Am. St. Rep. 875, and note.

WILL — WHAT IS. — A will is an instrument by which a person makes a disposition of his property, to take effect at his decease: *Barney v. Hayes*, 11 Mont. 571; 28 Am. St. Rep. 495, and note; *Hazleton v. Reed*, 46 Kan. 73; 26 Am. St. Rep. 86, and note; *Coner v. Stem*, 67 Md. 449; 1 Am. St. Rep. 406, and note; *Babb v. Harrison*, 9 Rich. Eq. 111; 70 Am. Dec. 203, and note.

WILLS — WHETHER INSTRUMENT WAS INTENDED AS WILL — EVIDENCE. In determining whether an instrument executed by a testator was intended by him as a will, evidence as to the instruction he gave the draughtsman as to the nature of the paper he was asked to draw is admissible: *Sharp v. Hall*, 86 Ala. 110; 11 Am. St. Rep. 28, and note with cases collected. See note to *Seals v. Pierce*, 20 Am. St. Rep. 345.

WILLS — SUFFICIENCY OF TESTATOR'S MARK AS A SIGNATURE OF NAME. A testator may sign his will by making his mark: *Chaffee v. Baptist Missionary Convention*, 10 Paige, 85; 40 Am. Dec. 225, and note. *Contra*, *Grabill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418, and note. A blind testator's mark is equivalent to a signature when he is incapable of subscribing his name: *Ray v. Hill*, 3 Strob. 297; 49 Am. Dec. 647.

WILLS. — SUFFICIENCY OF ATTESTATION: See *Simmons v. Leonard*, 91 Tenn. 183; 30 Am. St. Rep. 875, and note; note to *Coffin v. Coffin*, 80 Am. Dec.

242; note to *Maynard v. Vinton*, 60 Am. Rep. 285; extended note to *Will of Meurer*, 28 Am. Rep. 595.

**WILLS. — DECLARATIONS OF TESTATOR TO IMPEACH OR INVALIDATE HIS WILL:** See notes to *Matter of Page*, 59 Am. Rep. 399; *Waterman v. Whitney*, 62 Am. Dec. 80; extended note to *Roberts v. Trawick*, 52 Am. Dec. 167.

## KAMP v. PEOPLE.

[141 ILLINOIS, 9.]

**VILLAGE ORGANIZATION — ATTACK BY QUO WARRANTO ON PETITION FOR ORGANIZATION.** — In *quo warranto* proceedings to determine the validity of a village incorporation under the Illinois statute, parol evidence is admissible to contradict the petition for incorporation, and to show that at the time of filing it the territory did not have the required population, notwithstanding the recitals in such petition to the contrary.

**VILLAGE ORGANIZATION — ATTACK BY QUO WARRANTO.** — Under the Illinois statute, the duties imposed upon a county judge in respect to the petition for incorporation and the steps to be taken thereunder, are purely ministerial, and not judicial, and his action in calling an election for village trustees is not conclusive of the validity of the incorporation, which may be attacked by *quo warranto*, and the recitals in the petition for organization may be contradicted by parol evidence in such proceeding.

**VILLAGE ORGANIZATION — JUSTIFICATION ON QUO WARRANTO — SUFFICIENCY OF ANSWER.** — When the validity of the incorporation of a village under the Illinois statute is attacked by *quo warranto*, the incorporators must justify, and in doing so, must allege in their answer and prove the jurisdictional facts necessary to the validity of such incorporation, and their failure to allege such facts will not excuse them from proving them, as their existence is essential to such justification.

**VILLAGE ORGANIZATION — QUO WARRANTO — ESTOPPEL.** — When the validity of the incorporation of a village is attacked on *quo warranto* by the state, its introduction, in evidence, of the petition for incorporation, merely for the purpose of identifying the records to be used in the examination of witnesses to contradict its recitals, will not estop it from introducing evidence to contradict such recitals.

**VILLAGE ORGANIZATION — QUO WARRANTO — LACHES AS DEFENSE.** — When the validity of the incorporation of a village is attacked by *quo warranto*, and the statute of limitations, or laches in prosecuting the action, is not set up in the answer, no such defense will be presumed or considered.

*James R. Ward, Frank M. Greathouse, and Edward A. Pintero*, for the appellants.

*T. J. Selby*, state's attorney, for the appellee.

**SCHOLFIELD, J.** The first question presented in argument is, whether it is competent, in a proceeding by *quo warranto* to determine the validity of a claimed incorporation of a village under the general law, to receive parol evidence tending

to prove that there was not a population of three hundred inhabitants residing on the territory sought to be incorporated, at and before the time the petition to become incorporated was presented to the county judge. The court below admitted such evidence upon the trial, and its judgment was given upon a finding by the jury, in consequence of the admission of parol evidence that there was not that amount of population residing on the described territory at the time mentioned.

It is provided in section 5, article 11, chapter 24, of the Revised Statutes of 1874, entitled "cities, villages, and towns" (page 242), that "whenever any area of contiguous territory, not exceeding two square miles, shall have resident thereon a population of at least three hundred inhabitants, . . . the same may become incorporated as a village, under this act, in the manner following: Any thirty legal voters resident within the limits of such proposed village may petition the county judge of the county in which they reside, to cause the question to be submitted to the legal voters of such proposed village whether they will organize as a village under this act." It is further provided in the next section (section 6), that "upon filing such petition in the office of the county clerk, it shall be the duty of such judge to perform the same duties in reference to fixing the time and place of such election, giving notice, appointing judges thereof, as is above required to be performed by the president and trustees in towns already incorporated." And it is provided in section 7, that "if a majority of the votes cast at such election is for village organization under the general law, such proposed village, with the boundaries and name mentioned in the petition, shall from thenceforth be deemed an organized village under this act, and the county judge shall thereupon call and fix the time and place of an election to elect village officers."

These are the only provisions of the statute relating to the question. It will be seen that the calling of the election to determine whether the territory shall be organized, the holding of that election, the declaring its result, and the declaring of the organization of the village pursuant to the result of the election, all presuppose that there is at least a population of three hundred inhabitants residing on the territory to be organized, that the county judge is not required to find what the fact is in that respect, that no tribunal or mode of ascertaining what the fact is, in that respect, is provided by stat-



ute, and that the statute does not make the petition conclusive evidence of the truth of the facts therein alleged. It is therefore impossible that anybody can be concluded by the recitals of the petition on this question.

The duties imposed upon the county judge are upon the individual selected and designated by his incumbency of office, and they are purely ministerial: *Owners of Land v. People*, 113 Ill. 296; *People v. Nelson*, 133 Ill. 565. It is of the essence of a judgment, conclusive as to any given question, that there shall be both jurisdiction and an actual decision of the question. But here no tribunal decides — petitioners merely recite — what was the number of inhabitants: *People v. McGowan*, 77 Ill. 646; 20 Am. Rep. 254; *Schroeder v. Merchants' etc. Ins. Co.*, 104 Ill. 71; and *Kelly v. People*, 115 Ill. 589, 56 Am. Rep. 184, cited by counsel for appellants, are therefore wholly unlike the present case, for in each of those cases a judgment of a court upon the particular question was under consideration.

It was incumbent on appellants here to justify, and in doing so it was necessary to state particularly the organization of the village, and this could not be done without stating the existence of the jurisdictional fact, — the residence of the requisite number of inhabitants upon the territory to be organized, which gave the right to file the petition for organization. The people were not bound to show anything: *Clark v. People*, 15 Ill. 217; *Carrico v. People*, 123 Ill. 203. The failure of appellants to set up the fact of the residence of the requisite number of inhabitants can upon no principle excuse them, in this proceeding, from proving that fact, for without such proof they do not justify.

The next question is, whether the people are estopped by the recitals in the petition, because of the petition having been read in evidence by the state's attorney in making out his case in chief. It was unnecessary for the state's attorney to introduce this evidence, and it should properly have come from the other side; but it is manifest that his intention in introducing it was merely to identify the records, for the purpose of calling the attention of the witnesses to them, in their examination, on the contested fact. It was not introduced to prove the number of inhabitants, but as a basis for contradicting its recitals in that respect. We think the people were not estopped by its recitals.

A point was urged in argument, that great injury will re-

sult from now allowing this suit to be prosecuted, by reason of many important acts having been done, in good faith, upon the validity of the organization. It is a sufficient answer to this, that no statute of limitations, and no facts constituting laches on the part of the people in prosecuting the suit, are set up in the answer. We cannot presume the existence of such laches as should bar the prosecution of the suit without allegation or proof.

The only remaining question is one of fact: Does the evidence sustain the finding of the jury as to the number of inhabitants residing on the territory sought to be organized, at the time the petition for that purpose was presented? We are unable to say that it does not. In our opinion there is ample evidence, if believed by the jury, to sustain their finding, and we cannot say that in believing it they must have been influenced by partiality or prejudice.

The judgment is affirmed.

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**QUO WARRANTO — DEFECTIVELY ORGANIZED MUNICIPAL CORPORATIONS.** An information will lie against a *de facto* municipal corporation for the usurpation of corporate franchises, or to oust it from the enjoyment of the privileges thereof: *State v. Tracy*, 43 Min. 497. When an information in the nature of a *quo warranto* is filed questioning the legality of the organization of a municipal corporation, such *de facto* corporation is a proper defendant: *State v. Commissioners*, 50 N. J. L. 457; *People v. Spring Valley*, 129 Ill. 169. For a discussion of the subject of informations in the nature of *quo warranto* against municipal corporations, see extended note to *People v. Rensselaer etc. R. R. Co.*, 30 Am. Dec. 48, 49.

**QUO WARRANTO — LACHES.** — Lapse of time is no bar to filing an information in the nature of a *quo warranto* by the attorney-general: *State v. Pawtuxet Turnpike Co.*, 8 B. L. 521; 94 Am. Dec. 123, and note.

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## PENN MUTUAL LIFE INSURANCE CO. v. HEISS.

[141 ILLINOIS, 85.]

**EMINENT DOMAIN — USE OF STREETS BY RAILROAD — DAMAGES.** — When a railroad acquires the right to lay its tracks in the streets of a city, it is not required to institute condemnation proceedings in respect to damages which may accrue to owners of property abutting thereon; and when no part of such property is taken for such public use, the owner is not entitled to have proceedings instituted under the eminent domain law to ascertain what damages his property may sustain in consequence of the construction and operation of the railroad. He is remitted to his action at law to recover his damages, which must all be recovered in one action.

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**STREETS — USE OF, BY RAILROAD — DAMAGES.** — A railroad company is liable for all direct physical damage accruing to a contiguous or abutting landowner from the construction and operation of such railroad in the street, although no land is actually taken; and in such case, the damages, past, present, and future, to which the landowner is entitled, must be recovered in one action.

**EMINENT DOMAIN — PUBLIC USE — TAKING PROPERTY FOR RAILROAD IS.** Railroads are *quasi* public corporations, and the taking or damaging of private property for their construction or maintenance is a public use for which just compensation must be made.

**STREETS — USE OF BY RAILROAD — INJUNCTION — DAMAGES.** — An injunction will not lie at the suit of an abutting property owner, when the entry upon a street by a railroad is under the authority of the municipal agency invested with the control of such street. In such case, the abutting property owner has an adequate remedy at law in an action to recover his damages, and there is no ground for the interference of a court of equity.

**STREETS — USE OF BY RAILROAD — DAMAGES AS AGAINST ENCUMBRANCERS OR ALIENEES.** — When the property of an abutting owner is taken or damaged by the construction or operation of a railroad in a street, he is entitled to compensation for the injury received, as against the encumbrancers, alienees, or successors of such railroad, and its franchises and property, unless he has done some act amounting to a waiver of his right, or by which he is estopped from asserting it.

**STREETS — USE OF BY RAILROAD — DAMAGES AS AGAINST ALIENEE OR ENCUMBRANCERS.** — When the property of an abutting owner is damaged by the construction of a railroad in the street, he may be without means of redress until by appropriate proceedings he has had the extent and amount of his damage ascertained; but when the damages are ascertained in the mode provided by law the right of such owner to the payment of the same as compensation out of the railroad property is absolute as a condition to the continued appropriation of the street to such public use whereby the injury is inflicted, and it is not in the power of the railroad company by alienation or encumbrance of its property to defeat this right, and the alienee, encumbrancer, or successor, will take with notice of the provisions of law restricting the power to take or damage private property for a public use, and subject to the burden cast upon the railroad company by, through, or under which such interest is acquired.

**EMINENT DOMAIN — PROPERTY TAKEN OR DAMAGED BY RAILROAD — RECOVERY AGAINST MORTGAGEES — PRIORITY OF LIEN.** — When a mortgagee of the bonds and property of a railroad, is notified by the face of the bonds that they are issued upon a projected and unfinished road, he takes with notice that the right of way must be acquired in some of the recognized modes known to the law, and that when the road is built through cities, damages may thereby be caused for which compensation must be made, and when such damages have accrued and have been reduced to judgment, the fact that the bonds and the mortgage were executed prior to the recovery of such judgment, will not give the mortgage any priority; on the contrary, upon a foreclosure thereof, the judgment for damages must be first satisfied out of the proceeds of the foreclosure sale of the railroad property.

**EMINENT DOMAIN — DAMAGE TO PRIVATE PROPERTY — SURVIVAL OF ACTION.** When a cause of action has accrued for damages to private property

from the construction of a railroad, and suit has been instituted therefor in the lifetime of the party damaged, the right of action will survive and pass to his personal representative upon his death and not to his heir or devisee.

**EMINENT DOMAIN — DAMAGE TO PRIVATE PROPERTY — RIGHT OF ACTION — MEASURE OF DAMAGES.** — In case of damage to private property from the location and construction of a railroad, a right of action accrues upon the completion of the road to recover not only present but prospective damages, but the injured party may bring his action at any time within five years from the accruing of the right. He may wait until his permanent damages have become susceptible of absolute proof before bringing his action, if brought within the five years, and then recover his permanent damages instead of sooner bringing the action and resorting to proof of prospective damages arising from the operation of the road.

**EMINENT DOMAIN — MEASURE OF DAMAGE TO PRIVATE PROPERTY — STATUTE OF LIMITATIONS.** — Whenever a right of action for damages for injury to private property from the location, construction, and operation of a railroad has accrued, and the action has been brought within the period of the statute of limitations, proof may be made of the permanent damages to the property, and the recovery being once for all, may include all damages flowing from the location and ordinarily skillful operation of the road.

**EMINENT DOMAIN — DAMAGE TO PRIVATE PROPERTY — MEASURE OF DAMAGES TO TENANT.** — When the business of a tenant is injured by the location and operation of a railroad in front of the leased premises, the measure of damages which may be recovered by the tenant is limited to the loss of probable profits in his business as shown by the evidence from the time of the construction of the road and its operation to such time as the tenant might, by the exercise of ordinary diligence, have procured another place of business equally eligible for the transaction of his business, including a reasonable time for removal.

**EMINENT DOMAIN — INVITATION TO LOCATE RAILROAD — ESTOPPEL TO CLAIM DAMAGES.** — When the owner of property urges or induces a railroad company to locate its road on an adjacent street he will, after the invitation has been acted upon, be estopped from claiming damages or enjoining the operation of the road, but to create such estoppel there must be some affirmative act by such owner, in reliance upon which the railroad company has acted to its prejudice. The fact that such owner requested an alderman to vote for an ordinance granting the right to the company to locate its road on the street, when it does not appear that such vote was necessary to the passage of the ordinance, does not estop him from recovering for damages to his business arising from the location and operation of the road.

**EMINENT DOMAIN — DAMAGE TO PRIVATE PROPERTY — JUDGMENT FOR, WHETHER BINDING ON MORTGAGEES OF RAILROAD.** — A judgment by default against a railroad for damages to adjoining property, arising from the construction and operation of the road, is not binding as to amount on a mortgagee of the company not a party thereto, and in a contest between such mortgagee and the owner of the property damaged as to priority of payment out of the proceeds of a sale of the road and property under foreclosure, the court may reopen such judgment and require a reassessment of the damages.



*Morrison and Whitlock, for the appellants.*

*T. E. Merritt, and Casey and Dwight, for the appellees.*

SHOPE, J. The principal question presented in this case is, whether the judgments in favor of appellees, severally, were entitled to priority of payment out of the funds produced by the sale of the railroad in the foreclosure proceeding instituted by appellants, or was the lien of the mortgage of July 1, 1882, paramount, and entitled to priority of payment as against those judgments. The court below decreed that the judgments, aggregating \$11,205, were entitled to priority, and directed the master to pay the same out of the proceeds of the sale.

The Jacksonville Southeastern Railway Company was organized under the laws of this state, to construct, build, and operate a line of railway from the city of Jacksonville to the city of Centralia, in this state. It acquired title to an existing railway from Jacksonville to the town of Virden, and thereupon issued three hundred bonds, of one thousand dollars each, and executed a first mortgage on the road from Jacksonville to Virden, and upon its projected line from Virden to Litchfield, to secure the same. Subsequently, on July 1, 1882, it executed the mortgage in question upon all of its line of road then constructed and thereafter to be built from Jacksonville to Centralia, to secure eleven hundred and twenty bonds, of one thousand dollars each, the bonds held by appellants being parcel thereof. These bonds upon their face contained a condition that the trustees therein named, or their successors in trust, might enter upon and take possession of the mortgaged road if the interest provided for therein should remain due and unpaid for six months, or the taxes on the mortgaged property should remain unpaid six months after the same became due, and might declare the principal of the bonds due and payable. By the terms of the mortgage, the bonds were to be issued as the work of construction progressed, at a rate not exceeding ten thousand dollars for each mile of completed road. The length of the proposed road was 110 miles. The road was completed to the city of Centralia from Virden in October, 1883. By ordinance of the city of Centralia, passed January 10, 1883, the railway company was authorized to lay its tracks upon and along Chestnut Street in said city, which was done. Appellees were owners, some in fee and others by leasehold interests, of lots abutting upon Chestnut Street,

each of whom, with others, claims that his abutting property was damaged, and, as to appellees Heiss, Prill, and Buehler, also that their business then and theretofore carried on on said street was damaged. In December, 1887, and January, 1888, suits were brought by appellees, severally, against the railroad company to recover damages therefor, which resulted in judgments for the plaintiffs. Executions issued upon these judgments, and were returned *nulla bona*. As will be seen from the preceding statement, these judgments were opened by the chancellor, at the instance of appellants, and such proceedings had as resulted in the several assessments, by a jury, of damages to the property of appellees, as shown by the decree. The authority of the city to authorize the laying of the railroad tracks in Chestnut Street, and its use for railroad purposes, is not questioned.

The constitution of 1870, article 2, section 13, provides "that private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law." It has, however, been repeatedly held that a railroad company acquiring the right to lay its tracks in the streets of a city is not required to institute condemnation proceedings in respect of damages which may accrue to owners of property abutting such streets, and where no part of the land of an abutting lot owner is entered upon or sought to be condemned for public use, the owner is not entitled to have proceedings instituted under the eminent domain law to ascertain what damage his property may sustain in consequence of the construction and operation of a railroad: *Peoria etc. R'y Co. v. Schertz*, 84 Ill. 135; *Stetson v. Chicago etc. R. R. Co.*, 75 Ill. 74; but the landowner is remitted to his action at law to recover his damages. The right to recover damages for injury to private property occasioned by the occupation of a public street by a railroad, or the taking of other property for the public use, is secured to the property owner by the provision of the constitution quoted: *Chicago etc. R. R. Co. v. Ayres*, 106 Ill. 511; and the railroad company will be liable for all direct physical damages accruing from the construction and operation of such railroad to such contiguous or abutting owner: *Stone v. Fairbury etc. R. R. Co.*, 68 Ill. 394; 18 Am. Rep. 556; *Eberhart v. Chicago etc. R'y Co.*, 70 Ill. 347.

We said in *Chicago etc. R. R. Co. v. Loeb*, 118 Ill. 203, 59

Am. Rep. 341: "The just compensation to be made for damages to land was, in our opinion, intended as an indemnity, not for successive, constantly accruing damages recoverable as they may afterwards be suffered, but for all the damages the landowner may suffer from all the future consequences of the careful and prudent operation of a railroad, it being the immediate damage done to the landowner's estate by changing its permanent condition and impairing its present value. The action for damages may be regarded as in the nature of one kind of condemnation proceedings." And we there held that under the clause of the constitution of 1870 restrictive of the exercise of the power of eminent domain in that private property shall not be taken or damaged for public use without just compensation, the proceedings for the recovery of damages for property damaged but not taken should be similarly regarded as the provision in regard to the taking of property where there is but one proceeding, and an assessment of compensation for damages once for all; and that in cases where no land was taken or appropriated there should be but one proceeding for recovery of damages, "in which there should be recovery for the entire damage, past, present, and future."

The constitution of 1848 provided only that private property should not be taken for public use without just compensation, and it was held that damages were not recoverable for injury to private property not touched by the public improvement. To obviate this supposed defect, the constitution of 1870 provided that private property should not be taken or damaged for public use without just compensation. Property is neither to be taken nor damaged without just compensation. Both provisions are of equal importance, and are alike restrictions upon the exercise of the power of eminent domain. It is true when compensation is not to be made by the state it is to be ascertained by a jury as may be prescribed by law. But it cannot be important that the legislature has failed to provide in the eminent domain act for the assessment of such damages. The property owner is not thereby left remediless, but may nevertheless have his action at common law, and thereby have his compensation "ascertained by a jury," as required by the constitution. It became necessary for the legislature by the eminent domain act, to provide for the right of entry upon and possession of the private property of the citizen, and as a necessary incident to prescribe the mode of ascer-

tainment of compensation in cases where the property was to be actually appropriated to the public use; but no such necessity existed when there was not a physical taking or appropriation for the reason that the common law furnished ample means for the ascertainment of the damages done the property not so entered upon or taken.

The right of eminent domain is an essential attribute of sovereignty, inherent in every independent government, and to be exercised in the discretion of the sovereign power, to promote the general welfare of the people. The right of the citizen to own, possess, and enjoy his property must necessarily give way to the right of the state to appropriate it to public uses, when, in the judgment of the sovereign power, public interest will be promoted. It is universally conceded that railroads are *quasi* public corporations, and that the taking or damaging of private property for their construction and maintenance is a public use, within the meaning of the constitution. The sovereign power of the state has seen proper, for wise purposes and in the interest of natural justice, to place an absolute restriction upon the exercise of the right either to take or damage private property, that just compensation for the taking or damaging shall be paid. It has been uniformly held in this country, that the compensation need not be paid before the taking,—it is sufficient that provision be made for compensation afterwards, provided the payment be made certain. So enactments providing for taking possession of property sought to be condemned for public use, upon giving bond, etc., have been held valid. The rule is stated by Chancellor Walworth (*Bloodgood v. Mohawk etc. R. R. Co.*, 18 Wend. 9, 31 Am. Dec. 313) that the compensation must be either ascertained and paid before the property is appropriated, or an appropriate remedy must be provided, and upon an adequate fund, that it may be reached by the owner through the medium of the courts of justice; and in *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526, Chancellor Kent held, that if, in any case, the government proceeded without taking these preliminary steps, their agents and officers may and should be restrained by injunction. Potter's Dwaris, 392.

It will be unnecessary to pursue this branch of the subject, for the reason that this court is probably committed to the doctrine that injunction will not lie at the suit of the abutting property owner when the entry upon and occupation of the



street by a railroad is by the authority of the municipal agency invested with the control of such street: *Stetson v. Chicago etc. R. R. Co.*, 75 Ill. 74; *Patterson v. Chicago etc. R. R. Co.*, 75 Ill. 583; *Chicago etc. R. R. Co. v. McGinnis*, 79 Ill. 269; *Truesdale v. Peoria etc. Co.*, 101 Ill. 564; *Peoria etc. Ry Co. v. Schertz*, 84 Ill. 135.

It was held in these cases, that the provisions of the eminent domain act providing for the recovery of compensation for property damaged but not taken, applied to cases where, a portion of the land having been taken, damages resulted in consequence thereof to the residue of the land of the same proprietor, but the damages resulting to abutting or adjacent lands in consequence of the construction and operation of a railroad upon its own land or upon the lands of another was not within its contemplation, and that the railroad company, having the right to enter upon its own land or to enter upon the street by license, its act of entry, and of constructing thereon its road, was not unlawful, and hence, there being a remedy at law in an action for the damages occasioned, there was no ground for the interference of a court of equity. After citing numerous English authorities it is said in the case of *Stetson v. Chicago etc. R. R. Co.*, 75 Ill. 74: "the reason given is, the impracticability in many cases of knowing whether damage will be sustained or not, and of measuring it if it were certain," until after the completion and operation of the road; and it was further said, that the company was not bound to make compensation for expected damages before it entered upon the work it had a lawful right to perform. "The party will be left to his action. When he has settled his right to damages, and ascertained the measure in an action at law, if any reason exists why he cannot have execution of the same, equity will assist him, but not before:" *Dunning v. City of Aurora*, 40 Ill. 481; *Bliss v. Kennedy*, 43 Ill. 67.

Without pausing to note further the rulings in this regard, or to express our approval or disapproval of the same, it will be seen that the right to recover compensation for such consequential damages as may accrue to abutting property, by the appropriate remedy at law, is clearly recognized, and that the want of power of a court of equity to interfere by injunction to restrain the supposed damaging of such property is predicated upon the impracticability of its ascertainment before the damage has been occasioned, and also a clear recognition of the power of a court of equity to interpose, by way

of execution, after the exhaustion of the legal remedy. Many cases are to be found in the books where the question has arisen as to the right of compensation to the landowner where his land has been taken and appropriated, and between the owner and encumbrancers or alienees of the railroad and its franchise and property, and the uniform holding has been, unless the owner has done some act amounting to a waiver of his right to compensation, or by which he is estopped from asserting it, that his right to compensation remains unaffected by the alienation. In many of the cases the right is placed upon the ground that, the compensation not having been paid, the title to the land sought to be taken remains in the original proprietor, and that ejectment will lie at his suit to recover the land, or, where the amount of compensation has been ascertained by condemnation proceedings, it may be treated as a forced sale of the land, and a lien in the nature of a vendor's lien enforced against the property. The right to compensation, before the owner can be deprived of his property, being secured by constitutional provision, such title cannot be divested, except upon payment of the compensation (or its equivalent), by any act of the legislature or of the railroad company, and an alienee or encumbrancer thereof will take *cum onere* the right of the owner to compensation, and is not, therefore, an innocent purchaser: *Rio Grande etc. R'y Co. v. Ortiz*, 75 Tex. 602; *Howe v. Harding*, 76 Tex. 17; 18 Am. St. Rep. 17; *Borough of Easton's Appeal*, 47 Pa. St. 255; *Lycoming etc. Co. v. Moyer*, 99 Pa. St. 615; *Western Pennsylvania R. R. Co. v. Johnston*, 59 Pa. St. 290; *Drury v. Midland R. R. Co.*, 127 Mass. 571; *Mims v. Macon etc. R. R. Co.*, 3 Ga. 333; *White v. Nashville etc. R. R. Co.*, 7 Heisk. 518; *Lake Erie etc. R'y Co. v. Griffin*, 107 Ind. 464; *Pfeifer v. Sheboygan etc. R. R. Co.*, 18 Wis. 155; 86 Am. Dec. 751; *Adams v. St. Johnsbury etc. R. R. Co.*, 57 Vt. 240. A careful study of these and like cases will disclose with what care and pertinacity the courts have sought to protect the constitutional right of the citizen against encroachments upon his property without indemnity against loss, by reason of the appropriation of his property to a public use.

It is said in this case, however, that the doctrine of these cases does not apply, for the reason that the title of appellees to their property is unaffected, and it is not sought to interfere with their right of possession or occupancy, and therefore, no right in their property being sought by the railroad, no lien

can be declared in their favor for the consequential damages resulting to such property by the building and operation of the railroad. It must be conceded that the right of appellees, here, cannot be predicated upon any supposed sale of their land, so that, by analogy, a vendor's lien might be declared in their favor. Nevertheless, there is a forced deprivation of property or damaging of property of the abutting owners without their consent, by reason of the appropriation of the street to the particular public use, and there is, therefore, in every just sense, a taking of the private property of the abutting owner to the extent to which it is thus damaged. Property consists, not of the physical thing of which it is predicated, but in the dominion that is rightfully and lawfully obtained over it, — the right to its use, enjoyment, and disposition. If a railroad company, by building its road upon the street fronting upon a lot reduces the value thereof from five thousand dollars to three thousand dollars, it has as certainly taken from the owner two thousand dollars of his property as if it had occupied a strip of his land of that value, — and this seems to be the current of later authority: Lewis on Eminent Domain, secs. 53-59, and cases cited; *Rigney v. City of Chicago*, 102 Ill. 64. But for the consent of the city, a mere instrumentality of government, to the occupation of this street by the railroad company, it must have acquired such right under the eminent domain laws of this state, and it cannot affect the right of the abutting owners to compensation, that the street is appropriated to the public use by the railroad by consent of the government, instead of having been acquired by another exercise of its sovereign power.

It is not, however, as we have already seen, an open question in this state that adjacent lot owners may recover damage occasioned by the building and maintaining of a railroad in the streets of a city by and with the consent of the municipal authorities, — that is, that damages not common to property in general resulting to abutting property from the appropriation of the street by the railroad is damaging private property within the purview of the constitutional provision before quoted: *Rigney v. City of Chicago*, 102 Ill. 64; *Chicago etc. R. R. Co. v. Loeb*, 118 Ill. 203; 59 Am. Rep. 341. And private property is, by the constitutional guaranty, secured against being thus damaged for such public use without compensation. Therefore, to hold that a railroad may occupy the streets of a city, and thereby damage the

private property of abutting or adjacent lot owners, and by reason of alienation or its insolvency may continue the occupancy and infliction of the injury, without indemnifying such owner, is to render the constitutional provision nugatory, and the safeguards specifically intended by the people to be thrown around the citizen in the protection of the right of private property, is rendered of no avail. It may be, as we have before seen it has been held, that the citizen is remediless until the damage has actually occurred, and by appropriate remedy he has determined the extent and amount thereof; but when the damages are ascertained in the mode provided by law, the right of the lot owner to the payment of the same, as compensation, is guaranteed to him by the constitution as a condition to the continued appropriation of the street to the public use, whereby the injury to his private property is inflicted.

As we have seen, it is not in the power of the railroad, by alienation or otherwise, to defeat this constitutional guaranty, and the alienee, purchaser, or successor will be required to take notice of the provisions restricting the power to take or damage private property for public use, and be held to take subject to the burthen cast upon the railroad by, through, or under which the interest is acquired. It by no means follows, as seems to have been supposed in some of the cases, that a right of action would exist against the new company, who might as successor to the original railroad company, become possessed of the franchise and property; but when a mortgagee or a successor company insists upon a continuation of the use, or where there is an appropriation of that part of the railroad whereby the damage has been occasioned, the right of the lot owner to compensation out of the *res* is absolute.

It is said, however, that appellants, mortgage bondholders, are innocent purchasers of the bonds, without notice of any equities in appellees; that the mortgage by which the bonds purchased by them are secured, is prior, both in date of execution and recording, to the judgments of appellees and to the accruing of the damages for which the judgments were rendered. It is true, as we have seen, that the mortgage was executed July 1, 1882, and that the road was not constructed along the street in question until October, 1883, and that the damage suits were not brought until in 1887, and judgments not recovered until August, 1888. If these bondholders were



not required to take notice of the rights of appellees, and it is necessary to bring notice home to them, evidence thereof is not wanting in this record. They were notified upon the face of the bond and mortgage that the bonds were issued upon an unfinished line of road, and that they were to be issued at the rate of ten thousand dollars a mile, as the projected line of railroad was completed. The mortgage executed to secure these bonds was made to cover, not only the small portion of the road then constructed, but the franchise and property of the railroad company then owned or thereafter to be acquired, and the projected line of road as it might be completed through to the city of Centralia. It was apparent on the face of the security that the railroad and property of the company then in existence were not intended as the sole security for these bonds, but the security was to be appreciated and perfected by the acts of the railroad company in the building and completion of the railroad. Every person buying these bonds must be presumed to have known that the right of way must be acquired in some of the recognized modes known to the law, and that when the road was built through cities, damages might be thereby occasioned. They were bound to take notice of the provisions of the constitution of the state, and of the rights of all persons whose property was taken or damaged in the completion of this public work to just compensation for such taking or damaging. It is apparent, therefore, that in respect of priority over the judgments of appellees, appellants are in no better condition than they would have been had the mortgage been subsequent to the accruing of the damages or the rendition of the judgments. It can no more be said that the fact that the bonds were executed at a date prior to the building of the road will entitle them to priority against persons whose property was damaged for the public use, than it could be that they are entitled to priority as against persons whose lands may have been taken and appropriated to the public use, and in the latter case it will not be contended that the mortgage would have priority. The railroad company was, in a sense, agent of the bondholders to perfect their security, and the latter must be held bound by the acts of the company in respect of the completion of the projected road, so far, at least, as such acts can be held to have been clearly within the contemplation of the parties in appreciating and perfecting the security.

By the original bill it was sought to subject the *corpus* of

the railroad to the satisfaction of these judgments for damages. The bondholders and trustees having been made parties, answered, setting up their bonds and mortgage, the bonds having been declared due, as might be rightfully done, for the nonpayment of the interest, filed their cross bill to foreclose the mortgage, and insisting upon the priority of the mortgage over the judgments. The foreclosure was decreed, and the question sharply presented was as to the right of appellees to satisfaction of their judgments out of the proceeds of the sale of the property. It is apparent that appellants were seeking to avail of the security as it had been perfected by the railroad company. This appellants could not do without incurring the obligation to discharge the liability of the railroad to appellees. It was necessary in the completion of the road, in the exercise of the discretion committed to the railroad company, to procure the right of way in Chestnut Street, which was done, and the road constructed therein. The road thus constructed formed parcel of the security which appellants were seeking to avail of. Before they could do this, as we have seen, the railroad company was required to pay the damages occasioned to appellees by the building of the railroad and the continued use of the street for that particular public use, which was guaranteed to appellees by the organic law of the land. It is not necessary, as seems to be supposed, that we should hold that a lien was created by the constitutional provision for the damages to abutting property. It is sufficient that appellees were possessed of superior equities, and entitled to be first paid out of the proceeds of the sale of the property. The right to the continued use and enjoyment of the railroad upon Chestnut Street, and its availability, therefore, as security to the bondholders, depended upon the payment of compensation to appellees as ascertained by law. We therefore hold that the court did not err in decreeing that the damage to abutting property owners, appellees, should have priority of payment out of the proceeds of the sale of the railroad under the decree of foreclosure.

There are some minor contentions which we deem it necessary to notice. It is insisted by appellants that the judgment in favor of Vortride, administrator of the estate of Minnie Vortride, deceased, is erroneous, in that the right of action survived to the heir, and not to the administrator. The suit was originally brought by Minnie Vortride, as owner of the abutting property damaged, and she having died pending the

suit, her administrator was substituted as party plaintiff; and the same question is raised in respect of the judgment in favor of Barbara Widmann, administratrix of the estate of Phillip Widmann, deceased. It is conceded that the cause of action accrued during the lifetime of the decedent owners, and the question is, to whom did the action survive? As we have before seen, the recovery in this class of actions, where the structure from which the injury flows is permanent in its character, and the damages therefore permanent, should and may be for all damages arising therefrom, past, present, and prospective. It was said in *Ohio etc. R'y Co. v. Wachter*, 123 Ill. 440, 5 Am. St. Rep. 532, that the decisions of this court go to the length of holding "that all special damages, present, and prospective, to the owners of lands, resulting or to result from properly constructing, maintaining, and operating a railroad under the laws of this state, constitute, as to such landowner, one single, indivisible cause of action, which may be enforced under the eminent domain act, or any other appropriate form of action." It is also there held that when after such right of action has once accrued, the land is conveyed to another, the latter can maintain no action for damages which could have been anticipated and allowed as prospective damages in a suit which the grantor might have brought. The right of action accrued in this case when the railroad was built and put in operation: *Chicago etc. R. R. Co. v. Loeb*, 118 Ill. 203; 59 Am. Rep. 341; *Wabash etc. R'y Co. v. McDougall*, 118 Ill. 229; *Chicago etc. R. R. Co. v. McAuley*, 121 Ill. 160. And it does not appear, from the record, that any element of damage or depreciation in value of the property entered into the judgments, other than that for which the right of recovery existed in the lifetime of the owners. The right of action was then a personal right, unassignable by conveyance of the land, and it could be enforced by the owner or his personal representatives, only: 1 Chitty's Pleadings, 177. It would not pass with the land to his grantee, devisee, or heir, and surviving under the statute, the suits were properly prosecuted in the name of the personal representative of the deceased owner.

It is next insisted, the court erred in instructing the juries called to assess appellees' damages, under the order of court, opening the judgment, and providing for the trial of the issues of fact as to such damages. It is sufficient to say that, taking the series of instructions together, the law was given in each case with substantial accuracy. No good purpose can

be served by an extended discussion of the various points made. Moreover, the verdicts of the juries, while not perhaps advisory to the conscience of the chancellor merely, as in ordinary submissions of issues of fact out of chancery, were nevertheless peculiarly under the control of the chancellor, and upon a consideration of the whole case he could reverse or set them aside. If, therefore, upon consideration of the whole case, it is found that the verdicts were warranted by the proofs, error in instructions would not necessarily reverse the judgments. But as before said, we find no substantial error, either as to the law as given by the chancellor to the jury, or in the verdicts upon the evidence submitted.

The particular objection to the instructions, however, seems to present the question as to whether the recovery should be limited to the damages accruing at the time of the completion of the road or within a reasonable time thereafter, or whether the jury would be at liberty to consider the actual depreciation from the location and operation of the road to the time of bringing the suits. As we have seen, the right of action accrued upon the happening of the injury, occasioned by the completion of the road, to recover not only present but prospective damages. It by no means follows that because the right of action then accrued it must then be enforced. The action may, under the statute, be brought at any time within five years from the accruing of the right, and the railroad company or appellants cannot complain that the plaintiff has waited until his damages have become susceptible of absolute proof before bringing his action, instead of resorting to proof of prospective damages. The authorities are, that whenever the suit is brought, if within the statute of limitations, proof may be made of the permanent damages to the property, and the recovery being once for all, may include all damages flowing from the location and ordinarily skillful operation of the road.

It is also said that the court erred in instructing the jury as to the measure of damages to the leasehold interest and business of appellee Buehler. The court instructed the jury, at the instance of appellants, in respect of the loss to his business, that "the measure of his recovery is limited to the loss of probable profits of his business, if any shown by the evidence, from the time of the construction of the railroad track on Chestnut Street and its operation, and such time as the plaintiff might, in the opinion of the jury from the evidence,



by the use of reasonable diligence, have procured another place of business equally eligible for the transaction of business of the kind he was engaged in, including a reasonable time for removal to the same." This instruction, it is conceded, lays down the correct rule. It is, however, said that the instructions given for appellees were in conflict with this instruction. We have carefully examined the instructions, and there is nothing that, in our judgment, conflicts with the principle announced in the instruction quoted, or to indicate that the jury did not follow it in considering the evidence and making their finding. Other minor objections were insisted upon, but, as before said, we find no prejudicial error.

It is next insisted that appellee Heiss is estopped from claiming damages to his property by reason of the location and operation of the railroad in Chestnut Street, because it was thus located, as it is claimed, by his invitation. The rule as laid down by Mr. Lewis (*Eminent Domain*, sec. 120) is: "Where the owner of property urges or induces a railroad company to locate its road upon the adjacent street, he will, after the invitation has been acted upon, be estopped from claiming damages or enjoining the operation of the road"; and the same principle has found recognition by this court in *Illinois Cent. R. R. Co. v. Allen*, 39 Ill. 205, and *Toledo etc. R'y Co. v. Hunter*, 50 Ill. 325. It appears that Heiss attended meetings of citizens called for the purpose of devising ways and means to procure the building of the road to Centralia, and it is shown by Huisseller, a member of the city council, that his recollection is that Heiss asked him to vote for the ordinance granting the right to the railroad company to locate their railroad on Chestnut Street, and that afterwards Heiss and Son, of which firm appellee was a member, subscribed one hundred dollars toward the cost of building a depot at Centralia, a fund having been raised therefor by the citizens as an inducement to build the railroad to Centralia. In respect of the latter, it is clear that it had nothing to do with the location of the road on the particular street in question. The line had been located for a year before that time to Centralia. Moreover Heiss and Son, who thus subscribed, are allowed nothing by the decree. If it be regarded as true that Heiss urged the member of the city council to vote for the ordinance, it does not appear that his vote was necessary to its passage, or that the ordinance would not have been passed but for his action. We are of opinion that it cannot

be said that the railroad company was induced to locate its road upon Chestnut Street by the invitation of Heiss. To create the estoppel there must be some affirmative act by the person sought to be estopped, in reliance upon which the company has acted to its prejudice.

It was not error for the court to open the judgments, and require a reassessment of the damages by a jury. The original judgments had been entered by default against the railroad company only. If appellants were liable, or the property in their hands liable to be subjected to damages which had accrued to appellees, it was only for damages actually sustained, and, as to such damages, appellants were not bound by the original judgments.

We find no error in this record for which the decree should be reversed, and it is accordingly affirmed.

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**RAILROAD IN STREETS — CONSENT OF ABUTTING OWNERS.** — When streets are needed for railroad purposes, the rights and interests of the abutting owners must be obtained, with their consent, or by the exercise of the right of eminent domain: *Theobald v. Louisville etc. R'y Co.*, 66 Miss. 279; 14 Am. St. Rep. 564, and note with cases discussing this subject collected; note to *Jones v. Erie etc. R. R. Co.*, 31 Am. St. Rep. 733.

**RAILROADS IN STREETS. — DAMAGES TO ABUTTING OWNERS:** See note to *Jones v. Erie etc. R. R. Co.*, 31 Am. St. Rep. 733. An owner of property who has sustained special damages by the construction of a railroad in close proximity to his property, may recover therefor though there has been no actual taking of his property: *Omita etc. R. R. Co. v. Janacek*, 30 Neb. 276; 27 Am. St. Rep. 399, and note; *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644, and note; extended note to *Sheehy v. Kansas City etc. R'y Co.*, 4 Am. St. Rep. 402; *Fort Worth etc. R'y Co. v. Downie*, 82 Tex. 383; *Fox v. Baltimore etc. R'y Co.*, 34 W. Va. 466.

**EMINENT DOMAIN — PUBLIC USE — RAILROADS.** — Taking property for railroad purposes is a taking for public use: *Toledo etc. R'y Co. v. Detroit etc. R. R. Co.*, 62 Mich. 564; 4 Am. St. Rep. 875, and note; *Little Rock etc. R. R. Co. v. Woodruff*, 49 Ark. 331; 4 Am. St. Rep. 51, and note; *Brown v. Beatty*, 34 Miss. 227; 69 Am. Dec. 339, and note; *Small v. Georgia etc. R'y Co.*, 87 Ga. 602; *Grand Rapids etc. R'y Co. v. Weiden*, 70 Mich. 390. See extended note to *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 695.

**RAILROADS IN STREETS. — MEASURE OF DAMAGES TO ABUTTING OWNERS:** See note to *Jones v. Erie etc. R. R. Co.*, 31 Am. St. Rep. 734; *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644, and note; *Fulton v. Short Route etc. Co.*, 85 Ky. 640; 7 Am. St. Rep. 619, and note.

**EMINENT DOMAIN — RAILROADS.** — The successors in interest to a railway are liable for the value of lands taken by the old railway company for railway purposes: *Pfeifer v. Sheboygan etc. R. R. Co.*, 18 Wis. 155, 86 Am. Dec. 751, and note discussing this subject.

**EMINENT DOMAIN — DAMAGES TO TENANT.** — Where land condemned for railroad purposes is occupied by a tenant he may recover for damage done to his crops planted before notice that his possession would be interfered

with, but he cannot complain that the value of his term has been diminished: *Lafferty v. Schuylkill etc. R. R. Co.*, 124 Pa. St. 297; 10 Am. St. Rep. 587. See also *Fulton v. Short Route etc. Co.*, 85 Ky. 640; 7 Am. St. Rep. 619.

EMINENT DOMAIN — RAILROADS — INJUNCTION. — A railroad will be enjoined from appropriating land admitted or proved to belong to plaintiff when not authorized to do so by its charter: *Bird v. Wilmington etc. R. R. Co.*, 8 Rich. Eq. 46; 64 Am. Dec. 739, and note. See *Kersey v. Schuylkill etc. R. R. Co.*, 133 Pa. St. 234; 19 Am. St. Rep. 632.

## SCHULTZ v. PLANKINTON BANK.

[141 ILLINOIS, 116.]

**MORTGAGE AND NOTES SECURED THEREBY CONSTRUED TOGETHER.** — When a mortgage is given to secure the payment of several notes described therein, such mortgage and notes must be construed as one instrument or contract.

**MORTGAGE SECURING DIFFERENT NOTES — PRIORITY.** — When a mortgage is given to secure several notes maturing at different dates, the notes are entitled to priority of payment from the proceeds of the property embraced in the mortgage, in the order in which they respectively become due.

**MORTGAGE SECURING SEVERAL NOTES — PRIORITY — EVIDENCE TO VARY.** — When a mortgage is given to secure several notes maturing at different dates, parol evidence of an agreement made contemporaneously with the mortgage, by which, on foreclosure, the proceeds of the sale are to be first applied to the payment of the note last maturing to relieve the indorser thereof, is not admissible in favor of such indorser.

**MORTGAGES — EVIDENCE ADMISSIBLE TO SHOW CONSIDERATION, BUT NOT TO VARY.** — When the consideration expressed in a mortgage is in dispute, parol evidence is admissible to show the real consideration; but when the consideration is not in dispute, parol evidence is not admissible to change the terms of the mortgage in regard to the payment of notes described therein.

**ASSUMPSIT** by the Plankinton Bank against Albert Schultz to recover from him as indorser of a note for two thousand dollars executed by Henry Schultz. The note is the fifth mortgage note mentioned in the opinion. Judgment for plaintiff. The defendant appealed.

*Kraus, Mayer, and Stein*, for the plaintiff in error.

*Moses and Pam*, for the defendant in error.

**CRAIG, J.** On the trial, the court excluded the parol agreement set up in the affidavit for a continuance, and on the propositions of law submitted, held that a parol agreement entered into at the time the mortgage was executed, was not admissible to vary the contract between the bank and Henry Schultz, embraced in the chattel mortgage, and the propriety

of this ruling is the principal question presented by the record for our consideration.

Parol evidence is not admissible to vary or contradict the terms of a written agreement. This principle of law is so well understood and so thoroughly settled that it will not be necessary to cite authorities in its support. What did the defendant undertake to prove as a defense to the note? Upon an examination of the affidavit relied upon, it will be found that the defendant undertook to show that at the time Schultz executed and delivered to the bank a chattel mortgage to secure an overdraft of \$175.44, and five promissory notes, including the one in suit, it was agreed between Schultz and the bank, that when the property embraced in the mortgage was sold, the note in suit should be first paid from the proceeds of the sale of the mortgaged property. If the alleged agreement had been incorporated in the mortgage, of course it would have been binding; but it was not, and the question is, whether a parol agreement made at the same time the mortgage was executed, is admissible for the purpose for which it was offered.

In disposing of this question, the mortgage, and the promissory notes described in the mortgage, must be considered together and treated as one instrument. When this is done, it appears upon the face of the mortgage, by its terms, that the property therein described was conveyed by Henry Schultz to the bank, to secure: 1. An overdraft of \$175.44; 2. A note for \$2,500, dated March 3, 1888, and due on demand; 3. A note for \$500, due August 13, 1888; 4. A note for \$1,250, due September 19, 1888; 5. A note for \$2,000, due September 19, 1888; and 6. A note for \$1,250, due October 15, 1888. These notes were all executed by Henry Schultz, and the several amounts therein specified he promised to pay on the date named in each note. The mortgage and the notes constituted a contract in writing between Henry Schultz, the mortgagor, and the Plankinton Bank, the mortgagee. As stated before, the mortgage was given to secure several notes which became due and payable at different dates. The law is well settled, by the decisions of this court as well as by the decisions of other courts, that where a mortgage is given to secure the payment of several promissory notes maturing at different dates, the notes are entitled to priority of payment from the proceeds of the property embraced in the mortgage, in the order in which they respectively become due and payable.



The first becoming due has the first lien on the mortgaged property for payment, the next note becoming due will have the second lien, and so on to the last: *Vansant v. Allmon*, 23 Ill. 31; *Walker v. Dement*, 42 Ill. 272; *Gardner v. Diederichs*, 41 Ill. 158.

The rule on this subject is well stated in *State Bank v. Tweedy*, 8 Blackf. 447, 46 Am. Dec. 486, where it is held that the different installments in a mortgage, where secured by corresponding notes, may be regarded as so many successive mortgages, each having priority, according to its time of becoming payable. Applying this rule of construction to the mortgage in question, three thousand dollars of the mortgage indebtedness, in addition to the overdraft, became due before the note indorsed by the defendant, and that amount was entitled to be paid out of the proceeds of the mortgaged property before the bank was under any obligation to apply any of the proceeds on the note indorsed by the defendant, which would exhaust all the proceeds of the mortgaged property, and leave nothing to apply on the note indorsed by the defendant; but if the parol agreement made at the same time the mortgage was executed is admissible, what is the result? The terms of the mortgage — the written contract between the parties — are changed by the parol evidence, and the note which stands in the fifth order of payment is advanced to the first. We are aware of no rule of law under which this can be done. Indeed, the admission of the evidence would violate one of the elementary rules of evidence.

But it is said the agreement proposed to be proved is collateral to the mortgage, and upon that ground it is admissible. The parol agreement was made at the same time the mortgage was executed. It was made by and between the mortgagor and mortgagee. It related to the same subject embraced in the mortgage contract, and it is nothing but a part and parcel of the mortgage contract, which the parties failed to incorporate therein as a part of their contract.

It is also said the parol agreement was the consideration for the mortgage, and under the general rule which admits parol evidence to explain the consideration in a deed or show a different consideration for the one expressed, this evidence may be admitted. It is a well understood rule that parol evidence may be given to explain a receipt, and upon the same principle the acknowledgment of the receipt of a certain consideration expressed in a deed may be changed or varied by

parol evidence; but that doctrine has no application to the question involved here. The consideration named in the mortgage was not in dispute. Whether it was one sum or another had no special bearing on the case. The offered evidence had no bearing on the consideration of the mortgage. Its object and only purpose was to change the terms of the mortgage in regard to the payment of the notes described in the mortgage, and as such it was not admissible on the pretense that it had a bearing on the consideration named in the mortgage.

But it is said the defendant is not a party to the mortgage or in privity with a party to it, and being a stranger he may contradict it, by parol or otherwise. It is true that the defendant is not a party to the mortgage, but he claims under it. He introduced it in evidence. Indeed, the mortgage is the foundation of the defendant's claim. Take the mortgage out of the case and the defendant has no ground whatever to stand upon. Claiming, then, as defendant does, under the mortgage, and under a contract alleged to have been made by the mortgagor and mortgagee at the time the mortgage was executed, he has no more right to introduce evidence to vary or contradict the terms of the mortgage than he would if he was a party to the instrument.

Many authorities have been cited by counsel in their argument to sustain their position. These authorities have been examined, and the questions presented have been carefully considered, but we perceive no ground upon which the parol agreement set up in the affidavit can be admitted in evidence.

The judgment of the appellate court will be affirmed.

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**MORTGAGE AND NOTES SECURED THEREBY CONSTRUED TOGETHER.** — A trust deed by a banking association to secure notes issued in violation of a statute is void: *Leavitt v. Palmer*, 3 N. Y. 19; 51 Am. Dec. 333; *Heburn v. Warner*, 112 Mass. 271; 17 Am. Rep. 86, and note discussing the proposition as to whether or not a mortgage is void when the note which it secures is void.

**MORTGAGE SECURING SEVERAL NOTES — PRIORITY.** — When a mortgage is given to secure several notes which mature at different times and are assigned to different persons, and the proceeds of the mortgaged property are not sufficient to pay all the notes, such proceeds must be distributed among the different holders *pro rata* irrespective of the dates of the notes or the dates of the assignments: *Penzel v. Brookmire*, 51 Ark. 105; 14 Am. St. Rep. 23, and note with cases collected discussing this subject: *Whitehead v. Morrill*, 108 N. C. 65.

## GORDON v. GORDON.

[141 ILLINOIS, 160.]

**DIVORCE — DEFENDANT IN CONTEMPT ENTITLED TO MAKE DEFENSE.** — When a defendant in a suit for divorce is in contempt in failing to obey the order of the court for the payment of temporary alimony, the court has no power to prevent him from interposing a defense to the merits of the bill by striking out his answer.

**DIVORCE FOR ADULTERY — COUNTERCHARGE BY DEFENDANT IN CONTEMPT.** When the party suing for a divorce on the ground of adultery is guilty of the same offense, the defendant may allege it in defense. His answer cannot be stricken out because he is in contempt for failure to pay temporary alimony as ordered by the court.

**DIVORCE. — ADULTERY TO JUSTIFY DIVORCE MUST BE VOLUNTARY** and not committed by the wife when she is compelled by force or ravishment, nor when she has intercourse with a man not her husband by mistake in believing him to be her husband, nor where she marries and lives with another man in the belief that her husband is dead, unless the statute makes the second marriage void and not voidable, in which case voluntary cohabitation under the second marriage is adultery.

**DIVORCE — ADULTERY WHAT IS NOT.** — If, after a formal divorce, a party thereto should suppose it valid when it is void for facts not known to him, cohabitation under a second marriage does not constitute adultery, unless continued after knowledge of the facts.

**DIVORCE — COHABITATION UNDER SECOND MARRIAGE, WHEN ADULTEROUS.** When after the hearing of an action for divorce, the attorney for the wife hands her what purports to be a copy of a decree of divorce, and informs her that she is free to marry again, and she, acting upon such information, thereupon without investigating the facts which are open to her, marries another man and cohabits with him for twenty days prior to the time when the decree of divorce is actually rendered, the second marriage is void and such cohabitation is adulterous on her part.

**DIVORCE — SECOND MARRIAGE WHEN VOID.** — The marriage of a man and woman when one of them has a husband or wife then living and undivorced is void, although the parties in contracting the second marriage acted in the honest belief of a prior divorce.

*D. T. Duncombe and Ernest Langtry, for the appellant.*

*Frank Ives, for the appellee.*

CRAIG, J. Two questions are presented by this record:

1. Whether the court erred in striking out the answer of the defendant, George B. Gordon, for his failure to pay temporary alimony, as decreed by the court; and 2. Whether Ada E. Gordon, the complainant, was guilty of adultery by her marriage with Harvey Wilson on the seventh day of May, 1887, and her subsequent cohabitation with him as his wife from that date until the second day of March, 1889, when she discovered that her decree for divorce was invalid.

The questions involved are important, and not entirely free from difficulty. It is clear that the defendant was in contempt of court in failing to obey the decree of the court in ordering the payment of temporary alimony, and while the court had the power to resort to such means as are provided in chancery practice to enforce obedience to its decrees, whether the court had the power to go so far as to prevent the defendant from interposing a defense to the merits of the bill, while he was in contempt of court in failing to comply with a decree for the payment of temporary alimony, presents a serious question. There are authorities which sustain the ruling of the court. *Walker v. Walker*, 82 N. Y. 260, may be regarded as a leading case on the question. There, as here, the defendant in a suit for divorce was in contempt because of disobedience of an order of the court directing the payment of alimony, and it was held that an order directing defendant's answer to be stricken out unless he obey the previous order within five days, and also an order striking out the answer upon his failure to obey, and directing a reference to take proof of the facts stated in the complaint, were proper.

Where a complainant is in contempt there may be cogent reasons for holding that his proceedings shall be stayed so long as he remains in contempt, under the well-known maxim that "he who seeks equity must do equity." But this well-known principle cannot, in reason, be applied to a defendant who is merely defending himself against attack. Indeed, a rule denying a defendant a right of defense solely upon the ground that he had failed to pay a money decree in a divorce proceeding would seem to be a harsh one, and one, too, which in many cases might work great injustice. The rule, therefore, in *Walker v. Walker*, 82 N. Y. 260, has not been looked upon with favor, and in many of the states, in its application to divorce cases, the courts have not followed it, but held the contrary doctrine: *Peel v. Peel*, 50 Iowa, 521; *Baily v. Baily*, 69 Iowa, 77; *Johnson v. Superior Court*, 63 Cal. 578. These cases hold that although the defendant may be contumacious, the court cannot deprive him of the right of defense. In *Haldine v. Eckford*, L. R. 7 Eq. 425, where the doctrine contended for was attempted to be applied, the vice-chancellor said: "Although the contempt committed by the defendants had been of the most flagrant kind, yet as what they asked was for the purpose of defending themselves, he had no juris-



diction to refuse the order": See also *King v. Bryant*, 3 Mylne & C. 191; *Wilson v. Bates*, 3 Mylne & C. 197.

The power of the court to commit the defendant until he obeyed the order of the court or showed a satisfactory excuse for a failure to comply, is not questioned or denied; but upon what principle of justice can a ruling be sustained which denied a defendant all right to be heard in defense of the case made in the bill? If the court had the power to strike out the answer it necessarily had the power to refuse to hear any evidence the defendant might offer in answer to the bill or in support of the matters set up in the answer. A rule of this character once established in divorce cases would not, in our judgment, have a beneficial effect upon the rights of parties, and in many cases the tendency of the rule would be to bring the law into disrepute. Under our practice divorces are granted and marriage contracts set aside quite as readily as could be desired, if proper regard is given to the well-being of society; but should a defendant be denied the right of all defense for nonpayment of alimony, in many cases, doubtless, divorces would be granted and marriage contracts set aside upon false or insufficient evidence, for the reason the defendant was denied the right to expose a false or fictitious case. It is true that the defendant's counsel was permitted to cross-examine complainant's witnesses, but this did not cure the error. When the answer was stricken out the foundation for the defendant's defense was gone. He had the right to presume that no evidence would be allowed or considered in defense of the matters relied upon to defeat the bill.

Section 10 of chapter 40 of the Revised Statutes of 1874 provides that in suits for divorce when adultery is the ground of complaint, if it appears that both parties have been guilty of adultery, no divorce shall be decreed. The defense interposed in this case was that the complainant had been guilty of adultery, and if the facts as they appear in the record are sufficient to sustain that charge, although the answer was stricken from the files, the decision of the appellate court holding that complainant had been guilty of adultery will have to be affirmed.

In Bishop on Marriage and Divorce, vol. 1, sec. 1507, the author lays down the rule that adultery, to justify divorce, must be voluntary. The doctrine is also laid down that adultery is not committed where the party is compelled by force or ravishment, or where the wife has intercourse with a

man not her husband through mistake, she believing him to be her husband, or where the wife marries another man through the belief that her former husband is dead, and during the continuance of this belief lives in matrimonial intercourse with him. The author then adds: "If in the case last mentioned the statute makes the second marriage voidable, . . . in distinction from void, a cohabitation under it is not adultery." In section 1511 the author says: "If the second marriage is void, a voluntary cohabitation under it, otherwise than through innocent mistake, as just explained, will be adultery." In section 1514 the author says: "If, after a formal divorce, the defendant should suppose it valid when it was void because of some fact he had no knowledge of, then, since parties are not concluded to know facts, cohabitation under a second marriage contracted by him would not be adultery, unless continued after he became aware of the facts."

As we understand the argument of appellant's counsel, they rely mainly on the doctrine last announced by Bishop. In the argument it is said: "What the appellant did in this case she did under the sanction of the law and under a decree of the court. When she married the second time that decree remained absolutely good, and was binding until it was set aside, and she has the right to claim, as she had the right and still has the right to claim, the protection under that decree up to the time it was set aside."

In order to determine whether complainant falls within any of the rules heretofore alluded to, it will be necessary briefly to refer to the facts.

On the second day of March, 1887, complainant filed her bill for divorce against George B. Gordon, in the superior court of Cook County, on the ground, as alleged in her bill, of cruel treatment and adultery. Service was had by publication, and defendant did not appear. On the seventh day of May, 1887, the cause was called for trial, and complainant testified as a witness in the case. After the hearing, and on the same day, complainant was informed by her solicitor that she had obtained a decree of divorce, and he gave her what purported to be a copy of the decree, certified by him, as notary public, and informed her that she had a right to marry. He went with her to the office of the county clerk and obtained a license, and on that day she was married to M. H. Wilson, and cohabited with him as his wife until March, 1889. It turned out, however, that no decree was rendered

on May 7th, but on May 27th, more evidence was taken, and a decree of divorce entered on May 28, 1887. In July or August, 1887, complainant learned that the paper her solicitor had furnished her was not a copy of a decree, and she then procured a certified copy of the decree of May 28th, and in the following January she was again married to Wilson. On February 7, 1889, the defendant appeared in court and filed a petition to set aside the decree of divorce, on the ground that it had been obtained by false and fraudulent evidence, and on April 13th the decree was vacated and set aside. On September 19, 1889, the complainant, Ada E. Gordon, filed this her second bill against George B. Gordon, charging him with adultery.

It will be observed that the complainant cohabited with Wilson as his wife from May 7th, until May 28th, — a period of twenty-one days, — while she was the lawful wife of the defendant, before she obtained a divorce, so that during this period she cannot claim the protection of any decree, either void or voidable, as no decree was in existence until May 28, 1887. It will therefore serve no useful purpose to enter upon a discussion of the question whether the decree of May 28th, was void or voidable, or whether the cohabitation of complainant with Wilson after the rendition of that decree was adulterous or not, because if the complainant was not guilty of adultery by cohabiting with Wilson after the decree was rendered, the question would still remain as to the legal effect of her cohabitation before the decree was rendered. We <sup>then</sup> therefore confine what we may say to that branch of the case.

*Bailey v. Bailey*, 45 Hun, 230, has been cited and relied on by counsel for appellant. In that case a decree of divorce having been granted in favor of the complainant, he at once married another woman. Subsequently, the defendant appealed, but the complainant continued to cohabit with his wife by the second marriage for about ten months, when the judgment was reversed, and the question presented was, whether complainant was guilty of adultery with a woman under a second marriage while the judgment granting him a divorce was in full force, and the court held he was not. Without stopping to determine whether the rule laid down in this case is the correct one or not, it is manifest that the case cannot be regarded as an authority on the question involved, for the reason that the cohabitation of complainant with Wil-

son, relied upon here, was not under a judgment or decree of court.

The next case relied upon is *Valleau v. Valleau*, 6 Paige, 207. In this case the husband deserted his wife for more than five years, and after an absence of seven years, the wife, not knowing that the husband was alive, in good faith married and cohabited with a second husband, and it was held that the wife was not guilty of adultery. This decision is predicated, to a great extent, on a statute of New York, which provides that a second marriage contracted in good faith, where the first husband has absented himself for five years without being known by the wife to be living, is only voidable. See Bishop on Marriage and Divorce, sec. 283.

*Oram v. Oram*, 3 Redf. 300, has also been cited. This was an application to revoke letters of administration granted to a wife on the estate of a second husband, the former husband being alive when the second marriage was entered into, and it was held that the second marriage was void, and the letters of administration granted to her as the widow of the second husband should be revoked. This case has no special bearing on the question involved.

*Smith v. Smith*, 64 Iowa, 682, has also been cited, but this case, upon examination, will be found not to be in point. Indeed, no authority has been cited which holds that the cohabitation of the complainant with Wilson before a decree of divorce was granted is not adultery, and so far as our investigation has gone, we have found no such authority, — indeed, the authorities all seem to hold a contrary view. Stewart on Marriage and Divorce, sec. 242, says: "*bona fide* but erroneous belief of a husband that his wife is divorced from him does not save his intercourse with another woman from being adultery."

*State v. Goodenow*, 65 Me. 32, is a case in point. The defendants were on trial for adultery, and they offered to prove, as a defense, that Hussey, the former husband, deserted his wife and married another woman; that the justice of the peace who united the defendants in marriage advised them that on account of such desertion and marriage they had the right to intermarry, and that they believed the statement to be true, and acted upon it in good faith. It is there said: "The defendants say that they were misled by the advice of the magistrate of whom they took counsel concerning their marital relations. But the gross ignorance of the magistrate cannot excuse them. They were guilty of negligence and



fault to take his advice. They were bound to know or ascertain the law and the facts at their peril. . . . The facts proved may mitigate but cannot excuse the offense charged against them."

*Moors v. Moors*, 121 Mass. 232, is also a case in point. It is there said: "The decree *nisi* heretofore entered in this case, as the term imports, is provisional only, and did not have the effect of dissolving the marriage between the parties. The libellant was not entitled to a full divorce until he had proved that he had given the notice required by the rule of the court under the statute, and that no cause to the contrary had been made to appear. Of course, the subsequent marriage which the libellant has undertaken to contract with another woman is illegal and void: *Graves v. Graves*, 103 Mass. 314; *Edgerly v. Edgerly*, 112 Mass. 53. It is urged that as the libellant acted under the belief that he had obtained a divorce and was at liberty to marry again, his intercourse with the woman whom he had since married was not adulterous. But we do not find in the facts . . . anything to justify him in such assumption. . . . If he acted in good faith, and under an honest mistake as to his rights and duties, that fact might properly be considered in mitigation of punishment if he should be indicted for adultery, but it would be of no avail as a ground of defense." See also Bishop on Statutory Construction, sec. 664; *Simonds v. Simonds*, 103 Mass. 572; 4 Am. Rep. 576; *Commonwealth v. Thompson*, 11 Allen, 23; 87 Am. Dec. 685.

It is true that after the hearing the complainant's solicitor gave her what purported to be a copy of a decree of divorce, which he certified as a notary public, and the complainant also testified: "After the hearing Mr. Beatty told me I had my decree, and that I could marry, or do as I pleased." Reliance seems to be placed upon what the complainant's solicitor did and said, as a justification of the complainant's intercourse with Wilson before she obtained a decree of divorce. If the complainant was on trial on a charge of adultery, and had acted in good faith, in an honest belief of the truth of what her solicitor said and did, such facts might properly be considered in mitigation of punishment; but such facts can not be relied upon as a ground of defense in this action. The complainant seems to have been a woman of intelligence, and at least of ordinary business capacity. She appeared at the trial on her application for divorce. Wilson, the man she married, was also present, and she had an opportunity to con-

sult with him. There was no difficulty in ascertaining whether she had obtained a decree of divorce, or not. If she or Wilson had gone to the clerk of the court, he would have informed them in regard to the matter. It was the duty of complainant to ascertain and know, before she entered into the marriage relation with another man, that she had procured a divorce. She had no right to rely upon the falsehood of an unscrupulous attorney, when without trouble or expense, she could have gone to the clerk of the court where the cause was heard and learned the truth, and the ignorance or dishonesty of her solicitor cannot be relied on as an excuse for her negligence. As said before, the complainant was present at the hearing, and had as good an opportunity to learn and know the result of her case as did her solicitor, and under such circumstances she had no right to rely upon any false statement her solicitor might see proper to make. Indeed, while the conduct of complainant's solicitor in furnishing her a copy of a decree when none had been rendered, and saying to her that she was at liberty to enter into the marriage relation, cannot be excused, at the same time the facts surrounding the transaction seem to indicate that undue haste for a second marriage had at least some influence on the conduct of complainant. Her marriage with Wilson before she obtained a divorce from Gordon was void.

The law on this subject is well settled by the decisions of this court, as well as by the decisions in other states. In *Reeves v. Reeves*, 54 Ill. 333, on a petition for a divorce, it was held that the marriage of a woman with a man whose wife by a former marriage was still living undivorced, was void. In *Cartwright v. McGown*, 121 Ill. 338, 2 Am. St. Rep. 105, in considering the effect of a second marriage where a divorce had not been granted, it is said: "The marriage of a man and woman where one of them has a husband or wife of a prior marriage who is then living and undivorced, is void, and not merely voidable."

If the marriage of the complainant with Wilson was void, as held in the cases cited, we are aware of no principle upon which it can be held that her cohabitation with him was not adulterous. The marriage with Wilson being void, she occupied the same position that she would have occupied if she had cohabited with him without marriage.

The judgment of the appellate court will be affirmed.

SHORE, J., dissenting.

**CONTEMPT — DEFENDANT IN, WHETHER ENTITLED TO MAKE DEFENSE.** — A defendant in contempt can neither file an answer nor be permitted to make a motion to dismiss a bill until he is discharged of such contempt by order of the court: *Gant v. Gant*, 10 Humph. 464; 53 Am. Dec. 736, and note. The application of a party in contempt for a favor, and not for a matter of strict right, will not be granted until he has purged himself of the contempt: *Johnson v. Pinney*, 1 Paige, 646; 19 Am. Dec. 459, and note.

**DIVORCE FOR ADULTERY.** — ADULTERY MUST BE VOLUNTARY, hence adultery by an insane person is not cause for a divorce: *Nichols v. Nichols*, 31 Vt. 328; 73 Am. Dec. 352. See note to *Matchin v. Matchin*, 47 Am. Dec. 469.

**MARRIAGE AND DIVORCE — SECOND MARRIAGE WHEN VOID.** — A marriage contracted while a previous marriage of the husband remains unannulled, though he had previously obtained a void decree of divorce in another state, has no legal force whatever: *Collins v. Voorhees*, 47 N. J. Eq. 315; 24 Am. St. Rep. 412. A marriage is void, and no decree is required to avoid it, if either of the contracting parties has a husband or wife then living and undivorced: *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105, and note; *Freeman v. Freeman*, 49 N. J. Eq. 102. A marriage contracted with a third party by a divorced person within the period allowed for an appeal from the judgment granting the divorce is void, although they continue to live together as man and wife after the time within which they could lawfully marry: *Estate of Smith*, 4 Wash. 702; notes to *Greenhow v. James*, 56 Am. Rep. 600, and *Gathings v. Williams*, 44 Am. Dec. 54, discussing the legality of marriages where prior marriages remain undissolved. See also *Rawson v. Rawson*, 156 Mass. 578.

## MUTUAL ACCIDENT ASSOCIATION v. JACOBS.

[141 ILLINOIS, 261.]

**BANKS AND BANKING — SPECIAL DEPOSIT.** — When money of any description is deposited in bank, and the identical gold or silver or bank bills deposited are to be returned to the depositor, the deposit is special. It is then the duty of the bank to safely keep and return the identical money.

**BANKS AND BANKING — GENERAL DEPOSIT.** — When money is deposited in a bank without any understanding that the identical money shall be returned, but only that a like sum of lawful money shall be repaid, the deposit is general, the bank is permitted to use the money in its business, and the relation of debtor and creditor is created by the transaction.

**BANKS AND BANKING — GENERAL DEPOSIT — CHECK DEPOSITED AS INDEMNITY.** — When a check is deposited in bank to indemnify the sureties on an appeal bond, and the bank issues a certificate of deposit reciting the appeal and the giving of the bond, and that when the sureties are discharged the deposit is to be returned, the deposit is a general one, and after it has been mingled with the other money of the bank, and its identity lost, the depositor is not entitled to a prior lien as against the other creditors of the bank in the event of its insolvency. Such deposit creates the relation of creditor and debtor as between the bank and the depositor, and the latter is only entitled to the rights of a general creditor.

**TRUST FUNDS — CONVERSION — RIGHT OF BENEFICIAL OWNER TO RECOVER.**

When a trustee changes the form of trust property, the right of the beneficial owner to reach it and compel its transfer may still exist if the trust property can be identified as a distinct fund, and is not so mingled with other property that it can be no longer separated. If it has lost its identity, the beneficial owner must, and under other circumstances may, resort to the personal liability of the wrongdoing trustee.

**TRUST FUNDS — CONVERSION — RIGHT OF BENEFICIAL OWNER TO FOLLOW INTO HANDS OF ASSIGNEE.** — When a trustee has converted trust funds into money, and mingled it with his other money, so that it cannot be separated therefrom, the beneficial owner occupies the position of a general creditor of the estate, and cannot follow the trust funds into the hands of an assignee for the benefit of creditors.

**ACTION** by the Mutual Accident Association to recover the sum of six thousand dollars, deposited by check with the banking house of Samuel A. Kean & Co. as indemnity on an appeal bond. The plaintiff claims this money as a special deposit, held in trust by said Kean, notwithstanding his insolvency; and it also claims the right to recover it of his assignee, the defendant, B. F. Jacobs, as soon as the sureties on the appeal bond named in the following certificate of deposit issued by the bank have been discharged:—

“CHICAGO, October 4, 1890.

“This is to certify that the Mutual Accident Association of the Northwest has deposited with Samuel A. Kean, of the county of Cook, state of Illinois, the sum of six thousand dollars, to be held by the said Kean upon the following conditions: Whereas, one Emma A. Tuggle, of the county of McDonough, recovered a judgment against the said accident company for the sum of five thousand dollars and costs, from which the said accident company have taken an appeal to the appellate court; and whereas, the said Samuel A. Kean and Jesse H. Cummings have signed the appeal bond in the said case, now, therefore, this six thousand dollars deposited with Samuel A. Kean is to be held by the said Kean to indemnify himself and the said Jesse H. Cummings from any loss or liability incurred by them, or either of them, by reason of having signed said appeal bond, and after the said Jesse H. Cummings and Samuel A. Kean are fully discharged from all liability under said bond, then the said six thousand dollars is to be returned to the said Mutual Accident Association, but not otherwise.

“S. A. KEAN & Co. (Branch),  
“WESLEY L. KNOX, Manager.”

**Judgment for the defendant. Plaintiff appealed.**



*Albert H. Veeder and Mason B. Loomis, for the appellant.*

*Jesse A. Baldwin, and Kraus, Mayer, and Stein, for the appellee.*

CRAIG, J. The six thousand dollars was not passed over to S. A. Kean in currency or other money, but as appears from the evidence, the officers of the accident association drew a check, payable to the order of S. A. Kean & Co., for six thousand dollars, on the Union National Bank, and delivered the check to Kean & Co., and the money was drawn on the check and used by Kean in his banking business. It is also plain from the evidence that the accident association knew that the check was paid, and that the money passed into the bank and was used by the bank in the same manner as other funds which were received by the bank in the usual course of business. Under such circumstances, can it be held that the bank received the money as a special deposit,—that the money became a trust fund, and was of such a character that the court was authorized to take it out of the hands of the general creditors and turn it over to petitioner?

If the evidence established the fact that the six thousand dollars had been placed in the hands of Kean & Co. as a special deposit, we think the petitioner was entitled to be protected. But was this a special deposit? As we understand the question, there is a wide difference between a special and a general deposit as those terms are understood, not only by bankers, but by the public, who are transacting business daily with banks. Where money of any description is deposited in a bank, and the identical gold or silver or bank bills which were deposited are to be returned to the depositor, and not the equivalent, the deposit will be special, while on the other hand, a general deposit is "a deposit which is to be returned to the depositor in kind": *Anderson's Law Dictionary*, 344; 1 *Morse on Banking*, sec. 190; 2 *Am. & Eng. Ency. of Law*, 92; *Keene v. Collier*, 1 *Met. (Ky.)* 415.

Where gold or silver coin, or a package of bills or currency, is received in a bank as a special deposit, the identical money to be returned, the bank has no authority to use the money in its business,—its duty is to safely keep and return the identical money; but where there is a general deposit, the understanding being that a like sum of lawful money should be returned, the bank is permitted to use the money in its general business, and the relation of debtor and creditor is

created by the transaction. There is nothing in the certificate of deposit which was issued by Kean & Co. which indicates that a package amounting to six thousand dollars had been deposited, there to remain for a time and be returned. That was not the transaction, but as is clearly shown from the evidence, the petitioner gave Kean & Co. a check on another bank, which went through the clearing house and was paid, and Kean & Co., with the knowledge of the petitioner, mingled the money with the general funds in the bank. This six thousand dollars was commingled with the general funds of the bank in the same manner as money deposited by other depositors. The money thus became the funds of the bank, and, as such, upon the failure of Kean & Co., could not be followed by the petitioner. If the six thousand dollars had been placed in a separate package and thus deposited in the bank, and had never been mingled with the general funds of the bank, the position of the petitioner might be sustained; but such was not the case.

*Otis v. Gross*, 96 Ill. 612, 36 Am. Rep. 157, is a case where the same principle was involved as here. There moneys had been deposited under an order of court, but had not been kept separate from the general funds of the bank, and it was held that the deposit was not a special one or a mere bailment, but the money deposited became that of the bank.

*School Trustees v. Kirwin*, 25 Ill. 73, is a case where the same principle is involved; and in *Union Nat. Bank v. Goetz*, 138 Ill. 127, 32 Am. St. Rep. 119, after referring to the *Kirwin* case and various other authorities, it is said: "Many other cases might be cited, but enough has been shown to clearly indicate the line of decisions holding the doctrine that trust funds can only be pursued when they can be clearly distinguished from other property held by the trustee or by those representing him, and this court is fully committed to this rule."

*Wetherell v. O'Brien*, 140 Ill. 146, 33 Am. St. Rep. 221, is also a case in point. There a deposit had been made with a banker, the intention of the depositor being that the deposit should be invested in a loan on real estate to be procured by the banker, and it was insisted that the money was deposited for a special purpose, and hence a trust for that purpose arose. In the decision of the case it is said: "Where the money which is delivered to a bank, even though it be for some specified purpose, as, for instance, investment in a mortgage security,

has been mingled with the funds of the bank, as was done here, there is no reason why the depositor should be preferred above any other creditor. Where a trustee changes the form of the trust property, the right of the beneficial owner to reach it and compel its transfer may still exist if the property can be identified as a distinct fund, and is not so mixed up with other moneys or property that it can no longer be specifically separated. 'If the trust property has been transferred to a *bona fide* purchaser for value without notice, or has lost its identity, the beneficial owner must, and under other circumstances he may, resort to the personal liability of the wrongdoing trustee': 2 Pomeroy's Equity Jurisprudence, sec. 1058. Where a trustee has converted a trust fund into money and mingled it with his other moneys so that it cannot be separated from the latter, the beneficial owner occupies the position of a general creditor of the estate, and cannot follow the fund into the hands of an assignee for the benefit of creditors: *Illinois etc. Bank v. Smith*, 21 Blatchf. 275, and cases there cited. Its identification is a prerequisite to the exercise of the right to follow it: 2 Story's Equity Jurisprudence, sec. 1259. While it may not be necessary to point to the particular pieces of money or the particular bank bills that were deposited with the trustee, if the trust property be money, yet there must be a preservation of the distinctness of the trust fund."

Here the money passed into the bank as a general deposit. It was mingled with other funds deposited in the bank, so that there is no means of separating it from other moneys received by the bank in its usual course of business, and the petitioner occupies the position of a general creditor.

The judgment of the appellate court will be affirmed.

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**BANK — LIABILITY FOR SPECIAL DEPOSITS.** — A special deposit cannot be used or appropriated by the bank without a breach of trust: *Foster v. Essex Bank*, 17 Mass. 479; 9 Am. Dec. 168, and note with cases collected; note to *Hawes v. Blackwell*, 22 Am. St. Rep. 876. The relation between the bank and a depositor is that of debtor and creditor, unless the deposit is special: *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350; 10 Am. St. Rep. 669. A bank and a depositor are bailee and bailor, where funds are deposited in the bank to be held and returned in the same bills or coin: *Marine Bank v. Chandler*, 27 Ill. 525; 81 Am. Dec. 249. See extended note to *Matter of Franklin Bank*, 19 Am. Dec. 423, for a discussion of special deposits. See also *Wetherell v. O'Brien*, 140 Ill. 146; *ante*, p. 221, and note.

**BANKS — GENERAL DEPOSIT — RELATION TO DEPOSITOR.** — A bank in receiving ordinary deposits becomes the debtor of the depositor: *Janin v. Lon-*

*don etc. Bank*, 92 Cal. 14; 27 Am. St. Rep. 82, and note; *Shipman v. Bank*, 126 N. Y. 318; 22 Am. St. Rep. 821, and note; extended note to *National Bank v. Smith*, 23 Am. Rep. 50; *Marine Bank v. Chandler*, 27 Ill. 525; 81 Am. Dec. 249, and note.

**TRUST FUNDS—CONVERSION—RIGHT OF BENEFICIAL OWNER TO PURSUE.**—A trust fund which has wrongfully been converted into other property may so long as its identity can be traced, be pursued and held liable in its new form to the rights of the *cestui que trust*, except as against a *bona fide* purchaser without notice; but this right fails when the means of ascertaining its identity are lost. This is always the case when the subject-matter is turned into money, or becomes mixed in a general mass of property of the same description: *Union Nat. Bank v. Goetz*, 138 Ill. 127; 32 Am. St. Rep. 119, and extended note at page 125 discussing this subject. See also note to *Balling v. Kirby*, 24 Am. St. Rep. 800.

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## HOUSE v. BEAK.

[141 ILLINOIS, 290.]

**EVIDENCE—BOOKS OF ACCOUNT.**—At common law it was necessary, in order to make books of account admissible in evidence, that the entries therein should be proved by the clerk or servant who made them, if he was alive and could be produced, and that they should have been made by a person whose duty it was to make them, and that they were made in the ordinary course of business, and contemporaneously with the delivery of the goods, so as to form a part of the *res gestæ*. The Illinois statute has simply enlarged this rule without repealing it, by permitting the owner who keeps the books to testify to the original entries made therein.

**EVIDENCE—BOOKS OF ACCOUNT KEPT BY PARTY.**—When a party to an action keeps his own book of original entries, it is admissible to sustain an account therein composed of many items upon proof that some of the articles were delivered at or about the time the entries purported to have been made; that such entries were in the handwriting of the party producing the book; that he kept no clerk at the time, and that his customers had settled by the book and found it to be fair and correct.

**EVIDENCE—BOOKS OF ACCOUNT.**—When the clerk who makes original entries in books of account has no knowledge of their correctness, but makes them as the items are furnished by another, it is essential that the party furnishing the items should testify to their correctness, or that satisfactory proof thereof from other sources should be produced before the books are admissible in evidence.

**EVIDENCE, BOOKS OF ACCOUNT.**—When, in an action on account, the clerk who kept the books of original entries testifies to their correctness, and the party furnishing the items to such clerk testifies to the correctness of such items, and it is also shown that the goods described were delivered to defendant, who paid part of the account without objection, and accepted a statement thereof, saying it was all right, and without objecting to its correctness for three years, the books of account are admissible in evidence.

**CONTRACT “ON SALE AND RETURN” IS AN AGREEMENT** by which goods are delivered by a wholesale to a retail dealer, to be paid for at a certain



rate if sold again by the latter, and if not sold, to be returned within a reasonable time, if no time is specified. What is such reasonable time depends upon the circumstances of each case.

**UNDER A CONTRACT "ON SALE AND RETURN,"** if the vendee returns the goods within a reasonable time, no time being specified for their return, the contract of sale is at an end; if he does not, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered.

**UNDER A CONTRACT "ON SALE AND RETURN," PROPERTY IN THE GOODS PASSES TO THE PURCHASER,** subject to an option in him to return them within a reasonable time. If the price is fixed at the time of the sale and delivery of the goods, the purchaser deals with them as his own, disposes of them as he pleases, for cash or on credit, is under no obligation to give any account of his disposition of them, and is only liable to pay for them at a price fixed beforehand, without reference to the price at which he sells them.

**CONTRACT "ON SALE OR RETURN"—LIABILITY OF PURCHASER.**—Contracts "on sale or return" are subject to a condition subsequent that if the goods are not sold they shall be returned. The property in the goods vests presently in the vendee, defeasible on the performance of the condition; and if the vendee disables himself from performing the condition or fails to perform it within a reasonable time, his liability to pay the price fixed becomes unconditional, and the plaintiff may declare as upon an *indebitatus assumpsit*.

**CONTRACT "ON SALE OR RETURN"—LIABILITY OF PURCHASER.**—Purchaser of goods, to be paid for at a given price when sold, and those not sold to be returned, is liable for all the goods at the price agreed upon when none are returned for more than three years, and no offer to return them is made when a statement of the account is rendered.

**CONTRACT "ON SALE OR RETURN"—LIABILITY OF PURCHASER.**—Under a contract "on sale or return," the buyer makes himself liable for the price fixed by refusing to return the property upon demand made by the seller; but if the seller does not want the property, and makes no demand for it, the buyer will become liable for the price fixed upon failing to return the property within a reasonable time.

**ASSUMPSIT** on an account under a contract by the purchasers of goods to pay a certain price for those sold by them and to return those not sold. Judgment for the plaintiffs, and the defendant appealed.

*Flower, Smith, and Musgrave, for the appellant.*

*Weigley, Bulkley, and Gray, for the appellees.*

**MAGRUDER, C. J.** It is assigned as error that the trial court received in evidence the books of account of Beak and Bucher showing the items of the accounts sued upon. It is claimed that a proper foundation was not laid for the introduction of the books, and that therefore they should not have been admitted.

We think that the books were properly admitted in con-

nection with the evidence. The court did not determine the weight of the books as testimony, but simply their admissibility. It was for the jury to decide what weight should be given to them. The defendants had the right to introduce proof for the purpose of contradicting them, or showing their incorrectness, but they failed to introduce any testimony whatever; and the books, together with the other evidence which accompanied them, made a *prima facie* case.

The third section of the act in regard to evidence and depositions in civil cases is as follows: "Where in any civil action, suit, or proceeding the claim or defense is founded on a book account, any party or interested person may testify to his account book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person or by a disinterested person, a nonresident of the state at the time of the trial, and were made by such deceased or nonresident person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries shall be admitted as evidence in the cause": 1 Starr and Curtis on Annotated Statutes, 1076.

This statute permits the party himself to testify to his own books. The party himself was not allowed so to testify at common law. The common law requires that the entries in the book should be proved by the clerk or servant who made them, if such clerk or servant be alive and can be produced: *Burnham v. Adams*, 5 Vt. 313. It was necessary, in order to make the book admissible, that the entries therein should have been made in the ordinary course of business by a person whose duty it was to make them, and that they should have been made contemporaneously with the delivery of the goods, so as to form a part of the *res gestæ*: 1 Greenleaf on Evidence, secs. 115-120; *Chicago etc. R'y Co. v. Ingersoll*, 65 Ill. 399. Section 3, which was first passed in 1867 (Laws of 1867, sec. 3, p. 184), adds to and enlarges, but does not repeal, the common-law rule. A contrary statement made in *Presbyterian Church v. Emerson*, 66 Ill. 269, was mere *dictum*, and not necessary to the decision of the case. It was not the intention of the statute to prohibit the introduction in evidence of books of account kept by a clerk, when such clerk is living in the state and is able to testify to the correctness of the books.

In *Taliaferro v. Ives*, 51 Ill. 247, we said that this statute of 1867 did not materially change the rule announced in *Boyer v. Sweet*, 3 Scam. 120. It was held in the latter case, that the rule in England, which allows the books of a tradesman to be introduced in evidence when they are supported by the oath of the clerk who made the entries, was the rule also in this state. See also *Ruggles v. Gatton*, 50 Ill. 412.

In *Kibbe v. Bancroft*, 77 Ill. 18, we again held that the statute of 1867 did not materially change the existing rule as to the admission of books of account in evidence, but merely permitted an interested witness to testify to all the facts, the proof of which had theretofore been decided to be necessary, in order to lay a foundation for the admission of the account books.

The existence of the common-law rule, which permits the clerk who has kept the books to testify, was again recognized in *Stettauer v. White*, 98 Ill. 72.

In a number of cases, we have held that there are certain limitations upon the rule permitting such books of account to be introduced in evidence. In *Boyer v. Sweet*, 3 Scam. 120, where the party kept the books himself, the books of original entries were held to be admissible to sustain an account composed of many items, upon proof being made that some of the articles were delivered at or about the time the entries purported to have been made; that the entries were in the handwriting of the party producing the books; that he kept no clerk at the time; and that persons having dealings with him had settled by the books, and found them to be fair and correct.

In *Humphreys v. Spear*, 15 Ill. 275, the same state of facts was shown to exist as in *Boyer v. Sweet*, 3 Scam. 120, except that the books were kept, not by the tradesman himself, but by his clerk; the clerk was introduced as a witness, and gave evidence tending to show the correctness of the account; and we there said: "It is very clear that the books were admissible in evidence in connection with the testimony of the clerk. It is well settled in this country that entries made by a clerk, in the regular and usual course of business, are admissible in evidence after his death on proof of his handwriting; and during his life, if authenticated by him. Such entries form part of the *res gestæ*, and are admissible as original evidence. . . . If it appears that some of the goods were delivered contemporaneously with the entries made by the clerk, and that the

books were fairly and honestly kept, the jury may reasonably conclude that the entire account is correct." See also *Lawrence v. Stiles*, 16 Ill. App. 489. The doctrine of *Humphreys v. Spear*, 15 Ill. 275, was not changed by the statute of 1867.

In *Stettauer v. White*, 98 Ill. 72, it was held that where the clerk who makes the entries has no knowledge of their correctness, but makes them as the items are furnished by another, it is essential that the party furnishing the items should testify to their correctness, or that satisfactory proof thereof (such as the transactions were reasonably susceptible of) from other sources should be produced. It is to be observed that in the *Stettauer* case there was no evidence except the carrier's shipping receipt that any portion of the articles had been delivered. In *Kent v. Garvin*, 1 Gray, 148, one of the cases upon which the *Stettauer* case is based, the failure "to show that at the time the charges were made, any articles, similar in character to those charged, were delivered by the plaintiff to the defendant" is commented upon as significant.

In the case at bar there is evidence that, of the goods described in the accounts, an amount exceeding in value five thousand dollars was delivered to the defendants; and not only does Henry, who kept the books of original entries, swear to their correctness, but in addition to this, Richard Beak, who furnished the items to Henry, testifies to the correctness of the items.

The proof establishes all the facts necessary to bring the present case within the requirements of the cases of *Boyer v. Sweet*, 3 Scam. 120; *Humphreys v. Spear*, 15 Ill. 275; *Ruggles v. Gutton*, 50 Ill. 412; and *Stettauer v. White*, 98 Ill. 72; except as to one matter. We find no evidence by any customer of Beak and Bucher, that he settled with them by their books and found them correct: *Ingersoll v. Banister*, 41 Ill. 388. The failure of the proof, however, in this regard would not have justified the exclusion of the books in view of the facts, that the defendants paid one thousand dollars upon the account late in December without questioning it, and accepted a statement of the account, as assigned, with the remark that it was "all right," and although more than three years elapsed after the account was presented before suit was brought, during which time many applications were made to them or some one of them for payment, they at no time ever urged any objections to the correctness of the account. A careful examination of the authorities hereinbefore referred to will show, that



before the statute of 1867 was passed, testimony from third persons, as to settlements made by the books, was more especially required in cases where the tradesman had no clerk, but kept his own books. In such cases, the party testifying to the correctness of the books being interested, it was held that his testimony should be supported by that of customers who had settled by the books: *Boyer v. Sweet*, 3 Scam. 120; *Ingersoll v. Banister*, 41 Ill. 388; *Ruggles v. Gatton*, 50 Ill. 412; *Waggeman v. Peters*, 22 Ill. 42.

It is further assigned as error, that the court refused to instruct for the defendants as follows: "The jury are instructed that as to the claim of plaintiffs for goods claimed to have been consigned by plaintiffs to defendants, there is no sufficient evidence to support a verdict," etc. The point is made, that a portion of the goods was consigned to the defendants to be paid for when sold, and to be returned if not sold, and that an action of assumpsit on the common counts cannot be maintained to recover for the goods so consigned, because there is no evidence of their sale by the defendants, or of a demand for their return by the plaintiffs.

Under the proofs in this case, the goods in question were not consigned to the defendants to be sold by the latter as agents of the plaintiffs, but the agreement between the parties was what is known as a contract "on sale or return." "A contract 'on sale and return' is an agreement, by which goods are delivered by a wholesale dealer to a retail dealer to be paid for at a certain rate, if sold again by the latter; and if not sold to be returned": *Story on the Law of Sales*, sec. 249. If the vendee returns the goods, the contract of sale is at an end; if he does not, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered. If no time is specified within which the return is to be made, the law implies that they are to be returned within a reasonable time. What is a reasonable time will depend upon the circumstances of each case: *Story on the Law of Sales*. In such cases, the property in the goods passes to the purchaser subject to an option in him to return them within a fixed or reasonable time; the price is fixed at the time of the sale and delivery of the goods; the purchaser deals with the goods as his own, disposes of them as he pleases for cash or on credit, is under no obligation to give any account of his disposition of them, and is only liable to pay for them at a price fixed beforehand, without any reference to the price at

which he sells them: *Jameson v. Gregory*, 4 Met. (Ky.) 363; *In re Linforth*, 4 Saw. 370; *Ex parte White, in re Neville*, L. R. 6 Ch. 397.

In *Moss v. Sweet*, 20 L. J. Q. B. (U. S.) 167, where goods were delivered to the defendant to sell again, upon his agreement to account for such as were sold at the invoice price, with an option to return the residue within a reasonable time, and where he sold a portion but failed to return the rest, it was held that his failure to return rendered him liable as upon an absolute sale, and to an action for goods sold and delivered.

The bargain, called "sale or return," means "a sale with a right on the part of the buyer to return the goods at his option within a reasonable time, and . . . the property passes; and an action for goods sold and delivered will lie, if the goods are not returned to the seller within a reasonable time": 2 Benjamin on Sales, 6th Am. ed., sec. 913, p. 794.

Such sales may be regarded as subject to a condition subsequent, that is, upon condition that, if the goods are not sold, they are to be returned. Therefore, the property vests presently in the vendee, defeasible on the performance of the condition. If the defendant disables himself from performing the condition, or fails to perform it within a reasonable time, his liability to pay the price fixed becomes unconditional, and the plaintiff may declare as upon an *indebitatus assumpsit*: *Ray v. Thompson*, 12 Cush. 281; 59 Am. Dec. 187.

These definitions of a contract "on sale or return" fit the facts in the case at bar. The prices were fixed upon the goods when they were ordered. The consigned goods were to be paid for when sold at the prices invoiced, and such as were not sold were to be returned. As no time for the return was fixed, a reasonable time was implied. The defendants kept the goods for more than three years without offering to return them, and accepted itemized accounts of them without objection. Demands were frequently made upon them to pay for the consigned goods, and, if such goods were unsold at the dates of such demands, offers should have then been made to return them. Under the circumstances, we think the defendants failed to exercise their option within a reasonable time, and are liable as upon an absolute sale. There was therefore no error in refusing the instruction.

The cases of *Creel v. Kirkham*, 47 Ill. 344, and *Johnston v. Salisbury*, 61 Ill. 316, have no application here, as in those cases there was no sale of the personal property by a vendor

to the vendee so as to vest the title thereto in the latter at the time of delivery. Nor do we think that the case of *Jones v. Wright*, 71 Ill. 61, conflicts with the doctrine here announced. It was there said, that the arrangement was, in legal effect, a sale with the privilege of returning the property when the buyer should choose to make such return, or on the demand of the seller. The buyer may make himself liable to pay the price fixed in the agreement by refusing to return the property upon demand made for it by the seller; but, if the seller does not want the property and makes no demand for it, it is none the less true that the buyer will become liable to pay the price fixed, upon failing to return the property within a reasonable time. In the present case, demands made for the price of the consigned goods, unanswered by either the payment of the money or an offer to return the goods, amounted substantially to such a refusal to surrender on demand, as was held to be sufficient in the *Jones* case.

The judgment of the appellate court is affirmed.

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**EVIDENCE — BOOKS OF ACCOUNT.** — An account book, fair on its face, and shown to have been kept in the usual course of business, is admissible in evidence even in favor of the party by whom it was kept: *Anchor Milling Co. v. Walsh*, 108 Mo. 277; 32 Am. St. Rep. 600, and note with the cases discussing this subject collected; extended note to *Union Bank v. Knapp*, 15 Am. Dec. 191.

**CONTRACTS OF "SALE OR RETURN."** — Such agreements are upon a condition that the buyer may return the goods within a fixed or reasonable time at his option. It has been held that the goods so sold pass to the purchaser, subject to the option in him to return them, and if he fails to exercise the option within the proper time, the price of the goods may be recovered as upon an absolute sale: note to *Hotchkiss v. Higgins*, 52 Am. Rep. 536; *Childs v. McDonnell*, 84 Mich. 533; *Jameson v. Gregory*, 4 Met. (Ky.) 363; *Quinn v. Stout*, 31 Mo. 160.

Where one purchases goods under an agreement that for all he uses or disposes of he shall pay for below the invoice price, with the privilege of returning such as are not used or disposed of, if he refuses or fails to return on demand the goods not used or sold, the sale become absolute and he will be liable according to the contract price: *Jones v. Wright*, 71 Ill. 61.

## CHICAGO HANSOM CAB COMPANY v. YERKES.

[141 ILLINOIS, 320.]

**CORPORATIONS — PURCHASE BY DIRECTOR OF.** — A director in a private corporation whose duty it is to preserve its property and protect it against loss, so far as that can be done by the exercise of ordinary care and diligence, cannot himself become the purchaser of any property of the corporation which it is his duty to sell.

**TRUSTEES — PURCHASE BY AT THEIR OWN SALE.** — A trustee is disqualified to act by the intervention of a personal interest in the performance of his duties as trustee, and he cannot obtain title to property when he has a duty to perform inconsistent with the character of a purchaser on his own account.

**SALE — RATIFICATION.** — Whether or not a ratification of a sale is effective in any case depends upon whether those assuming to ratify might have legally authorized the sale to be made in the first instance.

**CORPORATIONS — RIGHT OF MAJORITY STOCKHOLDER TO PURCHASE ITS PROPERTY ON WINDING UP ITS AFFAIRS.** — When it is determined to wind up a corporation and to settle its business, the holder of a majority of its stock cannot make or ratify a sale of all its property to himself against the protest of a holder of minority of its stock and in disregard of his rights, but the minority owner may elect to treat the majority owner as a purchaser and require him to account for the value of the property.

**CORPORATIONS — RIGHT OF MAJORITY STOCKHOLDER ON WINDING UP.** — A majority stockholder in a corporation may, when the law authorizes a vote of stockholders, so vote, upon any matter of policy in the conduct of the corporation, as to best subserve his own interests, and this may relate to the ceasing to do corporate business, the winding up of its affairs, and the sale of its property; but the action resulting from such vote must not be so detrimental to the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that the action of the majority is a wanton or fraudulent destruction of the rights of the minority.

**TRUSTEES — RIGHTS TO BECOME INTERESTED IN TRUST PROPERTY.** — When one person has the power to dispose of the property of another without the consent of the latter, he is not allowed to become personally interested in it himself, without regard to any question of fairness in the transaction, as he is not allowed to occupy a position where self-interest will tempt a betrayal of duty.

**CORPORATIONS — PURCHASE OF PROPERTY BY MAJORITY STOCKHOLDER.** — It is illegal and fraudulent for a majority stockholder to purchase the property of the corporation at a sale authorized by himself, and such purchase may be set aside in the same way and to the same extent that a purchase of corporate property by a director may be set aside at the instance of a minority stockholder.

**CORPORATIONS — IMPROPER SALE OF PROPERTY, SETTING ASIDE.** — A sale of the property of a corporation under a resolution appointing its president and secretary a committee to dispose of it, will be set aside on the suit of a contesting stockholder, when such sale is made to a purchaser under an agreement with the secretary for their joint acquisition of the



property. In such case, the power conferred on the president and secretary requires the action of both, jointly, and the secretary is disqualified to act, on account of his personal interest.

**CORPORATIONS — IMPROPER SALE OF PROPERTY, SETTING ASIDE.**—An action to set aside a sale of property of a corporation because in fraud of its stockholders, may be maintained by one of the latter without a previous demand on the corporation to bring the action, when it appears that the directors thereof are under the control of the person in whose interest the sale was made.

**PURCHASER UNDER CONTRACT BETWEEN THIRD PERSONS, WHETHER AFFECTED BY EXISTING EQUITIES.**—When a party furnishes the money and becomes the purchaser of property under a contract made between third persons, he takes subject to such contract and all equities existing against it.

**BILL** in chancery by C. T. Yerkes, a stockholder in the Chicago Hansom Cab Company, against such company, Warren Springer, Rose Abernethy, and others, to have a certain sale and conveyance of the property of the company to Abernethy declared void and set aside, and for an injunction and the appointment of a receiver. Upon the final hearing, complainant filed a supplemental bill to wind up the affairs of the corporation, sell the property belonging thereto, apply the proceeds to the payment of the corporate debts, and distribute any surplus remaining among the stockholders. The court granted the relief prayed for, and Springer and Abernethy appealed.

The Chicago Hansom Cab Company was organized as a corporation in 1884, with a capital stock of one hundred thousand dollars, divided into one thousand shares of one hundred dollars each. It acquired the property in dispute in its business, but as that business proved unprofitable, and as it was largely indebted, some of its debts having been reduced to judgment and others secured by mortgage on its property, it was the desire of all the stockholders to wind up its affairs and close out its business. A meeting of stockholders was called by Yerkes for this purpose, on April 13, 1889, but that meeting was adjourned to April 15, 1889. On April 13, 1889, Yerkes requested C. A. Needham, the secretary of the corporation, to inform all stockholders that he, Yerkes, would sell his stock or purchase theirs for thirty-five cents on the dollar. On that day Needham entered into the following agreement with one Warren Springer:—

“This agreement, made April 15, 1889, between Warren Springer, party of the first part, and Charles A. Needham, party of the second part,—

“Witnesseth, that said parties mutually agree to purchase the stock of the Chicago Hansom Cab Company, and thus obtain control of its property, real and personal, and then to pay the debts of and wind up the affairs of the said company, and divide the property of the same, as hereinafter provided. To accomplish this, the said first party agrees to furnish the sum of sixty thousand dollars to purchase said stock and pay the debts of said company,—thirty-five thousand dollars to purchase the stock of said company, and twenty thousand dollars to pay the debts of said company, except two judgments, one in favor of Sophia Havlick, for the sum of three thousand five hundred dollars, and one in favor of John McCarthy, for the sum of fifteen hundred dollars, and to pay said judgments in case they or either of them shall be affirmed, with interest. Second party agrees to furnish the money required to pay all of the debts of said company, and to purchase the stock of the same, except that above agreed to be furnished by first party.

“It is further agreed that said stock shall be bought in the name of . . . , and duly and legally transferred to the said first party, to be held by him as security for the money advanced by him to purchase said stock and pay said debts, till the division of said property, as hereinafter provided. When said stock shall have been all acquired, and said debts paid as aforesaid, it is mutually agreed that the real estate belonging to said company, consisting of seventy-five feet front on Clinton Street by one hundred and fifty feet deep, and now occupied as the barn and office of said company, shall be deeded to the party of the first part, free and clear of all liens and encumbrances, except the judgments above mentioned, and that all the personal property now belonging to said company shall be legally and properly transferred to said second party.

“It is mutually agreed that said Needham shall have the right to carry the appeals already taken from said judgments to the appellate courts or supreme court, if he shall see fit so to do, he agreeing to pay all costs and expenses of the same. In case said judgments, one or both, shall be affirmed, the said first party agrees to pay the same, with interest, but if either one or both shall be defeated, and said company saved from liability on account of the same, then the amount saved shall be divided equally between the parties hereto, the expense from this time being first paid by said Needham.

"Said second party agrees that at the time said personal property is transferred to him, he will make, execute, and deliver to the said first party his three notes for five thousand dollars each, payable on or before eight, sixteen, and twenty-four months after date; and as a part of the purchase price of said personal property, and payment for the aid given by said first to said second party in settling the affairs of said company, said second party agrees that if said notes of five thousand dollars are not paid within those dates, he will pay to said first party the sum of one and one half per cent per month upon the amount unpaid as liquidated damages. Said second party also agrees to make, execute, acknowledge, and deliver to said first party, to secure his said notes and agreement, a chattel mortgage upon the entire amount of said personal property, and to insure the same in the sum of fifteen thousand dollars for the benefit of said first party, and keep the same so insured until the said notes are paid.

"It is mutually agreed that said second party shall have the bills receivable, cash on hand, and the earnings of said company until said property shall be divided, and that he shall have the right to sell fifty hansom cabs, twenty harnesses, and forty horses for such prices and upon such terms as he shall see fit, said Needham agreeing to turn over the avails of said sale, except the sum of two thousand five hundred dollars, to the said first party to apply on said notes. Said Needham guarantees that the debts of said company do not exceed twenty-three thousand dollars, exclusive of said judgments. Until said personal property is transferred, said second party is to pay said first party the sum of three hundred dollars per month for rent of said real estate, from date thereof."

At the time this contract was executed the stock of the corporation was owned as follows: C. T. Yerkes, 375 shares; A. B. Pullman, 265 shares; W. M. Van Northwick, 100 shares; E. Leger, 30 shares; G. L. Dunlap, 100 shares; N. L. Jones, 50 shares; J. W. Cotton, 60 shares; W. Flagg, 5 shares; Anderson, 5 shares; J. N. Cutler, 10 shares; and the officers and directors of the corporation for the year 1889 were A. B. Pullman, President; C. H. Needham, Secretary; and these, together with W. M. Van Northwick, J. W. Cotton, and C. T. Yerkes, directors. When the stockholders' meeting was held on April 15th, Needham had purchased all the certificates of shares in the corporation except those standing in the name

of Yerkes and Pullman, paying Springer's money therefor, and he afterwards, on May 8, 1889, completed the purchase of Pullman's shares in the same way. At the time of such meeting Yerkes was ignorant of the contract existing between Needham and Springer, and of the purchases of stock made by the former for the latter, and with money furnished by him. By direction of Springer, 290 shares of the stock thus purchased for him were transferred to K. Himrod, and 30 of such shares were transferred to T. A. Haggerty. On May 6, 1889, such original certificates of stock were taken up and canceled, and new ones issued in lieu thereof directly to Himrod and Haggerty. At the stockholders' meeting held on April 15, 1889, Pullman offered to buy Yerkes's stock at thirty-five cents on the dollar, with money furnished by Springer and as his agent, although the latter facts were unknown to Yerkes, who refused the offer and declined to sell. No other action was taken at this meeting in regard to the sale of the corporation property. Another stockholders' meeting was held on May 6, 1889, when the following resolution was adopted by the vote indicated therein, as shown by the record of that meeting:—

"Whereas, the object of this meeting being to devise ways and means to raise money to meet the indebtedness of this company, and as part of this indebtedness is past due and must be met at once; therefore be it

"Resolved, That a committee, consisting of the president and secretary, be appointed to mortgage or sell all or part of the property of the company, at their discretion, and be authorized to sign, seal, and deliver any mortgage, deed, or bill of sale necessary, and to report at an adjourned meeting, May 8th, at 2:30 P. M., at the same place.

"The following was the stock voted for or against said resolution: In favor of the same—Cutler, 10 shares (by A. B. Pullman); Pullman, 265 shares; Himrod, 290 shares; Cotton, 30 shares (by Himrod); Haggerty, 30 shares; total, 625 shares. Against said resolution—Yerkes, 375 shares (by Furbeck, proxy).

"There being a majority, the resolution was carried, and there being no other business, meeting adjourned to Wednesday, May 8th."

The minutes of such adjourned meeting, held May 8, 1889, showed that the secretary read the following report, and also the transaction of other business as follows:—



**"Report of A. B. Pullman, president, and Charles A. Needham, secretary:—**

**"Under instructions contained in a resolution passed at stockholders' meeting held May 6th, and knowing it was the wish of all the stockholders that the business of the company be immediately closed, we have to report that we have sold the real estate of the company, consisting of the property where the stables are now located, for the sum of \$40,000 in cash, and have received the money therefor, less the amounts of encumbrances and liens thereon, which the purchaser has assumed and agrees to pay; less, also, the sum of \$14,500, for which a certified check has been given and placed in the hands of a third party, to be handed to us as soon as the first mortgage, which has been paid, is released, there being no record to show that the same has been released, although said \$14,500, and interest, has been paid; and we have also sold the personal property of the company for the sum of \$20,000, and received cash therefor; that the debts of the company amount to the sum of \$10,540.38, exclusive of liens on said real estate; that checks have been prepared and signed to pay the debts of said company and the amounts coming to the stockholders. We have acted thus because we know it to be the wishes of the stockholders that the business of the company be closed."**

The secretary then handed around the checks and vouchers for inspection. Mr. Himrod offered the following resolution:—

**"Resolved, That the foregoing report be approved and in all respects ratified; and further resolved, that the business of this company be declared ended, and the president and secretary are authorized and requested to pay the debts of said company, and divide the moneys left *pro rata* among the stockholders, and that the books and papers remain in the hands of the secretary."**

The president having put the above resolution, it was voted for as follows: For—A. B. Pullman, 275 shares; Kirk Himrod, 350 shares; total, 625 shares. Against—C. T. Yerkes, 375 shares. Resolution declared carried.

The sale was made to Springer and Needham, the former furnishing the money, and both the real estate and the personal property of the corporation was conveyed to Rose Abernethy by his direction, the conveyances being delivered to him. These conveyances were executed by Pullman and Needham, as president and secretary of the corporation, and

dated May 6, 1889. After May 8, 1889, Needham continued the business formerly carried on by the corporation, under a lease from said Abernethy, executed by said Springer, her attorney in fact.

*Miller, Starr, and Leman, for the appellant.*

*Goudy, Green, and Goudy, for the appellee.*

SCHOLFIELD, J. From the foregoing statement it is clear that when Needham entered into the contract with Springer, the former was a director in the Chicago Hansom Cab Company, and its secretary. As director he owed the duty to the company to preserve its property and protect the company against loss, so far as that could be done by the exercise of ordinary care and diligence, and he could not himself become the purchaser of any property of the corporation which it was his duty to sell: *Wardell v. Railroad Co.*, 103 U. S. 651. The contract between Needham and Springer requires the purchase of all the property of the cab company, and the subsequent transfer of the personal property to Needham. It is an entire and indivisible contract, and Needham is therefore directly interested in every part of the claimed contract of sale by the company to Springer.

But it is claimed the authority to make this sale is derived from a vote of a majority of the stockholders. That vote was given at the stockholders' meeting on the 6th of May, 1889, in these words: "Therefore be it resolved that a committee, consisting of the president and secretary, be appointed to mortgage or sell all or part of the property of the company, at their discretion, and be authorized to sign, seal and deliver any mortgage, deed or bill of sale necessary, and to report at an adjourned meeting, May 8th, at 2:30 P. M., at the same place." This required the exercise of judgment and discretion by both the president and the secretary, and being a special power, it could not be exercised by one only: Perry on Trusts, sec. 413; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; and so necessarily if one was disqualified to act, neither could act. The resolution of the stockholders invested Needham, as well as Pullman, with a special confidence and trust, which required that he should act solely with a view to the best interests of all the stockholders. But he was disqualified to thus act by reason of his previous contract with Springer, which gave him a personal interest to be promoted by his action under the resolution. The rule is familiar that a trustee

is disqualified to act by the intervention of a personal interest in the performance of his duties as trustee. He cannot obtain title to property where he has a duty to perform inconsistent with the character of a purchaser on his own account: *Borders v. Murphy*, 125 Ill. 577.

It is, however, contended that this sale was ratified by a vote of a majority of the stockholders at their meeting on the 8th of May. Whether, in any case, a ratification is effective, depends upon whether those assuming to ratify might have legally authorized the act to be done in the first instance. At the time this vote was taken Springer either really owned or had contracted to purchase, and by virtue thereof was entitled to and did control a majority of the shares of stock, — indeed, all except those owned by Yerkes; and so, upon the record of the meeting of the 8th of May, the names and votes of Pullman, Himrod, Haggerty, Cotton and Cutler, being the votes in favor of the ratification of the sale, are but another form of expressing the name and votes of Springer in favor of it. The question is therefore presented whether after it is determined to wind up a corporation and settle its business, it is competent for a holder of a majority of its shares of stock to make or ratify a sale of all its property to himself, against the protest of a holder of a minority of its shares, and in disregard of his rights.

That a holder of a majority of the shares of stock in a corporation may, where the law authorizes a vote of stockholders, so vote upon any matter of policy in the conduct of the corporation as to best subserve his own interests, and that this may relate to the ceasing to do corporate business, the winding up of its affairs and the sale of its property, we do not question; but the authorities cited by counsel for appellant (*Gamble v. Queens County Water Co.*, 123 N. Y. 91, and *Northwest Transportation Co. v. Beatty*, L. R. 12 App. Cas. 589), concede that even in such cases the action resulting from such vote must not be so detrimental to the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or a fraudulent destruction of the rights of such minority. In the cases cited, and, so far as we are informed, in all other cases where the majority of the stockholders may by their votes lawfully affect the interests of the minority of the stock-

holders, the interests of the minority are, theoretically at least, protected either by directors or trustees of the corporation, who it will not be presumed will betray their trust by acting in the interest of one stockholder to the prejudice of another, or by reason of the transaction being such as is presumed to be alike beneficial to all stockholders, — as where the corporate property is in good faith appropriated to the payment of the corporate debts, or is sold at a fair sale; and no case cited or within our knowledge goes to the extent of holding that a majority of the stockholders may take the property of the corporation and retain it if the minority shall elect to deny its right to acquire title to it in that way. Undoubtedly if in such case the minority of the stockholders shall elect to treat the majority as purchasers, they may do so, and require them to account for the value of the property. Here Springer, who through Pullman, Himrod, Haggerty, Cotton and Outler assumes to ratify this sale, is the same Springer who with Needham is the purchaser of the property, — in other words, he assumes to ratify a sale to himself; but a man cannot be both buyer and seller in the same transaction, and where he assumes to be such, his action simply amounts to a taking of the property, and would be quite as valid without as with the circumlocution of the form of a sale through dummies.

The right of a majority of the stockholders to sell the corporate property can by no reasonable construction be held to involve the right to seize the property to their own use. A sale conducted, as it must be, fairly and openly, cannot, theoretically, operate to the prejudice of one stockholder more than to another. There is in such case no presumptive antagonism between the different stockholders; but where, under pretense of a sale to themselves, the majority seize the property and undertake to invest themselves with title, their interests are wholly hostile, for the gain of the one is the loss of the other.

It is a general rule, administered by courts of equity, that where one person has the power of disposition of the property of another without the consent of that other, he shall not be allowed to become personally interested in it himself, — and this without regard to any question of fairness in the immediate transaction, — for he shall not be allowed to occupy a position where self-interest would tempt a betrayal of duty. This rule is plainly applicable here, and it has been so applied in adjudicated cases. It is said in Cook on Stock-



holders, sec. 656: "It is illegal and fraudulent for the majority of the stockholders to purchase the property of the company at a sale authorized by themselves. Such a purchase by the majority may be set aside in the same way and to the same extent that a purchase of corporate property by a director may be set aside." See also 2 Bigelow on Frauds, 645, where it is said, "no act of the majority can purge the fraud" of appropriating the common property to their own benefit by any portion of the corporators; and to like effect is the ruling in *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 49, and *Ervin v. Oregon R. R. etc. Co.*, 20 Fed. Rep. 577; and see also *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. 350; *Brewer v. Boston Theatre*, 104 Mass. 378; *Preston v. Grand Collier Dock Co.*, 11 Sim. 327; *Hodgkinson v. National etc. Ins. Co.*, 26 Beav. 473; *Atwood v. Merryweather*, L. R. 5 Eq. 464, and note.

The action of the board of directors on the 8th of June, as affecting the validity of the sale, is not, under the pleadings, properly before us for consideration. Counsel for appellant are mistaken in saying, as they do, that appellee in his supplemental bill relies upon it. The allegation of the supplemental bill to which reference is made is this only: "Your orator further shows that a majority of the stockholders of said corporation having resolved to discontinue the business of said corporation, the directors of said corporation, since the filing of said bill, have ratified such action of the majority of the stockholders." There is no reference whatever to the sale of the property. "Such action" means plainly the resolution to discontinue the business of the company.

We think it unimportant whether the money furnished by Springer, and used by Needham in purchasing the stock of the corporation and in paying for the property claimed to be purchased from it, was that of Rose Abernethy, as said by Springer at the time he began negotiating with Needham, or whether, as the evidence strongly tends to prove, it was in fact that of Springer, for in either view the money was furnished and used, as is shown, in performance of the contract between Needham and Springer; and Rose Abernethy can therefore only take subject to that contract, and she must be affected by whatever has been done by Needham and Springer to acquire title to the property.

It appears from the evidence that the directors of the corporation were in the interest and under the control of

Springer, so that a demand upon the corporation to bring suit against him would have been unavailing, and the suit is therefore properly brought by Yerkes: *Chicago v. Cameron*, 120 Ill. 447.

We are unable to perceive any sufficient reason for reversing the decree below. It is therefore affirmed.

**CORPORATIONS — DIRECTORS — DUTIES AND POWERS OF IN RESPECT TO CORPORATE PROPERTY.** — An agreement by the directors of a corporation by which its property is disposed of for their own use and benefit will not be upheld against the creditors or stockholders: *Goodlin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169; 98 Am. Dec. 95, and note. The directors of a corporation are trustees of its assets and may be prohibited from purchasing the trust property and thus securing a preference over other creditors: *Beach v. Miller*, 130 Ill. 162; 17 Am. St. Rep. 291, and extended note. See also extended notes to *Garrett v. Burlington Plow Co.*, 59 Am. Rep. 466, and *Hodges v. New England Screw Co.*, 53 Am. Dec. 637, in which the rights and liability of directors as trustees of the property of the corporation is discussed.

**CORPORATIONS — ACTIONS BY STOCKHOLDERS TO ANNUL IMPROPER ACTS OF DIRECTORS.** — A stockholder can appeal to a court of equity to prevent the directors or a majority of the stockholders from doing some act which is *ultra vires* or from making some fraudulent disposition of the corporate property: *Davis v. Gemmell*, 73 Md. 539, or for redress where some such wrong has been done: *Perry v. Tuscaloosa etc. Mill Co.*, 93 Ala. 364; *Miller v. Murray*, 17 Col. 408; *Woodroof v. Howes*, 88 Cal. 184; *Gamble v. Queens County Water Co.*, 123 N. Y. 91; *Rothwell v. Robinson*, 39 Minn. 1; 12 Am. St. Rep. 608, and note; *Alexander v. Searcy*, 81 Ga. 536; 12 Am. St. Rep. 337; *Sears v. Hotchkiss*, 25 Conn. 171; 65 Am. Dec. 557, and note. In the three cases last cited as in the principal case the majority sought to purchase the property of the corporation for their own benefit. See extended note to *Hersey v. Peazie*, 41 Am. Dec. 367, for a further discussion of this subject.

**RATIFICATION.** — There cannot, in law, be a ratification of a contract, which could not have been made binding on the ratifier at the time it was made because the ratifier was not then in existence: *McArthur v. Times Printing Co.*, 48 Minn. 319; 31 Am. St. Rep. 653. The officers of a corporation without the authority to bind the corporation by their acts have no power to ratify an unauthorized contract by a failure to repudiate a claim arising out of it: *Lyndon Mill Co. v. Lyndon Literary etc. Inst.*, 63 Vt. 581; 25 Am. St. Rep. 783. See also *Duke v. Markham*, 105 N. C. 131; 18 Am. St. Rep. 889, as to the power of a corporation to ratify a contract which it could not legally make.

**A STOCKHOLDER OF A CORPORATION MAY PURCHASE FOR HIS OWN BENEFIT** the corporate property at a sheriff's sale thereof, and in the absence of fraud cannot be called to account to the other stockholders, although the purchase was at a low price: *Mickles v. Rochester etc. Bank*, 11 Paige, 118; 42 Am. Dec. 103.

## HAYES v. BOYLAN.

[141 ILLINOIS, 400.]

**DEEDS — DELIVERY, WHAT DOES NOT CONSTITUTE.** — If a father executes and acknowledges a deed purporting to grant an estate to his three adult sons, and to operate presently, and then delivers the deed to one of them, saying, "Take this deed and put it in our box at the bank," without doing any other act showing an intention to formally deliver the deed, and himself retaining possession of the land granted, receiving the rents and profits during his lifetime, the instrument is inoperative as a deed for want of sufficient delivery.

**DEEDS — DELIVERY, WHAT IS NOT.** — When a grantor in a deed hands it to the grantee, telling him to "take this deed and put it in our box at the bank," this does not constitute a present delivery of the deed to the grantee, but a mere employment of him, as agent of the grantor, to do an act for the grantor whereby the latter could retain the custody of the deed.

**DEED TO INFANT — DELIVERY, WHEN SUFFICIENT.** — When a parent executes a deed to an infant child and in his interest, and manifests, by his words and conduct, an intention that the deed shall operate at once, a delivery will be presumed, and proof of actual delivery is unnecessary, because it is the duty of the parent to accept and preserve the deed for such infant until he arrives at his majority.

**DEED — DELIVERY, WHEN SUFFICIENT.** — If a grantor intends, when executing a deed, to be understood as delivering it, that will be sufficient as a delivery, or when he induces the grantee to believe that a deed has been executed which makes him the owner of land on which he is afterwards permitted to erect valuable improvements, the grantor is not allowed to set up that the deed is in fact inoperative for want of formal delivery.

*Sheen and Lovett, for the appellant.*

*Puterbaugh, Page, and Puterbaugh, for the appellees.*

SCHOLFIELD, J. Thomas Boylan and John Boylan filed their petition for partition in the circuit court of Livingston County, praying for the partition of a certain tract of land lying in that county, which they allege was conveyed to them and their brother, Charles Boylan, as tenants in common, by deed of their father, Patrick Boylan. Mary W. Hayes and Charles Boylan were made defendants to the petition, and they each answered, — the answer of Mary W. Hayes denying that the deed under which the petitioners claim was ever delivered, and alleging that the land in question was devised by the last will and testament of Patrick Boylan to Charles Boylan, in trust, in part for her use. On hearing, the circuit court decreed that the prayer of the petition be granted, and that partition be made accordingly, and Mary W. Hayes by her appeal brings that decree before us for review.

The decree finds that title was vested in the petitioners by virtue of the deed of Patrick Boylan. That deed is inconsistent with and repugnant to the rights of the heirs at law of Patrick Boylan, deceased, if he died intestate, and it is also inconsistent with and repugnant to the devises in what is set up in the answers as his last will and testament. The question, therefore, whether the decree of the circuit court is erroneous, depends entirely upon whether that deed operated as a valid conveyance of the land, and in the determination of that question it can not be necessary, nor even proper, to either pass upon the validity of the will or to give construction to its terms.

The only evidence in the record in regard to the execution of the deed is that of Charles Boylan. The evidence of John Boylan having been objected to for incompetency, must be excluded under section 2, chapter 51, page 488, of the Revised Statutes of 1874.

Charles Boylan produced the deed, and testified in regard to its execution, thus: "My father signed a deed to the Livingston County land at my house, in my presence, while he was residing with me. No one else was present. I have the deed with me. This is it. I think father signed it the day it bears date. He signed it the day before Mr. Hough took the acknowledgment. . . . No part of the six thousand dollars mentioned in the deed was paid father. Nothing was paid for it. After father signed the deed it remained in his room. I think I saw him hand it to Hough. When Hough signed it he gave it to father, and father kept it. I went down stairs with Hough and came back, and he handed me the deed and said: 'Take this deed and put it in our box in the bank.' Before his sickness we each had one private box in the bank. His eyes were so bad that he could not attend to it. Sometimes he had the cashier at the bank to look over his papers. He had me bring his box home and look his papers over, and took such of his papers as he thought valuable and put them all in the box with mine. He said: 'Take this deed and put it in the box in the bank.' When he gave me the deed he said: 'The boys need not know anything about this till after my death'; that was all he said. I put the deed with the other papers as directed, and it remained there till after father's death." On cross-examination he further testified, among other things: "John was there one day talking about his family. He had a large family of girls, was hard up, and owed



father some interest, and father said: 'You are better off than you think you are,—you will get two thousand dollars out of the land over the river after I am dead, and that will come handy'; about two thousand dollars, I think, is the way he put it. Father retained possession of the land through John Kane and his sons during his life. They had a written lease. In 1890, after making the deed, he got some cash rent from there. . . . . When father first spoke of making the deed he spoke of reserving the rents; that was a couple of months before he made it. . . . . The deed was given to me immediately after it was acknowledged. He told me to put it in the box—in the box he and I kept our papers in,—and I did so. It was my box, and he had papers in it, and the deed was put in there. It was delivered the way I stated."

This leaves no doubt that no act was done by the grantor intended as a present delivery of the deed, for handing it to Charles Boylan, and at the same time telling him to "take this deed and put it in our box in the bank," was not a delivery to Charles, but it was the mere employing him, as an agent of the grantor, to do an act for him, whereby he could retain the custody of the deed during his life. In thus taking and depositing the deed the act of Charles was the act of Patrick, and although the box in the bank belonged to Charles, yet since it was used by both Patrick and Charles, and under the control of each, the deed in that box was just as much within the possession and control of Patrick as if he had retained it about his person: *Jordan v. Davis*, 108 Ill. 336; *Bovee v. Hinde*, 135 Ill. 137; *Chadwick v. Webber*, 3 Greenl. 141; 14 Am. Dec. 222.

It is plain that the intention of Patrick Boylan was to have the deed to take effect only after his death. On its face the deed purported to operate presently, but he intended to, and did, retain the possession of the land, and received and enjoyed its rents during his life. He did not deliver the deed in escrow, to a third party, with direction to him to deliver it to the grantees therein named after his death, but he retained its possession himself until his death, intending that it should become operative only after that event; in other words, he intended it should operate precisely as a will, without having it executed and witnessed as a will.

It has been held that where a parent executes a deed to an infant child which is beneficial to the child, and manifests by his words and conduct that he intends that the deed shall

operate at once, a delivery will be presumed, and proof of actual delivery is unnecessary; but this is because the infant is incapable of doing any act in regard to the deed which he might not avoid on reaching his majority, and it is the duty of the parent, as his natural guardian, to accept and preserve the deed for him: *Bryan v. Wash*, 7 Ill. 563; *Masterson v. Cheek*, 23 Ill. 72; *Newton v. Bealer*, 41 Iowa, 334. The grantees in this deed were all beyond the age of infancy, — men of families, who had for many years been acting for themselves. It has also been held that where a grantor intends when executing a deed to be understood as delivering it, that will be sufficient; and also that where the grantor induces the grantee to believe that a deed had been executed which made him the owner of certain premises, and afterwards permits such grantee to act upon this belief in the construction of valuable improvements on the land, he can not then be allowed to say that the deed was in fact inoperative for want of a formal delivery: *Masterson v. Cheek*, 23 Ill. 72; *Walker v. Walker*, 42 Ill. 311; 89 Am. Dec. 445; *Reed v. Douthit*, 62 Ill. 348; but it has been seen that Patrick Boylan did not here, as evinced by anything proved to have been said or done by him at the time, intend when executing the deed to be understood as delivering it, and no act is proved to have been done by the grantees upon the faith of anything said by him as to the execution of the deed.

This case is analogous to *Cline v. Jones*, 111 Ill. 563, only there the circumstances tending to prove that what was done was intended as a delivery of the deed were much stronger than they are here. There, John Cline went alone before a justice of the peace and had drawn up, and he signed and acknowledged, a warranty deed of the land in controversy to Mrs. Jones, his daughter, the deed reciting it was made in consideration of filial love and affection, and one dollar. At the time, the grantor told the justice that he had given all his other children land, but none to Mrs. Jones, and he felt he ought to give her this land. The grantor took the deed away and ever after retained it in his possession till his death. He also kept possession of the land, received the rents from it and paid the taxes on it until his death. After he had thus signed and acknowledged the deed he told different persons that he had made it; that he had made all his children equal; that the land would be Mrs. Jones's at his death; and to Mrs. Jones and her husband he said, several times, he had fixed it

so that the land would be hers at his death, but that if she would move on it and live there, it should then be hers. This she did not do. We held there was no delivery of the deed, and that for that reason it conveyed no title. The conclusion was reached after a careful examination of all the authorities bearing upon the question, and the reasons therefor are given in an elaborate opinion by Mr. Justice Sheldon. Among other things it is said in the opinion: "The deed by its purport was absolute, conveying the grantor's entire interest, to operate immediately; but the evidence shows the deed was not intended to be absolute, but to be qualified in its effect; that it was not intended to convey the grantor's whole interest, but that he meant to have a life estate unless the grantee should move upon the land, which she never did; that the deed was not intended to operate presently, but only upon the grantor's death, or going upon the land to reside. The evidence shows the distinct intention not to create a present estate in the grantee. As then there was never any actual delivery of the deed, but the grantor ever kept it in his own possession, and as it never was his intention that the deed should presently take effect and become operative according to its terms, there was no delivery of the instrument as the deed of the grantor, and it was not valid as a deed. As Mrs. Jones never moved on the land, this made the deed one to take effect at the grantor's death, which was a disposition of property of a testamentary character, and invalid because not in compliance with the statute of wills." See also *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212; *Price v. Hudson*, 125 Ill. 284; *Bovee v. Hinde*, 135 Ill. 137.

The decree of the court below is reversed.

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**DEEDS — WHAT NECESSARY TO CONSTITUTE VALID DELIVERY.** — To constitute a valid delivery the dominion over the instrument must pass from the grantor with the intent that it pass to the grantee if the latter will accept it: *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337; *Dean v. Parker*, 88 Cal. 283. In determining the question of delivery in any case the intention with respect thereof is the controlling element: *Gordon v. Adams*, 127 Ill. 223; *Vreeland v. Vreeland*, 48 N. J. Eq. 56; *Price v. Hudson*, 125 Ill. 284. It is essential to the delivery of a deed that the grantor surrender all power and control over it for the benefit of the grantee at the time of the delivery: *Porter v. Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131, and note; *Schuffert v. Grote*, 88 Mich. 650; 26 Am. St. Rep. 316, and note with cases collected. For a further discussion as to the sufficiency of the delivery of deeds and the evidence to show the same, see extended notes to *Fain v. Smith*, 58 Am. Rep. 289, and *Jones v. Jones*, 16 Am. Dec. 39.

**DEEDS — SUFFICIENCY OF DELIVERY OF TO INFANTS.** — A voluntary conveyance absolute in form and beneficial in effect by a parent to one who is not *sui juris*, and placing it upon record, although possibly not effectual as a delivery between adults, is deemed to evince an unmistakable intent on the part of the grantor to give the deed effect and to pass the title to the grantee: *Colee v. Colee*, 122 Ind. 109; 17 Am. St. Rep. 345, and note; *Cecil v. Beaver*, 28 Iowa, 241; 4 Am. Rep. 174.

## COMMERCIAL NATIONAL BANK v. BURCH.

[141 ILLINOIS, 519.]

**RECEIVER — ORDER APPOINTING — COLLATERAL ATTACK.** — When the court appointing a receiver for an insolvent corporation has jurisdiction of the subject-matter and of the parties, its order appointing the receiver, no matter how erroneous, cannot be collaterally attacked.

**CORPORATIONS — ASSIGNMENT BY OFFICERS OF.** — Under a resolution passed by the board of directors of an insolvent corporation authorizing its president and secretary "to hereafter execute judgment notes, chattel mortgages, bills of sale, or other instruments in their judgment necessary to the financial interests of the company," such officers have power to make an assignment of the book accounts of the corporation to a creditor holding its judgment notes.

**CORPORATIONS. — PURCHASE OF ITS OWN STOCK BY A CORPORATION** by exchange for its property of equal value, though made in good faith and without any element of fraud, or anything in the apparent condition of the corporation to interfere with the making of the exchange, will not be allowed when it injuriously affects a creditor of the corporation, even though the fact of the indebtedness is not at the time established or known to the stockholders.

**CORPORATIONS — CAPITAL STOCK — TRUST FUND IN HANDS OF DIRECTORS OR STOCKHOLDERS.** — The capital stock of a corporation is a fund set apart for the payment of its debts, and the directors hold it in trust for that purpose. The stockholders of the corporation are conclusively charged with notice of the trust character which attaches to its capital stock; as to it they cannot occupy the *status* of innocent purchasers, and when they have in their hands any of this trust fund, they hold it *cum onere*, subject to all equities which attach to it.

**CORPORATIONS — ASSIGNMENT OF BOOK ACCOUNTS — WHEN SUBJECT TO DEFENSES.** — When an insolvent corporation buys some of its capital stock, giving its note secured by an assignment of its book accounts in payment therefor, and the payee of the note transfers it as well as the book accounts to an innocent purchaser for value before the maturity of the note, such purchaser takes the note free of all defenses, but he takes the accounts subject to all defenses, and therefore subject to the claim by the creditors of the corporation that such assignment is based upon an illegal consideration.

**ASSIGNMENTS — DEFENSES AGAINST ASSIGNEE.** — Each successive assignee of a chose in action takes it subject to the equities existing between the original assignor and his immediate assignee.

**FRAUD — EQUITY WILL NOT RELIEVE AGAINST.** — A party will not be permitted to come into a court of equity to enable him to reap the fruits of



fraud; and if it is found that the right sought to be enforced is unconscionable, or has been obtained by fraud, deceit, or covin, a court of equity will not lend its aid.

**FRAUD — EQUITY WILL NOT RELIEVE AGAINST FRAUDULENT ASSIGNMENT.**

A creditor of an insolvent corporation who obtains an assignment of its book accounts through fraud is not entitled to the aid of a court of equity to enforce his claim under the assignment.

**BILL** by creditors to dissolve a private corporation known as the J. L. Regan Printing Company. On October 27, 1887, one J. J. West held the judgment notes of such corporation for more than forty thousand dollars. Such corporation also owed the Kalamazoo Paper Company \$2,576, West acting as the agent of the latter company for the purpose of closing its indebtedness with the former corporation. One Yaggy owned 130 shares of the stock of the printing company, and also its note for a large amount; and West refused to advance any more money to such company until Yaggy's stock was purchased and his note paid. West then purchased the stock held by Yaggy for said company, transferred such stock to said company, and took its judgment note for thirteen thousand dollars therefor, such note being payable to the order of the maker ninety days from date, and indorsed in blank by said company. On October 11, 1887, the printing company executed to the Kalamazoo Paper Company its note for \$2,576.25, payable three months from date. A warrant of attorney authorizing confession of judgment was attached to both these notes. On October 27, 1887, West procured from said printing company a written assignment of all its book accounts amounting to more than thirty thousand dollars. This assignment, though absolute on its face, was taken as collateral security for the notes held by West and the Kalamazoo Paper Company, and on the same day West had judgment to the amount of forty-five thousand dollars entered on all the notes except the one for thirteen thousand dollars. On the same day a sheriff under direction of West took possession of all the property of the printing company except said book accounts, which West immediately took and carried away without the knowledge or consent of said company, and deposited them with his attorney. Two days later West took the thirteen thousand dollar note given by said company for the Yaggy stock, together with the assignment of the book accounts, and delivered them to the Commercial National Bank as collateral security for a loan of twenty-five thousand dollars from the bank. All of the property of said printing

company was seized under executions issued upon the judgments in favor of West, whereupon the creditors of said company filed the present bill. Other facts are stated in the opinion.

*Weigley, Bulkley, and Gray*, for the appellant.

*Matthew P. Brady, and Cratty Brothers*, for the receiver.

SHOPE, J. The original bill was a proceeding under section 25, chapter 32, of the Revised Statutes, entitled "Corporations," to dissolve the corporation known as the J. L. Regan Printing Company, to enjoin the sale of its property, and to procure the appointment of a receiver to wind up its affairs. The objection is made that the original bill fails to show a right in the circuit court to entertain jurisdiction and to appoint a receiver. The objection is based on the assumption that the proceeding is a creditor's bill, which will not lie until the creditor has first reduced his demand to judgment, and exhausted his remedy at law by the return of an execution *nulla bona*. The propriety of the original decree appointing the receiver is not involved on this appeal. The decree was entered by consent of the corporation and most of its officers, and the receiver was acting under that decree when leave was granted to the Commercial National Bank and Kalamazoo Paper Company to intervene. They each filed their petition, not to vacate any former order or decree, nor questioning the power and jurisdiction of the court in the appointment of a receiver, but for an order directing the receiver to pay the petitioners' claims in full out of the collections made by him out of the book accounts of the insolvent corporation. This was the relief sought. The court denied this relief and dismissed the petition, and from this order they severally appealed to the appellate court. The appeals will not bring up for review the order appointing the receiver and directing the property to be turned into his hands. The relief asked by petitioners was in subordination to such orders, and in recognition of their validity. Moreover, the attack is here made collaterally, and as the court had jurisdiction of the subject matter and of the parties, its order, no matter how erroneous, cannot be thus attacked: *Harris v. Lester*, 80 Ill. 307; *Wing v. Dodge*, 80 Ill. 564; *Hernandez v. Drake*, 81 Ill. 34; *Wenner v. Thornton*, 98 Ill. 156.

The order dismissing the petitions is sought to be upheld upon the ground that the president and secretary of the print-

ing company were without power or authority to execute the assignment to West, and that it is therefore void. It appears that the board of directors had, prior to this assignment, passed a resolution, as follows: "The president and secretary of this company are authorized to hereafter execute judgment notes, chattel mortgages, bills of sale, or other instruments in their judgment necessary to the financial interests of the company." We are inclined to concur with the appellate court that the president and secretary, under such resolution, had power and authority to execute said assignment.

The only remaining question to be considered is, whether the court below erred in refusing to direct the payment of the money of the insolvent debtor corporation, derived from the collection of the book accounts, to be first applied on the claims of the intervening petitioners. In respect of the petition of the Commercial National Bank we are inclined, after full consideration of the case, to adopt the opinion of the appellate court, which is as follows: —

"The sole consideration of the thirteen thousand dollar note, to satisfy which the bank now seeks to have the book accounts which were assigned to West, and by him to the bank, applied, was the purchase of a portion of the capital stock of the printing company. The financial condition of the printing company at the time that West purchased the said shares of stock was not such as would, under the law as announced by our supreme court, permit it to thus diminish its capital stock and impair the rights of its creditors, — and that condition was known to West. The purchase of the stock by West from Yaggy made West a stockholder of the company, and he, knowing its condition, could not sell that stock to the company in such a manner as to hold property received from the company in consideration thereof, against then existing creditors of the company. The question is settled by the decision of the case of *Clapp v. Peterson*, 104 Ill. 26, where it is held that the purchase of its own stock by a corporation by the exchange of its property of equal value, though made in good faith and without any element of fraud about it, there not being anything in the apparent condition of the company to interfere with the making of the exchange, will not be allowed where it injuriously affects a creditor of the company, even though the fact of the indebtedness was not at the time established or known to the stockholders. The court holds that the capital stock of an incorporated

company is a fund set apart for the payment of its debts, and that the directors of the company hold it in trust for that purpose, and say: 'The shareholders of the corporation are conclusively charged with notice of the trust character which attaches to its capital stock.' As to it they cannot occupy the *status* of innocent purchasers, but they are to all intents and purposes privies to the trust. When, therefore, they have in their hands any of this trust fund, they hold it *cum onere* subject to all equities which attach to it. Now, the evidence, so far as it shows the purpose for which the assignment of the book accounts was made, establishes that it was made as security for the note for thirteen thousand dollars, given in consideration of the transfer of the stock to the company, and as security for the payment of the debt due to the Kalamazoo Paper Company. This is the testimony of West and of the secretary of the company, and is substantially uncontradicted. The transfer of the notes from West to the bank having been made before the note was due, made the bank an innocent holder of the note for value, and protected it under the rule which protects the innocent purchaser of negotiable paper; but the book accounts were mere choses in action, and the assignment of them a transfer of so much of the property of the J. L. Regan Printing Company to West to satisfy the said note. Each successive assignee of a chose in action takes it subject to the equities existing between the original assignor and his immediate assignee. Therefore, if West could not hold the book accounts as collateral security for the payment of the thirteen thousand dollar note, the bank cannot hold it, for, as far as the assignment of the book accounts was concerned, the bank stands in the shoes of West. It holds its negotiable promissory notes relieved from all defenses, but held the book accounts subject to all defenses, and therefore subject to the claims of the creditors of the corporation. The court therefore properly dismissed the intervening petition of the said bank, but such dismissal will not operate to prevent said bank from proving up its claim upon the note, and sharing *pro rata* in the assets of the printing company in the hands of the receiver."

In respect of the decree dismissing the intervening petition of the Kalamazoo Paper Company, we, however, feel constrained to differ with that court in the result reached. There is, as it is said, no question that the claim of the paper company was *bona fide*. The Regan Printing Company was at



the time a going corporation, and, as said by this court in *Burch v. West*, 134 Ill. 258, it is clear that the officers of the corporation did not contemplate that the corporation would make a voluntary assignment of its property, and that those in charge of its business were using every endeavor to tide over the indebtedness of the corporation with a view of an improvement in its affairs. In that case the question was, whether the execution and delivery of the judgment note amounted to a voluntary assignment, and it was held that it did not. The court there found that the judgments sought to be enjoined were based upon full, adequate, and valuable considerations, and it was said that nothing appears in the record to charge any of the judgment creditors with fraud, or to show that the judgments were collusively entered. The judgments being in nowise impeached under the statute (Rev. Stats. p. 69, sec. 7), could not be enjoined, and it was accordingly held that the bill seeking to enjoin the collection of the judgment was properly dismissed. In this case no attack is made upon the judgment of the Kalamazoo Paper Company, nor is it sought in any way to interfere with its collection. On the contrary, the Kalamazoo Paper Company comes into a court of equity and seeks affirmative relief in its own behalf. To entitle it to such relief it must come with clean hands, and be prepared to do equity. A party will not be permitted to come into a court of equity to enable him to reap the fruits of fraud; and if it appears that the right sought to be enforced in equity is unconscionable, or has been obtained by fraud, deceit, or covin, a court of equity will not lend its aid.

It is conceded that James J. West was the authorized agent of the Kalamazoo Paper Company. At the time of the execution of the note to the paper company and the assignment of the book accounts to West, he knew that the J. L. Regan Printing Company was an insolvent corporation, that it was largely indebted to other persons and corporations, and unable to pay its debts. The Kalamazoo Paper Company must be held responsible for the knowledge and conduct of its agent, West. He, by his representations and conduct, had led the president of the Regan Printing Company to believe that he was friendly to it, and would aid it financially. The proof tends to show that West applied in the afternoon to the president of the company for the execution of the assignment, saying in effect that he only wanted it as protection in the

event that anything happened; that the president might be killed in going up and down the elevator, and the like; that it was intended to put the notes away where they could not be seen, and the assignment would be used only in the event of disaster overtaking the company, and that the president was induced by these representations to execute the formal assignment. On the same afternoon, after procuring the assignment, West caused judgments to be entered up upon the notes which he held for over forty thousand dollars, and execution immediately to be issued, and the sheriff put in possession of all the property of the company on the same day, and its business closed. On the same afternoon, in the absence of the officers of the company, and in apparent violation of the understanding, the books were, by West's orders, loaded into a wagon and taken to the office of West's attorney, and two days later delivered into the possession of the Commercial National Bank as collateral to the note of West. As said by the appellate court, "the fact that West intended, at the time he took the assignment, to enter up his judgments and levy upon the remaining property of the company, and leave other creditors with their debts unpaid, may be fairly inferred from the evidence"; but there is more than this. He procured the preference by unquestioned fraud and overreaching, and now he or his principal, for whom he acted, seeks the aid of a court of equity to reap the fruits of his fraudulent practices.

We fully recognize the doctrine that the law favors the diligent creditor, and will uphold him in pursuing all legitimate means to secure or satisfy his debt, whether the debtor be an insolvent corporation or an insolvent person; but here the means resorted to were not legitimate, but were in the highest sense culpable and fraudulent. The officers of the company were led to believe that by taking this step they would be permitted to go on, with a fair hope of meeting the obligations of the corporation. Without the active fraud practiced, it is clear the assignment would not have been made. As said by this court in *Fortier v. Darst*, 31 Ill. 212: "A party who comes into a court of equity asking for equitable relief, which a court of law cannot afford him, and exhibits a case all blotched over with fraud and overreaching, as this is, must expect but little favor or sympathy at our hands." Here the assignment was obtained through falsehood, fraud, and deception, and possession of the books of account taken forcibly

and without leave of the company, and, as before said, at least in apparent violation of the understanding.

It is not necessary to here determine whether the officers of an insolvent corporation, knowing it to be insolvent, may prefer creditors, for the preference here obtained was not by the consent fairly or lawfully obtained from any officer of this corporation. In equity and good conscience it should be treated as if no assignment had been attempted to be made.

We are of opinion that the appellate court erred in reversing so much of the decree of the circuit court as dismissed the intervening petition of the Kalamazoo Paper Company, and in so far the judgment will be reversed. In all other respects the judgment is affirmed.

It being admitted that the debt was *bona fide*, there is no objection apparent in permitting the Kalamazoo Paper Company to prove its claim, and share *pro rata* in the assets in the hands of the receiver with the other unsecured creditors.

Judgment affirmed in part, and in part reversed.

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**CORPORATIONS — PROPERTY OF — TRUST FUND FOR PAYMENT OF CREDITORS.** — The property of a corporation is a trust fund for the payment of its debts: *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174; 31 Am. St. Rep. 637, and note. The capital stock of a corporation, including unpaid subscriptions thereto, constitute a trust fund for the benefit of the creditors of the corporation: *Marshall Foundry Co. v. Killian*, 99 N. C. 501; 6 Am. St. Rep. 539; *Thompson v. Reno Sav. Bank*, 19 Nev. 103; 3 Am. St. Rep. 797, and extended note; *International Fair etc. Ass'n v. Walker*, 88 Mich. 62.

**CORPORATIONS — POWER TO MAKE ASSIGNMENTS.** — A conveyance by a corporation of all of its property for the payment of all of its creditors without preference is valid: *Pope v. Brandon*, 2 Stew. 401; 20 Am. Dec. 49; *Sargent v. Webster*, 13 Met. 497; 46 Am. Dec. 743, and note; *Lexington etc. Ins. Co. v. Page*, 17 B. Mon. 412; 66 Am. Dec. 165, and note; *Tripp v. Northwestern Nat. Bank*, 41 Minn. 400.

**EQUITY. — HE THAT COMES INTO EQUITY MUST COME WITH CLEAN HANDS:** *McVey v. Brendel*, 27 Am. St. Rep. 630; *Solis Cigar Co. v. Pozo*, 25 Am. St. Rep. 285; *Power's Appeal*, 125 Pa. St. 175; 11 Am. St. Rep. 882. A court of equity will not lend its aid until all the circumstances of the case are disclosed, that it may see that there is no fraud and that everything is fair: *Clay v. Williams*, 2 Munf. 105; 5 Am. Dec. 453. Relief against imposition and oppression may be obtained in chancery, but the applicant must be guiltless of fraud or chicanery: *McDonald v. Neilson*, 2 Cow. 139; 14 Am. Dec. 431.

**ASSIGNMENT — RIGHTS OF ASSIGNEES.** — An assignee of a non-negotiable chose in action takes it subject to the equities existing against it in the hands of the assignor at the time of the assignment: *Timms v. Shannon*, 19 Md. 296; 81 Am. Dec. 632, and note; *Robeson v. Roberts*, 20 Ind. 155; 83 Am. Dec. 308; *Warner v. Whittaker*, 6 Mich. 133; 72 Am. Dec. 65, and note; *State*

*v. Hearn*, 109 N. C. 150; *Scott v. Magloughlin*, 133 Ill. 33; *Owen v. Evans*, 134 N. Y. 514; *Stephens v. Weldon*, 151 Pa. St. 520.

**CORPORATION — POWER OF TO PURCHASE ITS OWN CAPITAL STOCK.** — In England the rule is well settled, both at common law and under the statutes, that a corporation has no power to purchase its own capital stock either directly or indirectly, unless it is given authority so to do either by and under its charter or its articles of association. In the absence of authority expressly given to traffic in its own stock, the purchase thereof by the corporation is *ultra vires* and invalid as an attempt to reduce the capital of the company and does not relieve the selling shareholder from liability for his contributory share in the settlement of the debts of the company on a winding up of its affairs: *Hope v. International etc. Soc.*, L. R. 4 Ch. Div. 327; *Hall's Case*, L. R. 5 Ch. 707; *In re London etc. Bank*, L. R. 5 Ch. 444; *Ex parte Morgan*, 1 Macn. & G. 225; *Daniell's Case*, 22 Beav. 43; *Raymond's Case*, 3 De Gex & S. 96; *Walter's Second Case*, 3 De Gex & S. 244; *Bennett's Case*, 5 De Gex, M. & G. 284; *Eyre's Case*, 31 Beav. 177; *Morgan's Case*, 1 De Gex & S. 750. The object of this rule manifestly is to preserve the rights of the corporate creditors by preventing a diminution of the stock, and also to confine the corporation within the express powers given it, and the implied powers necessary to the transaction of its business. On the other hand if the corporation is expressly or impliedly authorized to purchase its own stock by its articles of incorporation, it may so purchase from a shareholder and he will then be relieved, as to the shares so purchased by the corporation, from all liability for contribution on the winding up of the corporate affairs. And this is true, although the transfer of the shares sold by the stockholder to the corporation is not made in strict accordance with the provisions of the articles of association: *Nicols' Case*, 3 De Gex & J. 387; *Cockburn's Case*, 4 De Gex & S. 177; *Grady's Case*, 1 De Gex, J. & S. 488; *Tensdale's Case*, L. R. 9 Ch. 54; *Thomas's Case*, L. R. 13 Eq. 437. The articles of association of some corporations empower them to accept a surrender or forfeiture of his shares from a stockholder. In such case the power will be strictly construed, and if any doubt exists as to the facts or any irregularity appears in the transaction it will be held to be a sale instead of a surrender and cancellation, and the stockholder will be deemed liable for his contributory share on the winding up of the affairs of the corporation: *Hall's Case*, L. R. 5 Ch. 707.

**Rule in United States.** — In America the great weight of authority sustains a doctrine directly opposed to that announced by the English courts, and in this country it is very generally maintained that in the absence of statutory prohibition, a solvent corporation or its officers may invest its funds in the purchase of its own stock; or may take such stock in payment of debts due it from a stockholder; or may take it in exchange for other property owned by the corporation. It seems, from an examination of the decisions upon this subject that the creditors of the corporation can question such purchase or exchange only when the circumstances are such as to show that the transaction was fraudulent in fact, or that the corporation was insolvent, or in process or contemplation of dissolution at the time the purchase or exchange was made, and also that the transaction diminished their security for the debts due them. No case has been found maintaining that the shareholders have any right to question the authority of the corporation to purchase its own stock under any circumstances, while on the other hand it has been said that "there are numerous cases which hold that a corporation



may do so, and violate no duty to the stockholders, unless prohibited by its charter": *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220-225.

The controlling doctrine as deduced from a majority of the cases is excellently and clearly stated in *Fraser v. Ritchie*, 8 Ill. App. 554, as follows: "It must be admitted that no fixed nor very well-defined rule is deducible from the authorities as to the right of a corporation to use its corporate funds or property in the purchase of its stock. The doctrine as commonly stated in general terms is that the capital stock of a corporation constitutes a trust fund for the payment of its debts, such stock being regarded as a substitute for the personal liability which subsists in private partnerships. It is said that when debts are incurred, a contract arises with the creditors that the capital stock or property of the company shall not be withdrawn or applied otherwise than to the satisfaction of their demands; that the creditors have a lien upon it in equity, and that if diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration without notice. This principle, as a general proposition, would seem to be founded in reason and justice, and may be regarded as settled law. But it remains to be considered whether the principle as stated is one of universal application, admitting of no exceptions, or whether it is limited in its application, depending upon the circumstances of each particular case, the time and manner of its application, the provisions of the charter of the corporation, the nature of its business, etc. In England the doctrine seems to be settled that corporations, whatever may be the nature of their business, cannot, without an express authority in their charters, deal in their own stock. The current of American authorities, on the other hand, seems to be to the effect that under certain circumstances, and for certain purposes, moneyed corporations and corporations possessing banking powers, and in some instances other corporations, may invest their funds in the purchase of their own stock, subject to certain restrictions and limitations, one of which is that it shall not be done at a time and in such manner as to take away the security upon which the creditors of the corporation have a right to rely for the payment of their claims, or, in other words, so as not to diminish the fund created for their benefit. Each case must therefore depend upon and be determined by its own facts and the circumstances; and the difficulty sometimes met with grows out of the proper application of the rule of law to the facts of a particular case. Upon principle we think it would be pushing the doctrine of trusts as applied to the capital stock of a corporation too far to hold that it takes away the power of the corporation to purchase its own stock under any and all circumstances, for this would be to deprive it of the right to make an investment which, in a given case, might be highly advantageous both to the creditor and the corporation, and would moreover ignore all distinctions between a corporation which is insolvent, or in process of dissolution, and one which is engaged in a prosperous and active business, with abundant means to meet all its obligations. If in contemplation of winding up, or when insolvent, a corporation should attempt to divide its effects among its stockholders, either directly or indirectly, by accepting a surrender of their stock in exchange for the corporate property, the transaction would not be upheld as against the equitable rights of creditors, and this, it is apprehended, is the limited application of the doctrine which the American courts and text-writers have intended when speaking of the trust property of the capital stock, rather than that general and universal application which would deprive a corporation of all power and discretion in re-

spect to the disposition of its capital stock. Without going more at large into this branch of the case, our conclusion is, that the weight of authority in this country is in favor of the power of a corporation to purchase its own capital stock, except where the circumstances are such as to show that the purchase was fraudulent in fact, or that the corporation was insolvent, or in process or contemplation of dissolution, at the time of the purchase.

"Most of the cases which we have examined were, it is true, cases relating to financial or commercial corporations, but we are unable to see any valid grounds for holding that a corporation for manufacturing purposes may not, as between itself and its creditors, invest its surplus earnings in the purchase of shares of its stock, which would not apply with equal force to the former class": *Fraser v. Ritchie*, 8 Ill. App. 558-561. To the same effect is *Clapp v. Peterson*, 104 Ill. 26, maintaining that private corporations may purchase their own stock in exchange for money or other property, and hold, reissue, or retire it, if it is done in good faith for equal value, and is free from fraud, actual or constructive, and if the corporation is not insolvent or in process of dissolution, and the rights of creditors are not thereby affected to their injury. The court, in *First Nat. Bank v. Salem etc. Flour Mills Co.*, 39 Fed. Rep. 89, also maintained that the rule is well settled in the United States, that a corporation may, unless prohibited by a statute, purchase its own stock, if this is done in good faith without intent to injure the corporate creditors, and they are not injured thereby.

"A corporation may, if it acts in good faith, buy and sell shares of its own stock. The surrender by stockholders to the company of the certificates of stock upon which twenty per cent had been paid, and the issuance to such stockholders of certificates for paid-up stock was in substance and in legal effect a purchase by the company of the unpaid stock at its par value. The transaction was not *ultra vires*. It was based upon resolutions adopted by the corporation at a stockholders' meeting. It does not appear that any stockholder has ever objected either to the resolutions or to the transfers of stock, which, in conformity therewith, took place between the corporation and such of the stockholders as elected to avail themselves of the privilege given thereby. The contracts were valid as between the company and the stockholders, who gave up their part-paid stock for one fifth the amount relinquished. The transaction was binding upon the company, and the stockholders who sold their stock to the corporation should be protected against further payments upon their subscriptions, unless there were, at the time of such transaction, existing creditors in respect to whose rights it was fraudulent. It is to be noted that thereafter, as between such stockholders and the company, there was no indebtedness to the company in regard to the subscriptions for stock": *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150-162. The right of a corporation to purchase shares of its own capital stock is recognized in Pennsylvania, although the court in *Coleman v. Columbia Oil Co.*, 51 Pa. St. 74, said that, "the employment of corporate funds to speculate in the stock of the company to which the funds belong is not a practice to be encouraged. But the present plaintiff (a stockholder) is not in position to censure the practice. As to him, we must regard the purchase as valid and fair, and all we have to decide is how far it inures to his benefit." The court then proceeded to give its reasons why a stockholder could not object to such purchase, and said: "When a company buys in shares of its own stock outstanding, it enriches the shares of every holder; for whether the purchased shares be sunk, or sold at a profit, or distributed *pro rata* among the

stockholders, the chance for an increase of dividend or of shares enhances the value of each existing share."

A corporation, while solvent, may purchase and retire a portion of its capital stock, and such act will not relieve the other stockholders from their liability for calls after the company has become bankrupt: *In re Republic Ins. Co.*, 3 Biss. 452.

It is uniformly and well settled that a banking or other moneyed corporation, if solvent, may purchase shares of its own stock or take it in payment of a debt due from the shareholder: *Taylor v. Miami Exporting Co.*, 6 Ohio, 177; and the corporation may, after such purchase, hold the stock unextinguished, and it may resell and reissue it: *City Bank v. Bruce*, 17 N. Y. 507; *Vail v. Hamilton*, 85 N. Y. 453-457; *Hartridge v. Rockwell*, R. M. Charl. 260; *Robinson v. Beall*, 26 Ga. 17; *Chillicothe Branch of State Bank v. Fox*, 3 Blatchf. 431; *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418-452; *Ex parte Holmes*, 5 Cow. 426. Although it is generally said, in the foregoing cases, that, in the absence of prohibitory statute, a banking corporation may purchase its own stock, still it is determined, in *Farmer's etc. Bank v. Champlain Transportation Co.*, 18 Vt. 131, that a clause in the charter of such corporation which prohibits it from dealing, directly or indirectly, in buying or selling any goods, wares, or merchandise, or commodities whatsoever, will not prevent it from buying the stock of one of its shareholders, if the purchase is made in good faith. Although a corporation is not, strictly speaking, a banking or moneyed institution, it may make a valid and binding contract for the purchase of its own stock when one of the expressed purposes of its organization and incorporation is to "purchase and hold, sell or exchange any real estate or other property deemed desirable in the transaction of its business," and when the purchase of its stock by it is *bona fide*, and not in fraud of creditors: *Iowa Lumber Co. v. Foster*, 49 Iowa, 25; 31 Am. Rep. 140. In regard to the enforcement of a contract, by a corporation, for the purchase of its own stock, it was said, in *Blatock v. Kernersville Mfg. Co.*, 110 N. C. 99-103, that, "in the absence of statutory provision to the contrary, it might buy such shares for its own benefit from the owner of them upon such terms as might be agreed upon, subject to the rights of its creditors in proper cases to resort to its capital stock, paid and unpaid, as a trust fund out of which they may be entitled to have their debts paid. It is bound by its agreements with persons from whom it may purchase such shares of stock, and they may enforce the same by proper legal remedies, just as they might do in case of like agreements in respect to any other species of property. Hence, if it made its promissory notes to one of its stockholders for the price of any part that it had agreed to pay him for his shares of stock, he would have his remedy, so far as it is concerned, just as any other creditor would, certainly subject only to the possible rights of other creditors against him as a stockholder in some cases wherein he might be liable." Thus, a railway corporation may, for legitimate purposes, purchase shares of its own stock which it has issued to individuals or municipal corporations, and such purchase is a sufficient consideration to support an agreement to pay money: *Chicago etc. R. R. Co. v. Marseilles*, 84 Ill. 145, 643; and a corporation with the usual powers may, in the absence of statutory prohibition, contract for a surrender as well as a purchase of its own stock: *Rollins v. Shaver Wagon Co.*, 80 Iowa, 380, 20 Am. St. Rep. 427; or for an exchange of its property for its stock: *Morgan v. Lewis*, 46 Ohio St. 1. A corporation, chartered with power to purchase and hold water power and real estate, may, when its water privileges can no longer be used with profit,

and its water power has been extinguished, lawfully sell its lands and receive its own stock in payment therefor: *Dupee v. Boston Water Power Co.*, 114 Mass. 37. In this case, the court said that, "in the absence of legislative provision to the contrary, a corporation may purchase its own stock, or receive it in pledge or in payment, in the lawful exercise of its corporate powers."

In the absence of proof of the powers of a foreign corporation in regard to the purchase of its own stock, it will be presumed for the purpose of upholding a contract that the corporation possesses such powers: *Yeaton v. Eagle Oil etc. Co.*, 4 Wash. 183. The assignment to a corporation of its own stock as collateral security for a debt due it from its stockholder will divest the title of the assignor so that the stock cannot be sold under an execution against him: *Early's Appeal*, 89 Pa. St. 411; *Eby v. Guest*, 94 Pa. St. 160.

*Stock Not Merged or Reduced by Purchase.*—When a corporation purchases shares of its own capital stock, such stock is not thereby reduced by that amount nor is the stock merged: *State v. Smith*, 48 Vt. 266; *City Bank v. Bruce*, 17 N. Y. 507; *Vail v. Hamilton*, 85 N. Y. 453-456; *Chillicothe Branch of State Bank v. Fox*, 3 Blatchf. 431; *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418. In *Commonwealth v. Boston etc. R. R. Co.*, 142 Mass. 146-155, it was said, "It has not been considered in this commonwealth that shares in a corporation are necessarily extinguished by being transferred to the corporation, so that they cannot be reissued, or that the amount of capital stock is thereby reduced, nor has such rule prevailed in this country generally." So long, however, as the corporation retains the ownership of the purchased stock the latter is lifeless and it cannot be voted: *State v. Smith*, 38 Vt. 266; but the corporation holds it as unextinguished and may at any time resuscitate it by selling, reissuing, and transferring it to a purchaser: *City Bank v. Bruce*, 17 N. Y. 507; *Williams v. Savage etc. Mfg. Co.*, 3 Md. Ch. 418; *Chillicothe Branch of State Bank v. Fox*, 3 Blatchf. 431; *State v. Smith*, 48 Vt. 266; *Currier v. Lebanon State Co.*, 56 N. H. 262-268. In *Vail v. Hamilton*, 85 N. Y. 453-457, it was claimed that shares of stock purchased by the corporation first issuing constituted a merger of so much of the stock, but the court said: "The shares transferred ought not to be so treated, as to them at least, there was no merger in the general fund of the company. They were, in the first instance, duly issued for value received by it, and might be lawfully repurchased or retaken in payment of debts due, or otherwise acquired by the corporation. In some way it had become the owner of these shares, not for the purpose of diminishing its capital stock, but for enjoyment as property. As such they stood upon its books, until in the regular transaction of business the stock was transferred to Conklin. The company had a right to hold it unextinguished, and a right to reissue it."

*Purchase of Stock as Affected by Creditor's Rights.*—In the cases already considered the rights of creditors of the corporation buying its own stock were not directly involved, and as a consequence they universally maintain that such purchase is valid, although they also state the rule to be that if the corporation at the time of making a purchase of its own stock is in an insolvent condition, or about to dissolve and wind up its affairs, or if for any other reason the purchase is to the prejudice of corporation creditors, by diminishing their chances of collecting their claims, a different doctrine would be applied. We will now consider those cases where the rights of creditors are directly involved in the purchase by a corporation of its own stock. These cases generally hold that such purchases will be declared illegal and voidable at the instance of corporate creditors who are injured



thereby. The latter may always object that under and by such purchase the corporate funds are expended, and no property is received by the corporation, except the right to resell the stock. These cases also maintain, as a general rule, that the money paid by the corporation for its own stock is a trust fund in the hands of the stock seller, and that it may be pursued by the corporate creditors when the purchase is to their injury: *Crandall v. Lincoln*, 52 Conn. 73; 52 Am. Rep. 560; *Currier v. Lebanon Slate Co.*, 56 N. H. 262; *Gill v. Balis*, 72 Mo. 424; *Heggie v. People's etc. Ass'n*, 107 N. C. 581; *Bent v. Hart*, 10 Mo. App. 143-147; *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Coppin v. Greenles etc. Co.*, 38 Ohio St. 275; 43 Am. Rep. 425. The reasons underlying the doctrine announced by these cases are well stated in *Crandall v. Lincoln*, 52 Conn. 73-99, 52 Am. Rep. 560, where it was said that, "where it is provided by law that each stockholder, in case of insolvency, shall be liable to contribute a sum equal to the nominal value of his stock, there is an obvious reason why the company cannot become a stockholder. If it may, it withdraws from the fund designed to secure creditors a sum equal to the nominal value of the stock so owned. But in this case and in other cases where stockholders are not liable to contribution, the only security which creditors have being the capital stock, it is very important that the law should guard that security with the greatest care and vigilance, and not allow trust funds belonging to creditors to be appropriated by stockholders who have no equitable right to them. These views are abundantly sustained by authority. We do not intend to say that under no circumstances can a corporation legally become the owner of its own stock. Should it loan money to a stockholder, and be obliged to take its own stock in payment, that would not be illegal *per se*. So it may be allowable for a company to purchase stock temporarily with its surplus earnings; but stock should not be held indefinitely; it should be disposed of in a reasonable time. If not, and should creditors thereby be prejudiced, perhaps the managers of the company might be liable. Nor do we intend to say that a direct purchase would be declared illegal at the instance of a party to the transaction. If the stock is reissued, and creditors are not prejudiced, probably the courts would not interfere. But as a rule, to which there are few if any exceptions, when a stockholder conveys his stock to the company, and receives in return a portion of the capital, he holds the money so received as subject to the superior equities of creditors. Our conclusion is that the capital stock of the company being impaired when the stock in this case was purchased, and the stock in each case having been paid for from the capital, the transactions were illegal, and cannot be sustained. If the view we have taken of the character and nature of this stock is sound, that it is a trust fund for the security of creditors, and we have no doubt that it is, the conclusion inevitably follows that under no circumstances can a stockholder sell his stock to the company and take therefor his portion of the capital stock to the prejudice of creditors. The illegality of the transaction does not at all depend upon the actual knowledge or *mala fides* of the seller, if he in fact sells to the company and receives in return a part of the capital; the policy of the law requires him to know it, and conclusively charges him with knowledge. Thus selling, he sells at his peril. In no other way can the rights of creditors be protected. The seller can protect himself by selling to other parties, or he may hold his stock, taking, as he is bound to, the risk of his investment. The creditor is not bound to assume any part of the stockholder's risk, and he has no way of protecting himself. The law is his only protec-

tion." In *Bent v. Hart*, 10 Mo. App. 143-147, the court said: "Suppose the shareholder sells and transfers the share or right held by him to another for a money consideration? If the transfer be to the corporation itself, it is obvious that the money paid is only so much of the shareholder's original contribution returned to him. In other words, the capital stock is diminished to that extent. The corporation relinquishes a part of the very fund which the creditors have relied upon for the security of their claims, and gets literally nothing in return. A certain claim upon its future dividends is extinguished; but with that extinction is destroyed, at the same time, the corresponding quota of working capital which was to help create them. The transaction is in this aspect a violation of trust, and equity in a proper case will annul it."

In *Heggie v. People's etc. Ass'n*, 107 N. C. 581, it was decided that a corporation might buy in and cancel its own stock if creditors were not affected injuriously thereby; but that this could never be done in derogation of the rights of corporate creditors. Hence a corporation could not settle with its members and stockholders by the application of its assets to the retirement or redemption of its stock until it had first settled and discharged all its liabilities. Any agreement between the corporation looking to such an arrangement will be void as to creditors. Under the New Hampshire statute an insolvent corporation cannot purchase a part of its own stock, and when the stock of such corporation is fixed and limited and has not been fully paid in the corporation cannot relieve a delinquent stockholder from the payment of assessments on his shares by a purchase thereof, as against the objection of another stockholder: *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

*Cases Denying Right of Corporation to Purchase its Stock.*—A few of the American cases adopt the English rule and deny the right of a solvent corporation to purchase its own stock under any circumstances, unless expressly empowered so to do by statute, or perhaps to secure a debt due from the stockholder from whom it purchases. These cases maintain this doctrine without any regard as to whether the corporation is solvent or insolvent, or whether it is free from liability to creditors or not: *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Abeles v. Cochran*, 22 Kan. 405; 31 Am. Rep. 194; *State v. Oberlin etc. Ass'n*, 35 Ohio St. 258; *Coppin v. Greenles etc. Co.*, 38 Ohio St. 275; 43 Am. Rep. 425; *Cartwright v. Dickinson*, 88 Tenn. 476; 17 Am. St. Rep. 910; *St. Louis Carriage Mfg. Co. v. Hilbert*, 24 Mo. App. 338. In *Cartwright v. Dickinson*, 88 Tenn. 476, 17 Am. St. Rep. 910, it was held that although a corporation may have the right to deal in its own stock to secure a debt, it cannot reduce its authorized capital stock by purchasing its shares for cancellation; and in *St. Louis Carriage Mfg. Co. v. Hilbert*, 24 Mo. App. 338, it was decided that a business corporation cannot exchange its goods for its capital stock so as to reduce or retire the latter. The corporation may deny the legality of a contract for such exchange when it has not received the benefit of the consideration. The court said in this case: "The better reason is that a trading corporation should not be permitted to traffic in its own stock, where by so doing it decreases the security which all parties dealing with it have in the individual liability of stockholders, for the unpaid part of the stock." The case of *Johnson v. Bush*, 3 Barb. Ch. 207, is also in harmony with this ruling.

In the case of *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60-65, the court said: "A bank cannot purchase its own stock, except in some few cases for the purpose of securing some previously existing debt. There is

no law that attempts to give a bank any such power, and the purchasing by a bank of its own stock is not one of the objects for which banks are created, and is not legitimate banking business. For a bank to use its funds in the purchase of stock is to withdraw that much of its capital from legitimate banking business, and to purchase its own stock is in effect a withdrawal of that much of its stock from actual existence, and in that way the bank might reduce the amount of its capital stock below the amount required by law, and might also impair or even destroy all security given by law to the creditors of the bank. The law provides in effect that not only the bank, with all its property, shall be liable for its debts, but also that each stockholder in the bank to the amount of his stock, shall also be held liable; but if a bank may purchase in all its stock, and own it itself, then where would be the security to the creditors of the bank, except in the bank itself? They could not, after exhausting the property of the bank, find any stockholders to sue. The law never contemplated such a thing."

Again in *State v. Oberlin etc. Ass'n*, 35 Ohio St. 253, 263, the court said: "We do not deny that a corporation has power to receive shares of its stock as security for a debt or other similar purpose; but here the association purchased its own shares of stock in several instances for the purpose of disposing of them to persons not intending to become members of the association, and with a view of making such shares the basis of loans to such persons. The law will not uphold such transactions." In *Coppin v. Greenlee etc. Co.*, 38 Ohio St. 275, 43 Am. Rep. 425, the right of a corporation to purchase its own stock at pleasure was denied and the court held that a contract between a manufacturing corporation and one of its stockholders for its purchase of his stock could not be enforced either in an action for specific performance or for damages. The court said: "And if a corporation can buy one share of its stock at pleasure why may it not buy every share? If the right of a corporation exists to purchase its own stock at pleasure, and is unlimited, where is the provision intended for the benefit of creditors? This is not the security to which the constitution invites the creditors of a corporation. I am aware that the amount of stock required to be issued is not fixed by the constitution or by statute, and also that provision is made by statute for the reduction of the capital stock of corporations, but of these matters creditors are bound to take notice. They have a right to assume, however, that stock once issued, and not called back in the manner provided by law, remains outstanding in the hands of stockholders, liable to respond to creditors to the extent of the individual liability prescribed. In this view it matters not whether the stock purchased by the corporation that issued it, becomes extinct, or is held subject to be reissued. It is enough to know that the corporation, as purchaser of its own stock, does not afford to creditors the security intended; and surely, if the law forbids the organization of a corporation without stock, because the required security is not given or furnished, it cannot be, that having brought the corporation into existence, it invests it with power to assume at pleasure the identical character or relation to the public that was an insurmountable objection to the giving of corporate existence in the first place." In accord with this view it was decided in *Barton v. Port Jackson etc. Road Co.*, 17 Barb. 397, that it was against public policy to allow a corporation to enter into a binding agreement to purchase its own stock. Statutes may be and frequently are passed prohibiting corporations from purchasing or dealing in its own stock. Thus under the Revised Statutes of the United States, section 5201, national banks are

prohibited from purchasing their own stock, unless necessary to prevent loss upon a debt previously contracted in good faith, and in the latter case the stock purchased must be sold or reissued within six months from the time of the purchase, or a receiver may be appointed to wind up the affairs of the corporation: *Johnston v. Lufkin*, 103 U. S. 800-802.

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## HARDING v. HAWKINS.

[141 ILLINOIS, 572.]

**COLLATERAL SECURITY — EFFECT OF REDUCING TO JUDGMENT.** — A creditor who holds the note of a third person indorsed to him by his debtor as collateral security for his debt may, after maturity, reduce the collateral to judgment. The judgment will then take the place of the collateral and stand as security for the payment of the debt, but satisfaction of the debt is also a satisfaction of the judgment, upon which no action can thereafter be maintained.

**EVIDENCE.** — **ALLEGATIONS IN AN ANSWER NOT RESPONSIVE** to the bill are not evidence in favor of the defendant, but to be available as a defense must be proved.

**JUDGMENTS — RELIEF AGAINST IN EQUITY.** — When a party to an action at law neglects to make a defense known to him, or which might have been known by the exercise of proper diligence, the judgment rendered therein will not be enjoined, or the party relieved in equity from the result of his own want of proper care and diligence, unless he was prevented from discovering and availing himself of such defense by the fraud of the opposite party, or by other cause beyond his control.

**JUDGMENTS — RELIEF AGAINST IN EQUITY.** — A judgment at law may be enjoined or other equitable relief given against it notwithstanding an ineffectual attempt to defend at law, if an existing equitable defense was not available in the action in which such judgment was rendered.

**JUDGMENTS.** — **EQUITY WILL GRANT RELIEF AGAINST** a judgment at law only when it is shown that there is a good and valid defense on the merits, of which defendant was ignorant at the time of the trial, and which he could not have discovered by the exercise of reasonable and proper diligence in time to set it up, or when an existing equitable defense is not available in the action at law. This rule applies as well to sureties as to principals or other parties.

**JUDGMENTS — ACTIONS ON — PLEA OF PAYMENT.** — In an action on a judgment, the defendant may plead payment and this issue will then be submitted to a jury, and if it is found that the judgment is in fact paid, the court will, on motion, stay further proceedings, and order an entry of the satisfaction of the judgment to be made on the record.

**JUDGMENTS — EQUITABLE RELIEF AGAINST, WHEN REFUSED.** — The collection of a judgment will not be enjoined or relieved against in equity on the ground that it was recovered on a prior judgment on a note held as collateral security when the debt was paid long before the recovery of the second judgment, if the debtor might have ascertained that fact by inquiry or the exercise of reasonable diligence, and had an ample remedy at law, by motion before the second judgment was rendered, to have an entry of satisfaction made of record.



*William J. Ammen*, for the appellant.

*D. Blackman*, for the appellee.

SHOPE, J. This was a bill filed by Charles and Frederick Hawkins in the Cook circuit court against George F. Harding and R. M. Whipple to enjoin the collection of a judgment recovered by Harding in the superior court of that county, December 20, 1883, against the complainants on a prior judgment in favor of Harding and against them, recovered in the superior court of Chicago, in May, 1867, for \$3,530.31. The bill was taken as confessed as to Whipple. Harding answered under oath, the oath not being waived, and the cause was heard on the bill, answer, replication, exhibits, and the testimony of the parties and witnesses taken in open court. The circuit court dismissed the bill for want of equity. Complainants appealed from this decree to the appellate court, where the decree of the trial court was reversed.

A brief statement of the facts is necessary to an understanding of the points determined. On December 19, 1866, Whipple gave to Harding five promissory notes, aggregating \$32,150.47, two of which were signed "R. M. Whipple & Co.," and the others "R. M. Whipple." At the time of their execution, Whipple delivered to Harding divers notes and obligations as collateral security for the payment of said notes, among which was the note of Charles and Frederick Hawkins, upon which judgment was obtained by Harding, as before mentioned, in 1867. The note was for three thousand five hundred dollars, payable to Whipple three months after date, and by Whipple assigned to Harding as collateral to said five principal notes. As between the Hawkinses and Whipple it was accommodation paper. There is, however, no evidence charging Harding with notice thereof. Whipple gave to Harding a power of attorney, authorizing him to sell so much of these collaterals as might be necessary to pay the principal debt, and Harding agreed, in writing, to return the residue to Whipple. As we understand the record it is not claimed that more than fifteen thousand dollars of the principal debt had been paid at the time Harding recovered judgment against Hawkins on said collateral note. Harding then had the right to reduce the collateral to judgment, and a defense by the makers, so far as appears, would have been wholly unavailing. The judgment took the place of the notes, and stood as security merely for the payment of the residue of the principal

debt. On the 6th of April, 1837, Harding brought an action of debt in the superior court of Cook County, founded upon this judgment rendered against the Hawkinses upon said note. Appellees interposed the plea of *nul tiel* record only. The issue was found in favor of Harding, and judgment entered against appellees for eight thousand two hundred dollars.

This bill is filed upon the theory that before the entry of the last judgment the five promissory notes given to Harding by Whipple had been fully paid and discharged by Whipple. It is conceded that if Harding had received full payment from Whipple the Hawkins note would be released from pledge as collateral, and under the contract between Harding and Whipple should be returned to Whipple by Harding unless he had acquired a right to retain the benefit of the judgment in some other way. Upon the return of the note to Whipple, it being accommodation paper, as before stated, it would cease to be binding upon the Hawkinses. It is conceded that the note in controversy originally came into the hands of Harding as collateral merely to said principal debt. Harding, in his original answer, sets up that after the delivery and maturity of the said three thousand five hundred dollar note, by virtue of the transaction with Whipple, he became the absolute and sole owner of said note; and by his amended answer "that shortly after the said collateral was deposited with him by said Whipple, and before said notes upon which it was deposited as collateral became due, he bought the note of said complainants described in said bill, of said Whipple, and paid in cash or its equivalent, to the said Whipple, the value thereof at par, in full." Both the original and amended answers deny notice, when purchasing of Whipple, of any defense to said collateral note. These allegations of the answer are not responsive to the bill, and to be of avail as a defense to complainants' right of recovery, must be proved: 1 Daniell's Chancery Practice, 844, and note.

On the hearing the five principal notes mentioned were produced by Whipple who testified that Harding had surrendered the notes to him in May, 1873. Harding testifies that according to his recollection they were surrendered in July, 1869; but under what circumstances, why they were surrendered, and what took place, the testimony of Whipple and Harding, who alone have knowledge upon the subject, is wholly irreconcilable. Their interests in the result are equal. If Harding recovers, Whipple will be liable over to the Hawkinses.

Whipple testifies that the notes were paid. Harding insists that in some way — how he is not definite or certain — there was a mere change in the form of the indebtedness. The notes having originally come to the hands of Harding as collateral merely, the presumption would be that he still held them in that capacity: 1 Greenleaf on Evidence, sec. 41. The principal notes being produced by Whipple from his possession, the presumption was that they were paid: *Walker v. Douglas*, 70 Ill. 445; *Sutphen v. Cushman*, 35 Ill. 186. The burden being upon Harding to establish his ownership of the Hawkins note, it is apparent he must fail if his evidence and that of Whipple are to be regarded as of equal credit, unless other evidence can be found to overcome the presumptions arising from the possession of the original notes by Whipple, and the original possession of the note as collateral by Harding. There are in this record some circumstances tending to corroborate Harding. If the original notes were paid in 1869, at the time Harding says they were surrendered, or in 1873, when Whipple says they were paid, it is at least strange that neither Whipple nor appellees procured an assignment or satisfaction of the judgment then standing of record against appellees. The note upon which it was rendered having been accommodation paper, it was the duty of Whipple to have had satisfaction entered.

But it is unnecessary to determine the case on the merits. The real question presented is whether conceding the complainants' case, they have a standing in a court of equity. The general rule is, that if the complainants had a defense at law they cannot be relieved from the judgment entered in the common law suit by application to a court of equity. Where a party neglects to make a defense at law which is known to him or might have been known by the exercise of proper diligence, the judgment will not be enjoined, or the party relieved in equity from the result of his own want of proper care and diligence, unless he was prevented from discovering and availing himself of such defense by the fraud of the opposite party or by other cause beyond his control: 1 Black on Judgments, sec. 387; *More v. Bagley*, Breese, 94; 12 Am. Dec. 144; *Beaumont v. Turcotte*, Breese, 167; *Palmer v. Bethard*, 66 Ill. 529; *Ames v. Snider*, 55 Ill. 498; *Winchester v. Grosvenor*, 48 Ill. 517; *Galena etc. R. R. Co. v. Ennor*, 116 Ill. 55; *Warren v. Cook*, 116 Ill. 199; *Tone v. Wilson*, 81 Ill. 529.

It is here insisted that complainants' case is taken out of

the rule; 1. Because they were ignorant of the defense to the entry of the judgment in favor of Harding; and 2. That the plea of payment could not be interposed in the action of debt upon the former judgment, and therefore the defense was unavailing at law.

A judgment at law may be enjoined when the defense is an equitable one, and not available in an action at law. If the matter relied upon by the complainants could not have been received as a defense in the action at law, equity may relieve, notwithstanding an ineffectual attempt to defend at law: 1 Black on Judgments, 388; *Vennum v. Davis*, 35 Ill. 568; *Crim v. Handley*, 94 U. S. 652. A party will also be excused from failing to interpose a legal defense under certain circumstances, where he is ignorant of such defense at the time of the trial of the common-law action in which the judgment was rendered. It is said: "It may be regarded as well settled, upon the authorities, that equity will grant relief against a judgment at law when it is shown that there is a good and valid defense to the action on the merits, of which the defendant was ignorant at the time of the trial, and which he could not have discovered, by the exercise of reasonable and proper diligence, in time to set it up at law. But it is an important corollary to the above rule or indeed, an integral part of the rule, that mere ignorance of the defense is not sufficient. It must be shown that the party is guilty of no negligence, and that he could not possibly have ascertained it by the exercise of careful and reasonable diligence. It must appear that the defendant's ignorance was not due to any lack of diligence on his part, or that it was caused by the act of the opposite party." It is not enough to call into activity the court of conscience that the complainant's case should be meritorious, but he must have acted in good faith and with proper diligence. It can make no difference that appellants occupied, in effect, the position of sureties originally, for although if Harding had had notice that their note was accommodation paper, they would still be required to make their defense at law if available, and upon neglect to do so could not afterwards be relieved in a court of equity: *Ramsey v. Perley*, 34 Ill. 504; *Mellendy v. Austin*, 69 Ill. 15.

It seems that at common law, prior to the statute of 4th Anne (c. 16, sec. 12), payment after the day could not be pleaded to an action for money due by deed or other specialty: 2 Saund. 48a, note h; 2 Black on Judgments, sec. 975.



By the statute referred to, not in force in this state, it is provided, among other things, that if the defendant had paid the judgment, he might plead payment in bar of the action upon the judgment. It would seem that we have no equivalent legislation in this state. The remedy at common law would have been *audita querela* (Com. Dig., tit. A; Bac. Abr., tit. Audita Querela; 3 Bla. Com. 406), or the defendant had a right to demand a warrant to some attorney of the court authorizing him to enter up satisfaction on the roll: *Bryley v. Sugg*, 1 Dev. & B. Eq. 366; 1 Archbold's Practice, 325; 2 Saunders's Practice Cases, 713. In most of the states the use of the writ *audita querela* has been superseded by the more summary mode of application to the court for relief by motion: 1 Am. & Eng. Ency. of Law, 1008. It also seems to have fallen into disuse in England, although perhaps revived within a later date: 3 Bla. Com. 406; *Sutton v. Bishop*, 4 Burr. 2286. We are not aware that the writ has been resorted to in this state, the more convenient and less expensive mode of proceeding by motion having been adopted in its stead: *People v. Barnett*, 91 Ill. 422. It is unnecessary to determine now whether the writ can be used with propriety under our practice. Nor do we intend to be understood as holding that where the judgment has been paid in full the plea of payment may not be interposed as a bar to an action on such judgment. It is stated by Black on Judgments, sec. 975: "There can be no question that such a plea would now be good in all the courts of this country": 4 Wait's Actions and Defenses, 494, and cases cited by the author. We do not, however, find it necessary in this case to determine that question. It cannot, however, be questioned that if the plea of payment was not good under our practice, appellees had their remedy by the writ of *audita querela*, if it is not to be regarded as obsolete, or by motion in the same court to have the judgment of 1867 satisfied, at any time before it was merged in the later judgment. Both of these remedies were, as we have seen, provided by the common law. In this state, where a judgment is in fact paid, the court on motion may stay further proceedings, and compel the entry of satisfaction of record: *Russell v. Hogan*, 1 Scam. 552; *Hoag v. Starr*, 69 Ill. 365; *Neal v. Hanley*, 116 Ill. 423; 56 Am. Rep. 784; Black on Judgments, 1014. The same rule has been adopted elsewhere: *Lister v. Mundell*, 1 Bos. & P. 428; *Smock v. Dade*, 5 Rand. 639; 16 Am. Dec. 780; *Job v. Walker*, 3 Md. 129;

*Dunlap v. Clements*, 18 Ala. 778; *Chambers v. Neal*, 13 B. Mon. 256; *Marsh v. Haywood*, 6 Humph. 210; *McMillan v. Baker*, 20 Kan. 50; *Spafford v. Janesville*, 15 Wis. 475; *McDonald v. Falvey*, 18 Wis. 571.

In cases arising upon motion it would seem that the same mode of trial ought to prevail as prevailed at common law in proceedings by the writ of *audita querela*, and such we find to be the practice. An issue is made and sent to the jury to be tried, as any other issue of fact: *Lister v. Mundell*, 1 Bos. & P. 427; *Horner v. Hower*, 39 Pa. St. 126; *Cooley v. Gregory*, 16 Wis. 303; *Baker v. Ridgeway*, 2 Bing. 41; 9 Moore, 114; Black on Judgments, 1014. The parties are thereby given their right of trial by jury. If, therefore, it be conceded the plea of payment could not be interposed, it is apparent that appellees, if the theory of their bill be true and the judgment was in fact in any way satisfied, had an adequate remedy at law at any time after satisfaction was made. The latest period at which any one places the satisfaction is that given by Whipple as May, 1873, so that from 1873 until the entry of the judgment, in 1888, the right to require satisfaction of the former judgment at law clearly existed. It is not shown or pretended that appellees were prevented from seeking redress or relief from the judgment by any act of appellant or by any one acting for or on his behalf. They having been served with process in the original action must have known of the rendition of the judgment, which remained unsatisfied of record. After the bringing of the last action by Harding they might still have proceeded to obtain satisfaction of the judgment upon which that action was predicated. Both actions were brought in the same court, and the court, in the exercise of its sound discretion, would undoubtedly have postponed the action of debt until the determination of the motion for the entry of satisfaction, upon proper application being made therefor.

It is insisted that appellees were ignorant of the fact that payment of the principal notes had been made at the time of the rendition of the second judgment. This may be conceded without at all affecting the result. No sufficient reason is shown why they did not ascertain the fact, if fact it was. It is apparent from the whole record that Whipple, whom they now produce to testify to such payment, not only had knowledge thereof during all the years mentioned, but that the exercise of the slightest diligence on the part of ap-

pellees would have apprised them of the same fact. There is no proof of anything tending to raise a presumption that Whipple was in any way hostile to them or would have declined giving the information upon simple inquiry. It is true that when Whipple testified on the hearing of this cause, practically twenty years after the transactions in controversy, he was unable to give the detail of what was done, or the precise terms of the satisfaction, without reference to papers and documents in his control, which apparently were for a time mislaid; but the fact that the principal debt had been paid, and thereby the judgment upon the collateral note discharged, was susceptible of proof, in any event, as early as 1873, and continuously thereafter.

We are of opinion that appellees, upon the theory of their bill, and conceding it to be true, had a complete defense at law, and that they have not shown such a state of facts as will, under the rules governing this and other courts in like cases, excuse them from not interposing the same in the common-law courts. There is a failure to show that diligence and good faith necessary to authorize the interposition of a court of equity in their behalf. The judgment of the appellate court is therefore reversed, and the decree of the circuit court dismissing the bill is affirmed.

Judgment reversed.

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JUDGMENTS—RELIEF AGAINST IN EQUITY: See *Sullivan v. Shell*, 36 S. C. 578; 31 Am. St. Rep. 894, and note; *Douglass v. Todd*, 96 Cal. 655; 31 Am. St. Rep. 247, and note; *Carney v. Marseilles*, 136 Ill. 401; 29 Am. St. Rep. 328; *Crocker v. Allen*, 34 S. C. 452; 27 Am. St. Rep. 831, and note.

JUDGMENTS—ACTIONS ON—PAYMENT AS DEFENSE.—Payment may be pleaded in bar of a judgment in New Jersey: *Gulick v. Loder*, 13 N. J. L. 68; 23 Am. Dec. 711. See also *Smock v. Dade*, 5 Rand. 639; 16 Am. Dec. 780.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**KANSAS.**

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**WALTON v. OLIVER.**

[49 KANSAS, 107.]

**CORPORATIONS — ORGANIZATION OF.** — A corporation must have a full and complete organization and existence as an entity and in accordance with the law to which it owes its origin before it can assume its franchise or enter into any kind of contract or transact any business, and whatever be the mode prescribed by the act of incorporation, a substantial compliance with all the provisions of the law under which it is created is required before the corporation can be said to have such an existence as will entitle it to do business.

**CORPORATIONS — IMPERFECT ORGANIZATION — PERSONAL LIABILITY OF DIRECTORS.** — When a corporate charter is duly filed in the office of the secretary of state naming certain persons as directors of the corporation, but no other or further steps are ever taken to complete the preliminary organization, or to comply with the law for the government of corporations, such corporation has no such existence as will authorize its officers to contract, transact any business, or incur any liability in its name, and when the directors named in the charter contract and incur liability in the name of such corporation, they render themselves personally liable.

*Eaton, Pollock, and Love, for the plaintiffs in error.*

*Hackney, Shartel, and Brown, and H. D. Cummings, for the defendants in error.*

GREEN, C. This action was commenced in the district court of Cowley County by the defendants in error to recover the sum of \$295 debt and \$45.40 costs from the plaintiffs in error, who were alleged to be the directors of the Arkansas City Athletic Association. The petition charged that after making and filing a charter in the office of the secretary of state, the defendants never perfected the organization of the



corporation by opening books for the purpose of receiving subscriptions; that they did not levy and collect any money from themselves, nor adopt any by-laws or other rules for the government of the corporation; that no meeting had ever been called for the election of directors or other officers; that the defendants had failed to comply with any of the requirements of the law for the government of corporations after the articles of incorporation had been filed; that on the eighteenth day of January, 1889, the plaintiffs recovered a judgment against such corporation for the sum of \$295 and \$45.40 costs; that an execution was issued upon such judgment and returned "no property found." It was further alleged, "That after the filing of the said act of incorporation the defendants assumed to act as such corporation, and for that purpose leased real estate, and purchased of the plaintiffs material and lumber, with which they erected a grand stand or amphitheater upon said leased ground to the amount and value of several hundred dollars, and paid to the plaintiffs thereon all but the amount represented by the aforesaid judgment, and in all their dealings with the plaintiffs, dealt in the name of said judgment defendant hereinbefore referred to; and the plaintiffs aver that, knowing of the filing of the aforesaid articles of incorporation, and believing that said defendants were acting in good faith, and that they were complying with the provisions of the laws of Kansas in such cases made and provided in all things, and having no cause to think otherwise, on the faith and credit of these men they sold said lumber and building material to them, and charged it to said corporation, of which they were the proprietors and incorporators, by their direction and instruction; that but for all of which the plaintiffs would not have furnished them with said materials and credit; that after said execution had been issued and returned unsatisfied, the plaintiffs applied to these defendants for the names of the officers and stockholders of said corporation, and these defendants declined to furnish either the names or the places of residence, and insolently informed the plaintiffs that there were no officers, no books, no directors, no stockholders, and no subscriptions, and that if the plaintiffs thought they had any remedy looking to the collection of said judgment, interest, and costs they were mistaken, etc., and now refuse to give the plaintiffs any information of any kind relative thereto whatsoever; that plaintiffs only learned the foregoing facts after the rendition of the aforesaid judgment."

The defendants filed a demurrer to this petition, which was overruled by the court, and judgment was rendered for the amount prayed for in the petition. The defendants elected to stand upon the demurrer and bring the case here for review.

It is first urged by the plaintiffs in error that the petition did not state a cause of action; that the petition did not show that the goods furnished, for which the original judgment was rendered, were furnished at the request of the plaintiffs in error before the Arkansas City Athletic Association became a body corporate; but that the petition showed upon its face that the goods were sold upon the credit of the corporation, and that part of the purchase price of the goods was paid by the corporation. It is further insisted that the Arkansas City Athletic Association was legally incorporated, and that the organization became complete upon the filing of the charter with the secretary of state. This contention is not sound. The statute only provides that the existence of the corporation shall date from the time of filing the charter, and the certificate of the secretary of state shall be evidence of the time of such filing: Gen. Stats. of 1889, par. 1166. The statute is silent as to the organization. The rule is well established that a corporation must have a full and complete organization and existence as an entity, and in accordance with the law to which it owes its origin, before it can assume its franchise or enter into any kind of contract or transact any business; and whatever be the mode prescribed by the act of incorporation, a substantial compliance with all the provisions of the law under which it is created is required before the corporation can be said to have such an existence as will entitle it to do business: 4 Am. & Eng. Ency. of Law, 197, and authorities there cited. Now it is conceded in this case that nothing was done to perfect the organization after the charter was filed. A corporation cannot act without officers and agents, and it is powerless to do anything until its incorporators or promoters give it the means whereby it can act. The words "organize" or "organization" have a well-understood meaning; and as we construe them they mean the election of officers, providing for the subscription and payment of the capital stock, the adoption of by-laws, and such other steps as are necessary to endow the legal entity with the capacity to transact the legitimate business for which it was created. In this sense the corporation was not fully organized. While

it had an existence, the organization was never completed so that the corporation could do business.

In the case of *Hurt v. Salisbury*, 55 Mo. 310, which was an action brought upon a note purporting to have been executed by the directors of an agricultural association, the suit was brought against the directors upon the ground that the association was not incorporated at the time the note was given, and that the directors were therefore individually liable. It appeared that the association was not fully incorporated when the note was executed. The law required the charter to be filed with the recorder of the county where the corporation was located, and also in the office of the secretary of state. The charter was only filed with the recorder. The court held that the officers of the corporation had no power to issue the note, and that a note issued and signed by them would bind them personally, and not the corporation. The court said, in speaking of the attempted organization of that corporation:—

“It had organized under section 2, chapter 69, General Statutes of 1865, page 367, by signing and acknowledging and recording in the recorder’s office of the proper county the articles of association. This step being taken, it was an organized corporation, not for the transaction of business, but for the purpose of taking the next and last step to complete its authority to transact business and give date to its legal existence. Until the officers took this final and necessary step by depositing and filing in the office of the secretary of state a copy of the articles of association, as they stood recorded in the county, this corporation had no power to issue the note sued on. As it had no power to issue this note, the defendants are undoubtedly liable.”

“If a corporation be illegally formed, its members or stockholders are liable as partners for its acts or contracts; and directors, officers, and agents acting and contracting in its name render themselves personally liable”: Beach on Private Corporations, sec. 16; *Marshall v. Harris*, 55 Iowa, 182; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104; 41 Am. Rep. 85; *Coleman v. Coleman*, 78 Ind. 344.

While, in this case, the charter was filed with the secretary of state, the corporation had no officers outside of the directors named for the first year. No portion of the capital stock had been subscribed and no books opened, as required by paragraph 1173 of the General Statutes of 1889. In fact, nothing had been done to complete the preliminary business of organiz-

ing the corporation. We do not understand that a corporation can proceed to the transaction of business without any portion of its capital stock being subscribed or paid. It may have been the English rule, but in the United States it is otherwise: *Boone on Corporations*, sec. 113. The corporation has no means or capacity to act until some portion of the capital stock named in the charter has been subscribed and paid. Some states have, by a legislative rule, made directors of certain corporations jointly and severally liable for all debts of the corporation, until the whole amount of the capital stock has been paid in: *Rev. Stats. Wis.*, 1878, sec. 1901.

It is unnecessary for us to consider the other assignments of error, as the view that we take of the liability of the plaintiffs in error is not that of stockholders, and hence the rule laid down in the case of *Abbey v. W. B. Grimes Dry Goods Co.*, 44 Kan. 415, has no application in this case.

The question as to whether or not two of the defendants below were served with summons is not properly raised by the record. The summons is not in the record, and we cannot say whether these two defendants were served or not. We advise an affirmance of the judgment.

By the COURT: It is so ordered.

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**CORPORATIONS — ORGANIZATION OF.** — The existence of a corporation formed under the provisions of a general statute must be proved by showing at least a substantial compliance with the requirements of the statute: *Mokelumne Hill Min. Co. v. Woodbury*, 14 Cal. 424; 73 Am. Dec. 658, and note; *International Fair etc. Ass'n v. Walker*, 88 Mich. 62.

**CORPORATIONS DE FACTO.** — A corporation *de facto* is a corporation organized and operated under color of law, but not legally constituted; *American Salt Co. v. Heidenheimer*, 80 Tex. 344; 26 Am. St. Rep. 743; *Allen v. Long*, 80 Tex. 261; 26 Am. St. Rep. 735, and note.

**CORPORATIONS — IMPERFECT ORGANIZATION — LIABILITY OF MEMBERS.** — An association having made an unsuccessful attempt to incorporate does business as a partnership: Note to *Phipps v. Jones*, 59 Am. Dec. 712; and the individual property of the stockholders in such a company will be liable for the corporate debts: *Heuer v. Carmichael*, 82 Iowa, 288; but the stockholders of a *de facto* corporation are not liable to its creditors as partners: *American Salt Co. v. Heidenheimer*, 80 Tex. 344; 26 Am. St. Rep. 743, and note. This question and many others arising out of the defective organization of incorporations are discussed in the note to *People v. Montecito W. Co.*, ante, p. 176-186.



## PHENIX INSURANCE COMPANY v. MUNGER.

[49 KANSAS, 178.]

**INSURANCE — WAIVER OF PROOF OF LOSS — EVIDENCE OF USAGE.** — A fire insurance company cannot be bound by the usage and custom of other insurance companies doing business in the vicinity in regard to dispensing with proofs of loss, when the first-named company has expressly contracted for the performance of a certain condition precedent as to proof of loss before the insured is entitled to recover. In an action on the policy, evidence as to the usage and custom of the company sued in regard to waiver of proof of loss, is admissible, but evidence of the practice and usage of other companies doing business in the same locality, is inadmissible.

**INSURANCE — POWER OF GENERAL AGENT TO WAIVE PROOF OF LOSS BY PAROL.** — An agent of an insurance company who is given full power to receive proposals of insurance against loss and damage by fire, to fix rates of premium, receive moneys, and countersign, issue, and renew policies within a certain district within a state, is a general agent and may, after loss, bind the company by a parol waiver of conditions relating to proofs of loss, although the policy provides that a waiver shall be void unless in writing, signed by the agent, and indorsed thereon.

*T. M. Noble and W. C. Webb*, for the plaintiff in error.

*Homer Kennett, Jay F. Close, and N. T. Van Natta*, for the defendant in error.

**GREEN, C.** This was an action brought by Frank N. Munger against the Phenix Insurance Company of Brooklyn, on a policy of insurance for one thousand dollars, issued by the latter on a barn and carriage house belonging to the former. The insured property was destroyed by fire on the twenty-fourth day of November, 1887. The plaintiff's petition contained the following allegations as to the performance of all conditions precedent and notice to the company of the loss: "That after said loss plaintiff performed each and all of the matters and things required of him to be done by the terms of said policy of insurance, and has and did perform all the conditions precedent on his part, except that he did not within thirty days after the loss make and forward to said company a verified statement of said loss as provided for in said policy; but plaintiff says that within ten days after the said fire, and after said company had been duly notified of said loss, plaintiff applied to W. H. Bell, the agent for the company at Belleville, Kansas, and who made said contract of insurance with said plaintiff, and who was their authorized agent to issue policies of insurance for said company and consummate the contract, who informed the plaintiff that it was of no use to

make a verified statement of the loss by said fire; that said company did not insist on those provisions in their policy, and that the company would pay said loss in a few days; that plaintiff, relying on what said Bell told him, did not make out a verified statement of said loss within thirty days after said loss, but thereafter, and in the month of March, 1888, he learned that the said company claimed that proof of loss, duly verified, with the certificate of a magistrate and of a builder, should have been sent, notwithstanding the waiver of the same by said W. H. Bell; and said Munger then, and on or about the 16th of March, 1888, made out and forwarded by mail to said company's western department office at Chicago a duly verified proof of loss, with certificate of a magistrate and of a builder thereto attached, as required by said policy, and the same was received by said company; that if the said Bell did not have the authority to waive the requirements of said policy relative to proof of loss, plaintiff did not know it, but on the contrary supposed he had such authority."

The insurance company answered, and set up six defenses. The first and second defenses alleged that Munger misrepresented the facts as to the ownership of the land upon which the insured property stood. The third defense was, that Munger had failed to comply with the conditions of the policy, which required him within thirty days after the loss to make proof and submit it to the defendant company, and that by reason of such failure the policy became void. The fourth defense averred that "W. H. Bell was not their authorized agent to adjust or settle losses, and that he never had any authority delegated to him by said company defendant to adjust or settle the loss claimed by plaintiff, or to waive the terms or conditions of said contract, as provided by condition 6 in said policy," which reads as follows:—

"6. . . . It is understood and agreed that agents of this company have no authority, in any manner, or by any act or omission whatsoever, either before or after making this contract, to waive, alter, modify, strike from this policy, or otherwise to change any of its conditions or restrictions, except by distinct specific agreement clearly expressed and indorsed hereupon, and signed by the agent making it. Nor shall silence upon receipt of notice of breach of any condition or restriction herein, or failure to declare this policy forfeited thereby, or the issuance of any renewal or new policy, or the acceptance of any premium or other money, or any other act

or omission whatever, by any agent of this company, whether with or without the knowledge of such breach, or whether before or after the making of this contract, work any waiver of any such conditions or restrictions, or effect any estoppel against this company, or deprive it of any forfeiture or defense, either in law or in equity, to any action upon this policy."

The plaintiff's amended reply alleged that he requested W. H. Bell to write to the defendant and ask it to give his loss attention and adjust the same, and that the general agent of the defendant wrote Bell, within thirty days after the loss, that the plaintiff's loss would have attention and be adjusted, which letter was shown to the plaintiff, and he relied on the promise of the general agent, as well as its local agent, so made to him, as he had alleged in his petition, notwithstanding the verified proof of loss was not sent to the company within thirty days after the fire. The case was tried by the court, and resulted in a judgment for the plaintiff for the amount of the policy and interest. The insurance company brings the case here.

The controlling question in this case is, whether or not the insurance company waived any of the written conditions of the policy requiring the assured to give notice of loss, and render an account of the same to the company within thirty days after the fire. To establish a waiver, the plaintiff testified over the objection of the defendant that, —

"Mr. Bell told me it was not necessary; that he never had made proofs of any losses that he had had in town, and that none of the companies doing business here ever made proofs that he knew of. He told me that he had notified the company of the loss, and that there would undoubtedly be an agent here in a very few days to attend to it. He also cited me to a building on the corner that he had a risk on; that they made no proof, and that the adjuster had been here and adjusted the loss. Told me it would be better to let it stand until the adjuster came, and then if he required proof I could make it, or he could ask me any questions he saw fit about the fire."

To further establish the fact of a waiver, the plaintiff placed W. H. Bell, the agent of the company, upon the witness stand, who testified that his business was "real estate, farm loans, and insurance." He designated four insurance companies for which he was agent: The Insurance Company of North America, the Farmers', the Connecticut, and the Phenix of

Brooklyn; that he had never before had a loss under a policy issued by the latter company.

The next witness called by the plaintiff was George S. Simonds, who had been local or recording agent for different insurance companies for about ten years. The witness was then asked if he was familiar with the practice and rules of insurance business in reference to losses, and the conduct of the business after a loss had occurred, in the vicinity of Belleville. Objection was made to this question, and the court asked counsel what he wanted to show by this question. The following appears in the record:—

“Mr. Kennett [Munger’s counsel]: we wish to show by this witness that the custom of insurance companies in this vicinity is to never require proofs of loss until an examination has been made by an adjuster, and that provision of the policy is never insisted upon. Objected to by defendant as being incompetent, irrelevant, and immaterial, which objection was by the court overruled, to which ruling the defendant excepted.

“A. I do, so far as I have been connected with them — my companies — companies which I represent.

“Q. You may state what the custom of insurance companies is, in this neighborhood, in reference to requiring proofs of loss, and whether such proofs are or are not required before examination is made by the adjuster. Objected to by defendant as being incompetent, irrelevant, and immaterial, which objection was by the court overruled, to which ruling the defendant excepted.

“A. I have never known of a case wherein it has been required until this case; never has one come to my knowledge.

“Q. Have you been familiar with the facts and circumstances and the adjustment of insurance losses that have occurred in this vicinity since your residence here? A. I have, in several instances.

“Mr. England: We object to the question because it is incompetent, irrelevant, and immaterial, and move to strike out the answer for the same reasons; which objection and motion were by the court overruled, to which ruling defendant excepted.”

Other evidence of like import was admitted, over the defendant’s objections.

We are clearly of the opinion that this evidence was incompetent, and prejudicial to the rights of the defendant. The plaintiff was attempting to establish a waiver of certain con-



ditions imposed by an express contract entered into by him and the defendant. The evidence could not by any fair interpretation be made to extend beyond the custom of the party making the contract. In other words, the defendant could not be bound by the usage and custom of other companies doing business in the vicinity, where it had expressly contracted for the performance of a certain condition precedent before the plaintiff would be entitled to recover. We think evidence would be admissible as to the usage and custom of the defendant in the vicinity, in regard to the waiver of the proof of loss, but we know of no rule by which it could be bound by the practice and usage of other insurance companies in the same locality.

In the case of *Insurance Co. v. Norton*, 96 U. S. 234, Mr. Justice Bradley, in speaking for a majority of the court, said: "As denoting the power given by an insurance company to a local agent, evidence is admissible as to its practice in allowing him to extend the time for the payment of premium notes; and the jury, upon such evidence, may find whether he was authorized to make such an extension, and if so, whether it was in fact made in the case on trial." Where there is an express contract, we do not think it can be varied by the custom of other parties.

In *Graham v. Trimmer*, 6 Kan. 237, it was said: "It is, however, to be remarked that evidence of the nature referred to will not have the effect of changing or affecting an express contract of the parties in regard to the subject-matter to which it is directed."

In *Stout v. McLachlin*, 38 Kan. 120, the rule is stated: "The proof of usage can only be received to show the intention or understanding of the parties in the absence of specific agreement or to explain the terms of a written contract."

In the case of *Barnard v. Kellogg*, 10 Wall. 390, Mr. Justice Davis said: "The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation, on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied."

But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. "Usage," says Lord Lyndhurst, "may be admissible to explain what is doubtful; it is never admissible to contradict what is plain."

In the case of *Simmons v. Law*, 3 Keyes, 219, the court said: "A clear, certain, and distinct contract is not subject to modification by proof of usage. Such a contract disposes of all customs by its own terms, and by its terms alone is the conduct of the parties to be regulated, and thus their liability to be determined."

The supreme court of Illinois held, in the case of *Dixon v. Danham*, 14 Ill. 324, that no usage or custom could be admitted in evidence to vary or control the express terms of a contract, but that evidence might be admitted to determine that which by the terms of the contract was left undetermined.

In the case of *Schooner Reeside*, 2 Sum. 567, Mr. Justice Story stated the correct rule when he said: "The true and appropriate office of a usage or custom is to interpret the otherwise undeterminate intention of the parties, and to ascertain the nature and extent of their contracts, arising not from the express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character. As sustaining this doctrine, see Clark's *Brown on Usage and Customs*, 83, and authorities there cited; *Lawson on Usages and Customs*, 435; *Partridge v. Insurance Co.*, 15 Wall. 575.

In this case there was a written contract, expressing what was to be done by the parties; and we do not think this agreement could be modified by the custom of other insurance companies or their agents, in regard to dispensing with proofs of loss. If it had been the custom and usage of the plaintiff in error not to require these proofs of loss, the evidence might be competent, for the purpose of indicating the power given by the company to its agents to waive such requirements, as stated in the case of *Insurance Co. v. Norton*, 96 U. S. 234; but beyond that we do not think the rule should be extended.

As this case must go back to the district court for another trial, and the question of the authority of the agent of the plaintiff in error is one of the controlling questions in the case, it becomes necessary for us to determine the nature and extent of his authority. In speaking of such agents, Mr. Jus-

tice Brewer said, in the case of *American Central Ins. Co. v. McLanathan*, 11 Kan. 549: "The bulk of the fire insurance business of this state is done by eastern companies, which are represented here by agents. These agents are authorized to issue policies of insurance, and the entire consummation of the contract is intrusted to them. Blank policies, signed by the home officers of the company, to be filled up and issued, and to be binding when countersigned by the agent, are placed in their hands. It is a matter of no small moment, therefore, that the exact measure and limit of the powers of these agents be understood. All the assured knows about the company is generally through the agent. All the information as to the powers of and limitations upon the agent is received from him. Practically, the agent is the principal in the making of the contract. It seems to us, therefore, that the rule may be properly thus laid down, that an agent authorized to issue policies of insurance, and consummate the contract, binds his principal by any act, agreement, representation, or waiver, within the ordinary scope and limit of insurance business, which is not known by the assured to be beyond the authority granted to the agent."

In the case of *German Ins. Co. v. Gray*, 43 Kan. 497, 19 Am. St. Rep. 150, this case was followed, and it was held in that case that, "an insurance company might through its agents, by a parol contract, waive provisions stated in the policy with reference to the manner of altering or waiving its terms and conditions. In *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143, the court, in considering the question whether an agent of a company might change by parol the conditions of a policy wherein it was provided that it could only be done upon the consent of the company written thereon, held that the written policy might be changed by parol, and stated that 'a written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol, than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it.'"

It is claimed that by the sixth condition in the policy agents of the company have no authority to make any changes except by distinct agreements in writing, indorsed on the policy, and signed by the agent making them. The answer to this contention is that a corporation can act only

through its agents. The limitation and restriction is too broad and sweeping. "Agents of this company have no authority in any manner or by any act or omission," etc., is the language of the restrictive proviso. What agents or officer can change or modify the terms of a policy unless it be in writing and indorsed thereon? Not the president; he is but an agent, with extended powers; not the general agent, because he is only an agent with less power, perhaps, than the president. "A contracting party cannot so tie his own hands, so restrict his own legal capacity for future action, that he has not the power, even with the assent of the other party, to bind or obligate himself by his further action or agreement, contrary to the terms of the written contract": *Lamberton v. Connecticut F. Ins. Co.*, 39 Minn. 129.

"The fact that a policy is written does not prevent its change by subsequent parol agreement. Any written contract not within the statute of frauds may be changed by parol": *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Seaman v. O'Hara*, 29 Mich. 66. This rule has been applied to the enlargement and continuance of policies of insurance: *Kennebec Co. v. Augusta Ins. Co.*, 6 Gray, 209; *Trustees etc. v. Brooklyn F. Ins. Co.*, 19 N. Y. 305.

Upon the question of the power of an agent to waive proof of loss, the rule is laid down in Wood on Fire Insurance, sec. 419,—

"Where an agent is intrusted with policies signed in blank, and is authorized to issue them upon the application of parties seeking insurance, he is thereby clothed with apparent authority to bind the party in reference to any condition of the contract, whether precedent or subsequent, and may waive notice or proofs of loss, and may bind the company by his admissions in respect thereto."

Again the same author says,—

"Although the policy specially provides that preliminary proof of loss shall be made in a particular mode, and within a certain limited time, yet the company may, through its agents even, waive the benefits of the provisions, and a waiver may be implied from the manner in which the company or its agents have dealt with the policy holder subsequent to the loss; and where there is no dispute as to the facts, the question as to whether compliance with such preliminaries has been waived is one of law for the court": Wood on Fire Insurance, sec. 447. See also Bliss on Insurance, sec. 296; *Phoenix*



*Ins. Co. v. Bowdrie*, 67 Miss. 620; 19 Am. St. Rep. 326; *Insurance Co. v. Colt*, 20 Wall. 560.

We think the commission of W. H. Bell from the plaintiff in error constituted him a general agent of the company at Belleville, with full power to receive proposals for insurance against loss and damage by fire, to fix rates of premium, receive moneys, and countersign, issue, and renew policies. As stated in the case of *German Ins. Co. v. Gray*, 43 Kan. 497, 19 Am. St. Rep. 150, he fully represented the company within a certain district. He was authorized to do business for the plaintiff in error at Belleville and vicinity. All the knowledge the insured had of the company at the time he obtained his policy and sustained the loss was through this agent.

In the case of *Rivara v. Queen's Ins. Co.*, 62 Miss. 728, it was said: "The powers of insurance agents to bind their companies are varied by the character of the functions they are employed to perform. Their powers in this respect may be limited by the companies, but parties dealing with them as to matters within the real or apparent scope of their agency are not affected by such limitations unless they had notice of the same. An insurance agent clothed with authority to make contracts of insurance, or to issue policies, stands in the stead of the company to the assured. His acts and declarations in reference to such business are the acts and declarations of the company. The company is bound, not only by notice to such agent, but by anything said or done by him in relation to the contract or risk, either before or after the contract is made."

The judgment of the district court should be reversed, and a new trial granted, upon the first assignment of error discussed in this opinion.

By the COURT. It is so ordered.

All the Justices concurring.

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CUSTOM — WHEN PROOF OF WILL NOT CONTROL CONTRACT. — A local usage, inconsistent with an express contract made at the place where such usage prevails, or contradicting its terms, is not a part of such contract, and cannot be given in evidence to contradict or avoid it: *Hopper v. Sage*, 112 N. Y. 530; 8 Am. St. Rep. 771, and note; *Brown v. Foster*, 113 Miss. 136; 18 Am. Rep. 463; *Randall v. Smith*, 63 Me. 105; 18 Am. Rep. 200, and extended note; *Burdman v. Spooner*, 13 Allen, 353; 90 Am. Dec. 196, and note; *Cox v. Peterson*, 30 Ala. 603; 68 Am. Dec. 145; *Barlow v. Lambert*, 28 Ala. 704; 65 Am. Dec. 374, and note, with prior cases collected. See also extended note to *Willmering v. McGaughey*, 6 Am. Rep. 678; *Luke Store etc. Ry Co. v. Richards*, 126 Ill. 448.

A local usage that notice of the cancellation of a policy of insurance shall be given to the broker by whom it was obtained cannot be allowed to prevail where the policy stipulates that notice shall be given to the assured: *Mutual Ass. Soc. v. Scottish Union etc. Ins. Co.*, 84 Va. 116; 10 Am. St. Rep. 819, and note. If, however, an insurance company by its own habits and course of dealing creates in the mind of a policy holder a belief that a particular condition in its policy will be waived, it is binding on the company: *Home Protection v. Avery*, 85 Ala. 348; 7 Am. St. Rep. 54.

INSURANCE — WAIVER OF CONDITIONS BY AGENTS. — A policy of insurance can be modified or a condition therein waived by the general agent of the company: *German Ins. Co. v. Gray*, 43 Kan. 497; 19 Am. St. Rep. 150, and note with cases collected. See also *Dibrell v. Georgia Home Ins. Co.*, 110 N. C. 193; 28 Am. St. Rep. 678, and note; *Berry v. American etc. Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548, and note; also monographic note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 229-238.

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## WAGNER v. DARBY.

[49 KANSAS, 343.]

MECHANIC'S LIENS — WHO ENTITLED TO. — A lien is not acquired by a vendor for materials sold to a contractor when they are supplied under an ordinary sale on credit to him only, though he may actually use them in building a house or making an improvement.

*Ritter and Skidmore*, for the plaintiff in error.

*John, Wiswell, and Joseph T. Ryerson and Son*, for the defendant.

HORTON, C. J. This was an action brought by Adam Wagner, assignee of Swift's Iron and Steel Works, against H. C. Darby and others, to enforce a lien upon certain lots in the city of Columbus in this state. The plaintiff claimed to have sold H. C. Darby, under a contract, iron amounting to \$2,023.21 on July 13, 1887, for the erection of a standpipe on the lots. The plaintiff resided at Newport, Kentucky, and owned and operated iron mills at that place. H. C. Darby owned and operated shops at Kansas City, Missouri, and kept his general offices there. He was engaged in the manufacturing of steam boilers, in the repairing and rebuilding of second-hand boilers, in the manufacturing of engines, in the erection of standpipes, and in the repairing of gas systems. About 50,000 pounds of the iron purchased on July 13th, of the value of \$1,325, was used by Darby in the erection of the standpipe. The balance of the iron was used by him for other purposes. A trial was had before the court without a jury. No special findings of fact were requested or filed. A

personal judgment was rendered in favor of the plaintiff and against Darby for the value of the iron purchased, but a general finding was made against the plaintiff upon the mechanic's lien, and a judgment entered accordingly.

A lien is not acquired by a vendor for materials sold to a contractor, when they are supplied under an ordinary sale on credit, though the contractor may actually use them in building a house or making an improvement: *Clark v. Hall*, 10 Kan. 81; *Weaver v. Sells*, 10 Kan. 609; *Chapin v. Persse Paper Works*, 30 Conn. 471; 79 Am. Dec. 263; *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507; 64 Am. Dec. 675. The general finding and judgment that the plaintiff had no lien on the lots compels an affirmance, if there is any evidence in the record tending to show that the iron was furnished at Kansas City, Missouri, upon the credit of the contractor, and not upon that of the building. There is ample evidence sustaining such a view of the case, and therefore the judgment of the district court must be affirmed.

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MECHANIC'S LIENS — WHO ENTITLED TO. — If materials are sold and delivered to a contractor without any knowledge on the part of the seller that they are to be used in the construction of a particular building, the vendor cannot maintain a lien against the owner of such building: *Whittier v. Puget Sound etc. Banking Co.*, 4 Wash. 666; 31 Am. St. Rep. 944, and note with cases collected.

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## O'KEEFFE v. FIRST NATIONAL BANK.

[49 KANSAS, 347.]

NEGOTIABLE NOTES MAY BE TRANSFERRED BY MERE DELIVERY and without written indorsement.

NEGOTIABLE INSTRUMENTS — POSSESSION AS EVIDENCE OF OWNERSHIP. — In an action to recover on a note and to foreclose a mortgage given as security therefor, the possession of the note, although it contains no written indorsement or transfer to the holder, is *prima facie* evidence of ownership as between such holder and the vendee of the mortgaged premises, who purchased after the execution of the mortgage.

*J. A. Broughten*, for the plaintiffs in error.

*John V. Coon, and Gregg and Gregg*, for the defendants in error.

JOHNSTON, J. This was an action brought by the First National Bank of Frankfort, Kansas, to recover upon a promissory note executed on the fourteenth day of May, 1883, by H. H. Lowery and Mary E. Lowery, to Walter Bowman and

Henry Bowman Brady for fifteen hundred dollars, payable October 1, 1886, with interest at the rate of eight per cent per annum, and also to foreclose a mortgage executed by the Lowerys upon the same day to secure the payment of the note. The bank alleged in its petition that the payees named in the note, for a valuable consideration, had sold and delivered the note to it before the maturity thereof, and that it was then the holder and owner of the note and coupons as well as the mortgage deed, and was entitled to sue and maintain its action thereon. It was also alleged that default had been made in the payment of the interest due upon the note, and that according to the terms of the note and mortgage the whole amount was then due, and that on the first day of October, 1885, there was due the bank thereon the sum of \$1,620. There was a further allegation that subsequent to the execution of the mortgage, the Lowerys had by a deed of general warranty conveyed the land to Jeremiah and Catharine O'Keeffe, and they were made defendants in the action. The O'Keeffes filed an answer setting forth several defenses, the first of which was a general denial. The Lowerys answered, admitting the execution and delivery of the note and mortgage, for which they received the full amount of fifteen hundred dollars; and the bank replied, denying all the allegations set forth in the answer and cross petition of the O'Keeffes. At the May term, 1889, a trial was had by the court without a jury upon the issues so formed, and the bank offered in evidence the note and coupons, also the mortgage, which were admitted over the objection of the O'Keeffes. No other evidence was offered by either party, and the court awarded judgment against the makers of the note, and decreed the foreclosure of the real estate described in the mortgage.

The O'Keeffes now contend that the proof offered is insufficient to sustain the judgment that was rendered. They claim that, as the issues were formed, proof was necessary that the bank was the owner and holder of the note. The note was not indorsed by the payees, and there was no written transfer of the same to the bank, and, as its ownership of the note had been denied, it was incumbent upon the bank to prove that it was the owner and holder of the same. We think the proof offered was sufficient. The note and mortgage were in the possession of the bank and were produced by it at the trial. A negotiable note may be transferred without written indorsement and by mere delivery. The possession of the note and



its production at the trial furnished *prima facie* evidence of ownership in the bank, as between the contending parties in this action. If the controversy had been between the payees and a stranger, a different presumption would arise; but here neither the payees nor the makers are questioning the ownership of the note by the bank; and, as against the plaintiffs in error, who only claim an interest in the premises mortgaged to secure the payment of the note, the bank, holding possession, is *prima facie* the owner.

Some of the considerations presented by the plaintiffs in error would be entitled to great weight if the payees were contesting the ownership of the unindorsed paper with a stranger in possession; but when the bank produced and read the note in support of its title, it furnished presumptive evidence upon which it might safely rest; and nothing being shown to repel the force of the presumption, it was entitled to recover: *Williams v. Norton*, 3 Kan. 295; *Washington v. Hobart*, 17 Kan. 275; *Eggen v. Briggs*, 23 Kan. 710; *State Sav. Ass'n v. Barber*, 35 Kan. 488; *Durein v. Moeser*, 36 Kan. 441; *King v. Gottschalk*, 21 Iowa, 512; *Tuttle v. Becker*, 47 Iowa, 486; *Gill v. Johnson*, 1 Met. (Ky.) 649; *Jackson v. Love*, 82 N. C. 405; 33 Am. Rep. 685; *Robertson v. Dunn*, 87 N. C. 191; *Garner v. Cook*, 30 Ind. 331; *Gano v. McCarthy*, 79 Ky. 409; *Pomeroy's Remedies*, sec. 140.

The judgment of the district court will be affirmed.

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**NEGOTIABLE INSTRUMENTS — TRANSFER BY MERE DELIVERY.** — The only instruments transferable by delivery are bills and notes payable to bearer or payable to order and indorsed in blank: *Russ v. Smith*, 19 Tex. 171; 70 Am. Dec. 327. A note payable to a party named or bearer passes by mere delivery without indorsement by the party named: *Tillman v. Ailles*, 5 Smedes & M. 373; 43 Am. Dec. 520, and note; *Pu'num v. Crymes*, 1 McMull. 9; 36 Am. Dec. 250; but in Illinois this is not true: *Roosa v. Crist*, 17 Ill. 450; 65 Am. Dec. 679, and note. But a transferee of a promissory note by delivery without indorsement, while he acquires title, does not acquire the rights of a bona fide purchaser: *Moore v. Miller*, 6 Or. 254; 25 Am. Rep. 518.

**NEGOTIABLE INSTRUMENTS — POSSESSION AS EVIDENCE OF OWNERSHIP.** — The possession and production of a note uncanceled and unextinguished by indorsements of payments or otherwise is *prima facie* evidence that the holder is the owner and that the note is unpaid: *Perot v. Cooper*, 17 Col. 80; 31 Am. St. Rep. 258, and note with cases collected; notes to *Vastine v. Wilding*, 100 Am. Dec. 351, and *Ross v. Smith*, 70 Am. Dec. 330. The unexplained possession of a note indorsed in blank is presumptive evidence of ownership: *Barnes v. Peel*, 77 Mich. 391.

## GOODWIN v. SMITH.

[49 KANSAS, 351.]

**JUDICIAL SALE AS DIVESTING TENANT'S TITLE TO GROWING CROP.**—A tenant who takes a lease after suit in mortgage foreclosure has been commenced against his landlord, and who sows a crop of wheat after the judgment in foreclosure, is not entitled to any share of such crop, if before it ripens or is ready to harvest there has been a judicial sale of the land and a sheriff's deed to the purchaser. In such case the purchaser is entitled to the whole of the crop.

*James Lawrence and W. W. Schwinn*, for the plaintiffs in error.

*Charles Willsie, and Reed and Nebeker*, for the defendants in error.

**SIMPSON, C.** This action was commenced to restrain Milton Smith, the defendant in error, from trespassing upon a quarter section of land in Sumner County, and from cutting, carrying away, or disposing of a wheat crop of ninety acres growing on said land. Smith had rented the land for a year from the owner, in March, 1890. He had planted corn and oats in the spring, and, in accordance with the terms of his lease, had planted ninety acres in wheat in the fall of 1890. At the time he rented the land a suit was pending to foreclose a mortgage on the land given by the grantor of the lessor. Judgment was rendered in this action on the seventh day of May, 1890. The land was sold at judicial sale on the twenty-ninth day of December, 1890 (after said wheat was up and growing), and the sale was confirmed and the sheriff ordered to make a deed on the second day of January, 1891. The sheriff executed a deed to said land to the Alliance Trust Company on the fifth day of January, 1891. Smith was ejected from said land by the sheriff, under a writ of possession, on the second day of February, 1891. On the twentieth day of June, 1891, the wheat being ripe and ready for harvest, Smith, with horses and reapers and help, entered upon said land with the intent of harvesting and saving said wheat crop, and of keeping two thirds of said crop, and of delivering one third of said wheat crop to the Alliance Trust Company or its agents, and would have cut and shocked said wheat in four days' time, if he had not been prevented by the temporary injunction issued in this action. By the terms of his lease, Smith was entitled to two thirds of the wheat and the landlord to one third. Subsequently, on

the final trial of the case, the district court of Sumner County dissolved the pending injunction, and rendered judgment in favor of Smith for costs. The Alliance Trust Company brings the case here, and asks us to reverse the ruling below, because they claim that all the rights of Smith were divested by the sale and deed under the foreclosure proceedings. The question to be decided, therefore, is, whether a tenant is entitled to his share of the crop who takes a lease after a suit in foreclosure against his landlord has been commenced, and sows a crop of wheat after judgment in the foreclosure proceedings, and there is a judicial sale of the land, and a sheriff's deed to the purchaser before the crop ripens and is ready to harvest. Following the case of *Beckman v. Sikes*, 35 Kan. 120, and authorities cited therein, we are compelled to answer this question in the negative. The question is not new, and has been troublesome with the courts, and a variety of contradictory statements can be found in the books, but the best-considered modern cases all favor the view of the plaintiffs in error. It is said in that case: —

“The lien of the mortgage and the judgment, however, attached to the growing crops until they were severed, as well as to the land. The mortgagor planted the crop knowing that it was subject to the mortgage, and liable to be divested by the foreclosure and sale of the premises. Any one who purchased such crops from him took them subject to the same contingency, as the recorded mortgage and decree of foreclosure were notice to him of the existence of the lien. If the land is not sold until the crops ripen and are removed, the vendee of the mortgagor would ordinarily get a good title; but if the land was sold and conveyed while the crops are still growing, and there was no reservation or waiver of the right to the crop at such sale, the title to the same would pass with the land”: citing *Smith v. Hague*, 25 Kan. 246; *Chapman v. Vearh*, 32 Kan. 167; *Garanflo v. Cooley*, 33 Kan. 137; *Jones on Mortgages*, secs. 676, 780, 1658; 1 *Washburn on Real Property*, 3d ed., 124; *Jones v. Thomas*, 8 Blackf. 428; *Downard v. Groff*, 40 Iowa, 597; *Shepard v. Philbrick*, 2 Denio, 174; *Lane v. King*, 8 Wend. 584; 24 Am. Dec. 105; *Gillett v. Balcom*, 6 Barb. 370; *Scriven v. Moote*, 36 Mich. 64; *Howell v. Schenck*, 24 N. J. L. 89; *Pitts v. Hendrix*, 6 Ga. 452; *Rankin v. Kinsey*, 7 Ill. App. 215; *Sherman v. Willett*, 42 N. Y. 146; 1 *Schouler on Personal Property*, 133.

While that case was between the purchaser from a mort-

gagor, who claimed a crop of growing and immature corn, and the purchaser of the land at a foreclosure sale, we think the same rule applies to a tenant who leases the land after a suit for foreclosure has been commenced and sows the wheat long after judgment has been rendered. We regard the case of *Downard v. Groff*, 40 Iowa, 597, as being directly in point, it being a controversy as to the rights of a tenant who had leased mortgaged land. The mortgage was executed on the 22d of October, 1867, and duly recorded on October 22, 1869. November 1, 1870, the mortgagor leased said premises, by parol, for one year, and the lessee went into possession. Suit to foreclose the mortgage was commenced January 4, 1871. A judgment of foreclosure was rendered April 29, 1871, and sheriff's deed executed to the purchaser on May 8, 1871. On this state of facts the court say:—

“By the lease from Dorstal, the mortgagor, to Leroy, the latter acquired no greater rights in the premises than the mortgagor had. The tenant stands exactly in the situation of the mortgagor. As between the mortgagor and mortgagee, the latter, by the foreclosure and sale, became entitled to the possession of the premises and to all the crops then growing thereon. This right of the purchaser was not and could not be defeated by reason of the lease, or by the fact that the possession was in, or that the crops were grown by, the lessee. The right to the possession and the right to the growing crops passed to the purchaser. If the tenant had been made a party to the foreclosure suit, the possession and the crops could have been delivered to him by process under that judgment; but since he was not made a party thereto, he cannot obtain that remedy except by some other action. The purchaser's rights, however, are just the same as they would have been if the tenant had been made a party. It follows, therefore, that Groff, by his purchase and sheriff's deed, became the absolute owner of the premises, including the crops growing thereon; and by his conveyance he invested the plaintiff herein with that ownership, and she might by proper action have enforced her rights as such owner against the tenant. Her failure to do so cannot give her any cause of action against the defendant, her grantor. There was, therefore, only a technical breach of warranty, entitling plaintiff to nominal damages.

“This is clearly the doctrine of all the cases, both ancient and modern, unless it may be the case of *Cassilly v. Rhodes*,



12 Ohio, 88, and that case seems to be based upon a construction of the appraisement law of that state; and the whole matter is well summed up in *Jones v. Thomas*, 8 Blackf. 428, as follows: 'A mortgagor is not entitled to emblements as tenants at will are: 4 Kent's Commentaries, 456. A mortgagee may evict the mortgagor without notice, and retain the emblements; and if a lease be granted subsequently to the mortgage without his concurrence, he may evict the lessee without notice, and retain the emblements': Coote on Mortgages, 351; 2 Swift's Digest, 156; 2 Cruise's Digest, 108. The reason of this was said by the older writers to be, that the lessee was evicted by a title paramount, and the lease of the mortgagor amounted to a disseisin of the mortgagee, which rendered the lessee upon entry a wrongdoer; but a sufficient and better reason appears to be that every person who takes under a mortgagor takes subject to all the rights of the mortgagee, unimpaired and unaffected: 4 Kent's Commentaries, 157; *McKircher v. Hawley*, 16 Johns. 289; *Jackson v. Hopkins*, 18 Johns. 487; *Dickenson v. Jackson*, 6 Cow. 147. When, therefore, a mortgagee obtains the absolute estate in fee of the mortgaged premises, by becoming the purchaser under a foreclosure and sale, he is entitled to the emblements, and may maintain trespass against the mortgagor or his lessee for taking and carrying away the crops growing at the time of the sale: *Lane v. King*, 8 Wend. 584; 24 Am. Dec. 105; the title and interest of the mortgagor or his lessee being subject to, and liable to be divested by, a foreclosure and sale of the mortgaged premises: *Shepard v. Philbrick*, 2 Denio, 174. See also the cases cited in a note to the last case, and also the numerous authorities cited and stated in Hill on Mortgages, 3d ed., vol. 1, c. 9, note c."

We are compelled by the force of this decision, as well as the language of this court in *Beckman v. Sikes*, 35 Kan. 120, to recommend that the judgment be reversed.

By the COURT: It is so ordered.

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**MORTGAGE FORECLOSURE AS DIVESTING TENANT'S TITLE TO GROWING CROPS.** — The lessee of the mortgagor is not entitled to crops growing on the premises, as against the mortgagee, under a lease subsequent to the mortgage: *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105, and note. As between a purchaser of land on a foreclosure sale and the mortgagor's tenant, crops planted by the latter and mature when the sheriff's deed is executed, do not pass by the sale: *Hecht v. Dettman*, 56 Iowa, 679, 41 Am. Rep. 131, and note wherein this subject is discussed. As between the mortgagee of

land who purchases at the foreclosure sale, and the execution creditors of the mortgagor in possession, the former is entitled to the growing crops: *Crews v. Pendleton*, 1 Leigh. 297, 19 Am. Dec. 750, and extended note discussing the question as to whom growing crops belong under an execution sale of the land; note to *Barrett v. Choen*, 12 Am. St. Rep. 366 on the same point. Where nursery trees are grown upon mortgaged land, a sale and conveyance made under the foreclosure of the mortgage will pass to the purchaser the title to such trees as against a person claiming under an execution sale against the mortgagor under a levy subsequent to the lien of the mortgage: *Batterman v. Albright*, 122 N. Y. 484; 19 Am. St. Rep. 510.

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## BOWLING v. GARRETT.

[49 KANSAS, 504.]

**MERGER OF MECHANIC'S LIEN IN LEGAL TITLE BY CONVEYANCE — JUDGMENT LIEN — SALE ON EXECUTION — INJUNCTION.** — When the holder of a mechanic's lien acquires the legal title by a conveyance of the property such lien will not be so merged in the legal title, that a judgment in favor of a third person against the original owner, rendered subsequent to the conveyance, but at a term of court commenced prior thereto, will create a lien prior or superior to the mechanic's lien, or will authorize a sale of all the property on execution issued under such judgment; and in such case when part of the consideration for such conveyance is that the holder of the mechanic's lien shall satisfy certain mortgages against the property, a part of which he has paid, the property cannot be sold under such execution free of such mortgages, and the holder of the mechanic's lien is entitled to an injunction against the judgment creditor to protect his interests as against such sale; but the judgment creditor is entitled to have the property sold under execution to satisfy his judgment, provided it is sold subject to the rights of the holder of the legal title founded upon his mechanic's and mortgage liens.

*Hutchings and Keplinger*, for the plaintiffs in error.

*McGrew and Watson*, for the defendants in error.

VALENTINE, J. This was an action brought in the district court of Wyandotte County on May 11, 1889, by Robert Garrett and D. J. Griest against Thomas B. Bowling, sheriff, and the Badger Lumber Company, to perpetually enjoin the defendants from selling certain real estate upon execution. The defendants demurred to the plaintiffs' petition, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled, and the defendants electing to stand upon their demurrer, judgment was rendered in favor of the plaintiffs and against the defendants, in accordance with the prayer of the plaintiffs' petition; and the defendants, as plaintiffs in error, bring the case to this court for review.

It appears that on June 5, 1888, the June term of the district court of Wyandotte County commenced. On that day, and prior thereto, Fred. M. Cox was the owner of the real estate now in controversy, which real estate was, however, subject to a mechanic's lien held by the plaintiffs amounting to \$2,380, and subject to three mortgage liens aggregating \$4,346.52. At that time, and prior thereto, the plaintiffs were partners, doing business under the firm name of the Wyandotte Lumber Company; and the defendant, the Badger Lumber Company, was and is a Missouri corporation. On that day, and prior thereto, the plaintiffs had an action pending in the district court of Wyandotte County against Cox to foreclose the aforesaid mechanic's lien; and the Badger Lumber Company also had an action pending in said court against Cox for about \$2,344. But there is no pretense that the Badger Lumber Company had any lien upon the property at that time. On June 7, 1888, the plaintiffs and Cox settled their affairs, and as a result of such settlement, Cox, in consideration of the aforesaid mechanic's lien and of the aforesaid mortgages which the plaintiffs agreed to pay, conveyed to them the property in controversy, which, as before stated, was subject to said mechanic's lien and to the aforesaid mortgages. The deed of conveyance from Cox to the plaintiffs was recorded on the same day, and on the same day the plaintiffs dismissed their action against Cox to foreclose their mechanic's lien and discharged the lien. Immediately afterward, the plaintiffs took the possession of the property, and have had the possession ever since. Afterward the plaintiffs paid on said mortgages the amount of \$2,127.50. Afterward, and on September 8, 1888, the defendant, the Badger Lumber Company, obtained a judgment in the district court in its aforesaid action against Cox for the sum of \$2,344; and this judgment, under the provisions of section 419 of the Civil Code, would relate back to June 5, 1888, when that term of the court commenced, and be a lien upon all the real estate owned by Cox at that time and in the meantime, and subject to execution. On April 5, 1889, an execution was issued upon the judgment in favor of the Badger Lumber Company and against Cox, and was placed in the hands of the defendant, Thomas B. Bowling, who was then the sheriff of Wyandotte County; and afterward, under the authority of such execution, he levied upon the property now in controversy, and advertised the same to be sold on May 20, 1889; but prior to May 20, 1889, and on

May 11, 1889, the plaintiffs, Garrett and Griest, commenced this present action against Bowling and the Badger Lumber Company to perpetually enjoin and restrain them from making such sale; and the only question now to be determined is whether such an action can be maintained or not.

Before proceeding further, we might state that the plaintiffs' petition does not state that the action of the Badger Lumber Company against Cox was pending in the district court of Wyandotte County on June 5, 1888, nor does it state that the June term of such court continued until September 8, 1888, when the Badger Lumber Company's judgment against Cox was rendered; and if such action was not pending on June 5, 1888, or if the said judgment was not rendered at the June term of said court, then the Badger Lumber Company's judgment could not be a lien upon any of Cox's real estate which he conveyed on June 7, 1888: Civil Code, sec. 419. The district court may have been holding a special term and not the June term of said court on September 8, 1888; but as the parties seem by their briefs to agree that the Badger Lumber Company's action against Cox was pending on June 5, 1888, and that its judgment was rendered at the June term of such court, on September 8, 1888, we have stated these matters as facts. Neither does the plaintiffs' petition state in express terms that the Badger Lumber Company's execution was levied upon the property in controversy, or that the same was appraised and advertised for sale without reference to the mechanic's lien and the mortgage liens; but we think it does so state by fair implication and inference, and in all probability such were the facts, and the petition was evidently so construed by the court below and the parties, and we shall so construe it. If the land had been levied upon and then appraised and advertised for sale subject to the aforesaid mechanic's lien and mortgage liens, the plaintiffs, we think, would not have had or now have any cause of action: Civil Code, sec. 418, as amended in 1887; for under the facts of the case and the aforesaid statutes, the Badger Lumber Company's judgment was a lien upon the entire property, subject, however, to the aforesaid mechanic's lien and mortgage liens.

We would also state, before proceeding further, that the plaintiffs' mechanic's-lien statement was filed on December 29, 1887, and if the lien had not been discharged except by lapse of time, it would have continued to be a valid and subsisting lien for at least one year after the statement was filed,



and might have continued to be a valid and subsisting lien for any greater period of time, providing a promissory note, not to become due for such greater period of time, had been given for the amount: Mechanic's Lien Law of 1872, sec. 4; Mechanic's Lien Law of 1889, sec. 5. The Badger Lumber Company's judgment was rendered before the expiration of the year, and the June term of the district court in 1888 must also have expired before the expiration of the year, for the September term of such court must necessarily have commenced, under the law, on the third Monday in September of that year: Laws of 1887, c. 147, sec. 12.

Also, before proceeding further, we would state "that the judgment lien cannot attach to a mere naked legal estate when the entire equitable estate is vested in some third person; and in no case will the judgment lien attach to any interest greater than the judgment debtor himself possesses in the land": *Harrison v. Andrews*, 18 Kan. 535, 541, 542, and cases there cited. "The judgment lien attaches merely to the interest of the judgment debtor in the land, and to nothing more: Civil Code, sec. 419. Every equity belonging to other persons will be protected by the courts. A judgment creditor is never considered as a *bona fide* purchaser, or even a purchaser at all": *Harrison v. Andrews*, 18 Kan. 535, 541, 542, and cases there cited. See also *Holden v. Garrett*, 23 Kan. 98.

We would also state that the Badger Lumber Company was not a party to the action brought by the plaintiffs against Cox to foreclose their mechanic's lien, and it had no right to be a party to such action; for it did not have, nor even claim to have, any lien upon the property in controversy until more than three months had elapsed after the plaintiffs' action had been dismissed, and until September 8, 1888. At the time when the plaintiffs' foreclosure action was dismissed, they could not have foreclosed their mechanic's lien as against the Badger Lumber Company, nor even have made such company a party to the foreclosure action. Hence if the plaintiffs' foreclosure action had been prosecuted to final judgment, and the judgment obtained before September 8, 1888, and the property sold thereunder to satisfy the mechanic's lien, the purchaser would undoubtedly have obtained a good and valid title, free and clear from all claim of the Badger Lumber Company. Then why might not the plaintiffs, instead of prosecuting their action to final judgment at great cost and expense, settle their affairs with the defendant Cox, and take

the property in payment of their mechanic's lien, free and clear from the claim of the Badger Lumber Company? Such would seem to be equity. Or does the law favor litigation? Would the law be so inequitable as to require the holder of a lien of any kind upon real estate to prosecute his claim in the courts to final judgment at great inconvenience and cost, when he could compromise and settle his claim with his debtor to the satisfaction of both parties, and without inconvenience or costs? And would the law require this or require him to lose everything?

The only distinction between the two cases is this: If the plaintiffs' action had been prosecuted to final judgment, only so much of the property would have been sold as would satisfy the liens upon it, and any surplus arising from the sale after satisfying the liens would have gone to Cox or to any of his creditors who might be entitled to it, while the compromise and settlement between the plaintiffs and Cox, and the conveyance by Cox to the plaintiffs, left the property subject to any judgment lien which might be procured against it at a term of the court then being held, and in an action pending at the commencement of the term. But the Badger Lumber Company's judgment lien attached only to the rights and interest of Cox in and to the property, and to nothing more. It left the property subject to all the prior liens, the mechanic's lien and the mortgage liens, and they have certainly not been extinguished for the benefit of the Badger Lumber Company. Certainly, by their extinguishment, so far as they have been extinguished, neither Cox nor the Badger Lumber Company has procured any enlargement of his or its rights or interests in or to the property in controversy; but these liens have not been extinguished so far as the rights of the plaintiffs are concerned. Cox parted with all his rights and interests in and to the property before they were extinguished, and the Badger Lumber Company's lien is upon no greater interest than Cox possessed. The Badger Lumber Company, however, makes a claim upon the following statement, found in the plaintiffs' petition, to wit: "All of the real estate in said lien described, including that conveyed to plaintiffs, was released and discharged from the operation thereof." This, of course, did not mean that the lien was discharged as to any one except as between the plaintiffs and Cox. Certainly, the plaintiffs did not intend to release the lien for the benefit of the Badger Lumber Company,

but only for the benefit of Cox, and they procured a conveyance of the land from Cox to themselves in return. Their agreement to release the lien, amounting to \$2,380, and their agreement to pay the mortgage debts, amounting to \$4,346.52, and their actual payment of \$2,127.50 thereof, were not intended for the benefit of or as gifts to the Badger Lumber Company, but were intended only for the benefit of Cox; and when they accepted the conveyance from Cox, which was a general warranty deed for the real estate in controversy, they did not intend that this conveyance should inure to the benefit of the Badger Lumber Company, so that such company might obtain a judgment lien upon all the property conveyed, free and clear from the prior encumbrances of the mechanic's lien and the mortgage liens, but they evidently intended only to protect and preserve their own interests. The whole tenor and effect of the petition shows that the plaintiffs did not intend to allege that their mechanic's lien was released and discharged as between themselves and the Badger Lumber Company, but only as between themselves and Cox; and that they intended that all their rights and interest under the mechanic's lien, and their settlement and compromise with Cox, their agreement to pay the mortgage debts, and the conveyance by Cox of the real estate in controversy to themselves, should preserve to them and to Cox all the rights and interests which such mechanic's lien, settlement, compromise, agreement to pay the mortgage debts, and conveyance would give or preserve to them. When they agreed to pay the mortgage debts, they became, according to all the authorities, as between themselves and Cox, the principal debtors as to such mortgage debt, and Cox, who up to that time was the principal debtor, then became only a surety: *Union Stove etc. Works v. Caswell*, 48 Kan. 689.

The Badger Lumber Company's judgment was not rendered against Cox until more than three months after Cox had conveyed by a general warranty deed to the plaintiffs all his possible interests in the property in controversy; yet, under the statutes, (Civil Code, sec. 419,) and by relation, the company by such judgment obtained a lien upon and a right to have sold upon execution whatever interest Cox may have had in such real estate at the time when he conveyed the same to the plaintiffs, but the company did not obtain a right to have any greater interest levied upon or appraised or advertised for sale or sold. The statute upon this subject reads as follows: —

"If any of the lands and tenements of the debtor which may be liable shall be encumbered by mortgage or any other lien or liens, such lands and tenements may be levied upon and appraised and sold subject to such lien or liens, which shall be stated in the appraisalment": Civil Code, sec. 448, as amended in 1887.

The sheriff, however, in this present case, at the instance of the Badger Lumber Company, has levied upon, has had appraised, has advertised for sale, and will sell if not prevented, a greater interest in the property than Cox had when he conveyed the property to the plaintiffs. Have the plaintiffs no remedy, or will injunction lie? As to subrogation, see the cases of *Crippen v. Chappel*, 35 Kan. 495, 499; 57 Am. Rep. 187; *Yaple v. Stephens*, 36 Kan. 680. In the first of the above cases it is said: "Generally where it is equitable that a person furnishing money to pay a debt should be substituted for the creditor or in place of the creditor, such person will be so substituted." See, also, with regard to mechanics' liens and preventing a merger, the case of *Delaware etc. Construction Co. v. Davenport etc. R'y Co.*, 46 Iowa, 406. In that case it is decided as follows: "When the holder of a lien acquires the legal title to the property upon which it rests with the intention that the lien should not be merged therein, the intention of the lien holder will prevail, as against junior encumbrancers." (*Syllabus*.)

In the case of *Richardson v. Hockenull*, 85 Ill. 124, it is decided as follows: "A court of equity will keep an encumbrance alive or consider it extinguished, as will best serve the purposes of justice and the actual and just intention of the parties. The intention is the controlling consideration, and to arrive at this the court will look into all the circumstances of the case.

"If a mortgage is the eldest lien, and is for an amount equal to or exceeding the value of the mortgaged premises, and the mortgagee, to avoid the expense of foreclosure, takes a conveyance from the mortgagor, a court of equity will not permit the mortgaged premises to be swept away from him by a junior judgment creditor, without payment of the mortgage, under the pretense that its lien has been lost by merger, but will enjoin the sale at law, or restrict the judgment creditor's lien to the equity of redemption." (*Syllabus*.)

In the case of *Brooks v. Rice*, 56 Cal. 428, it is decided as follows: "A conveyance of mortgaged premises by a mort-



gagor to a mortgagee, made in satisfaction of the mortgage, and for the purpose of avoiding the expense of a foreclosure, held, where there was an intervening mortgage, not to operate a merger." (*Syllabus*).

In the case of *Hanlon v. Doherty*, 109 Ind. 37, it is decided as follows: "Even when the fee in the mortgaged property has been vested in the mortgagee by a conveyance from the mortgagor, and the mortgage has been released, it will still be upheld, whenever it is for the interest of the mortgagee, by reason of some intervening title or other cause, that it should not be regarded as merged." (*Syllabus*.)

See also the following cases: *Bruse v. Nelson*, 35 Iowa, 157; *Lowman v. Lowman*, 118 Ill. 582; *Watson v. Gardner*, 119 Ill. 312; *Rumpp v. Gerkens*, 59 Cal. 496; *Besser v. Hawthorne*, 3 Or. 130; *Young v. Hill*, 31 N. J. Eq. 429; *Van Duyne v. Shann*, 41 N. J. Eq. 311; *Stantons v. Thompson*, 49 N. H. 272. It is our opinion that whenever the holder of a mechanic's lien acquires the title to the property upon which the mechanic's lien exists by a conveyance thereof from the owner, and not by a foreclosure in the courts, though that would be equally good, the mechanic's lien will not be so merged in the legal title or be so extinguished or destroyed that a judgment subsequently rendered in favor of a third person against such owner, but rendered at a term of the court commenced before the conveyance was made, and in an action pending at the beginning of the term, would create a judgment lien prior or superior to the mechanic's lien, or would authorize the property to be sold on an execution issued on such judgment, free and clear from such mechanic's lien; and we would also think that, in such a case, where a part of the consideration for the conveyance by the owner to the holder of the mechanic's lien was that the holder of the mechanic's lien should pay and satisfy certain mortgages then existing upon the real estate, a portion of the amount of which mortgages he did pay, the property could not properly be sold on such execution free and clear from such mortgages. And we would also think that injunction would be the proper remedy by the holder of the mechanic's lien against the judgment creditor to protect his interests as against such sale, and this upon the authority of the case of *Plumb v. Bay*, 18 Kan. 415. See also *Richardson v. Hockenhull*, 85 Ill. 124; *Young v. Hill*, 31 N. J. Eq. 429. And we also think that injunction is the proper remedy in the

present case. For instance, if the plaintiffs had not commenced any action, but had permitted the property to be sold on the execution to an innocent purchaser, such innocent purchaser would undoubtedly have obtained the title to the entire property, freed from the mechanic's lien and from all that the plaintiffs had paid on the mortgages; for no record could at that time have been found showing conclusively that the mechanic's lien had any legal or valid existence for any amount, and no record could then have been found showing the amount paid on the mortgages by the plaintiffs. All these matters rested in evidence outside of records, and when the plaintiffs alleged them in their petition, the defendants could have controverted them by answer, if they had so chosen. If the defendants had desired to contest the validity or the amount of the mechanic's lien, or of the mortgage liens, or any part thereof, or any supposed rights of the plaintiffs founded thereon, they could have done so and perhaps can still do so in this present action, by filing a proper answer and going to trial upon the merits of the action. As before stated, the Badger Lumber Company had the right, and still has the right, to have the property in controversy sold upon execution to satisfy its judgment, provided, however, that it is sold subject to all the rights of the plaintiffs founded upon their mechanic's lien and the mortgage liens.

It follows from the foregoing views, that the decision of the court below in overruling the defendants' demurrer to the plaintiffs' petition was and is correct, and it will be affirmed; but we would think that the final judgment of the court below, after overruling the demurrer, was broader than it should have been, and it will be modified in accordance with the views herein expressed.

All the Justices concurring.

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**MECHANIC'S LIENS—EFFECT OF CONVEYANCE OF PROPERTY.**—A mechanic's lien is not affected by a conveyance of the property during the progress of the building; *Gordon v. Torrey*, 15 N. J. Eq. 112; 82 Am. Dec. 273, and note. When a lessor being the owner of the entire estate, subject only to a lease, buys the leasehold, he does not remove a mechanic's lien created upon the leasehold estate during the tenancy, but the entire estate remains liable for the lien; *Evans v. Young*, 10 Col. 316; 3 Am. St. Rep. 583, and note.

**EXECUTION SALE OF ENCUMBERED PROPERTY—WHAT INTEREST PASSES BY.**—When the sheriff sells encumbered property the purchaser acquires the equity of redemption only. This is the right to pay the prior lien and

hold the property: *Brooks v. Lewis*, 83 Tex. 335; 29 Am. St. Rep. 650, and note with cases collected discussing what interest passes by a sheriff's sale.

INJUNCTIONS TO RESTRAIN EXECUTION SALES: See *Parks v. People's Bank*, 97 Mo. 130; 10 Am. St. Rep. 295, and note; *Hartford etc. Ins. Co. v. Meyer*, 30 Neb. 135; 27 Am. St. Rep. 384, and note.

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## BRAS v. SHEFFIELD.

[49 KANSAS, 702.]

**LEASE WITH RIGHT TO PURCHASE.** — When a lease for a period of years at a stated annual rental contains a provision that the tenant shall have the right at his election upon the termination of the term to purchase the land, at a stipulated price, there is no completed sale, and the tenant has no estate in the land beyond the leasehold subject to judgment against him until he has elected to purchase and paid or tendered the purchase price.

ACTION to ascertain the interest of Charles and Alexander Bras in a tract of land held under a lease containing an option to purchase upon the termination of the term, and to subject the interest of Alexander Bras to certain judgments rendered against him. Judgment for the defendant, and Charles Bras and others appealed.

*W. A. Calderhead*, for the plaintiffs in error.

*Charles Brown*, for the defendants in error.

JOHNSTON, J. The result of this proceeding depends upon the proper construction of the contract of lease made February 5, 1883, between the owner of the land, H. L. Sage, and Alexander Bras and Charles Bras.

The Bras Brothers entered into the possession of the land under the lease, and together cultivated and operated it for about two years. After that time Alexander left the farm and engaged in another occupation, and did not subsequently contribute anything toward either rent or taxes. He seems to have abandoned the land and the lease, and left his brother Charles to carry on the farm and carry out the contract. In the month of September, 1886, a new contract was made between Sage and Charles Bras, with the consent of Alexander, which was the same in every respect as the first, except that it omitted the name of Alexander Bras and made Charles the sole lessee, and the only one who could exercise the option to purchase the land at the expiration of the lease. At that time, Sage made an agreement, which was indorsed on the

back of the lease, that if the rent was paid when it became due he would reduce it to \$120 per year, the lessee to pay the taxes.

If the contract originally made cannot be considered as a sale and transfer of the land, then Alexander Bras acquired no equitable title therein, and no part of the same can be subjected to the payment of the judgments against him. An inspection of its terms shows that it is an ordinary lease for a period of five years, at the annual rental of \$144 and the taxes that may be levied against it. It was expressly stated that the taxes were to be paid as rent, and it was also provided that the renters should surrender the possession of the premises at the end of the term in as good condition, usual wear excepted, as they were in when the lease was made; and that upon the nonpayment of any rent when due the owner might declare the lease at an end or distrain the rent due, and notice of demand for the possession of the premises in such case was waived. At the end of the lease is the stipulation that the renters had the right at the expiration of the lease to purchase the premises at the price of twelve hundred dollars, provided they elected to do so, and, in case they elected to purchase at that time, that the owner would make a good and sufficient title, warranting to such purchasers the premises, except taxes and tax titles.

It will be seen that the renters made no agreement to purchase the land at the end of the term, nor were they under any obligation to purchase at that time. There was no completed contract of sale upon which Sage could ask for specific performance, and the renters could have surrendered the premises at the end of the lease without violating the contract. All payments under the contract were to be paid as rent, and not as purchase money. It is true that the owner of the land had offered and agreed that the renters might have the privilege of purchasing at the end of the five-year period; and this agreement was probably binding upon him; that is, he was bound that the offer should be open and available to the renters at the end of the rental period, but the unaccepted offer had no binding force upon them. They had an option to purchase, which they were at liberty to accept or not at the end of the lease, but the fact that they made a contract for an option did not constitute a sale nor vest in them any title or interest beyond what was acquired under the lease. Until they had elected to accept the offer made by



Sage, and had paid or tendered the purchase price stipulated in the contract, there was no sale or transfer of the title: Tiedeman's Sales of Personal Property, secs. 33, 41.

The case of *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613, is relied upon, but is no authority on the turning point in this case. It was there held that an optional contract to convey land, made upon proper consideration, might be enforced; but there, the party to whom the option had been given had elected to purchase, and had offered to pay the purchase price within the stipulated time. Here, Alexander Bras, against whom the judgment sought to be enforced was rendered, never at any time elected to purchase, but had abandoned the lease and the land, and left the country, long before the time to purchase had arrived. In fact, these proceedings were begun before the rental period had expired. Before the time when the parties were to avail themselves of the privilege of purchasing, the rights of Alexander Bras under the contract had terminated, and the owner had made a new contract with Charles Bras; but neither Alexander nor Charles Bras had elected to avail himself of the option before the commencement of this action, and Alexander Bras has never done so, and has no equitable title to the land in controversy.

The judgment of the district court will be reversed, and the cause remanded for further proceedings.

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**LEASE WITH OPTION TO PURCHASE.** — Where premises are leased with right given to the lessee to purchase within a year, and with the further proviso that if the lessor should receive an offer for the property, ten days' notice should be given the lessee, and he should then have the privilege of purchasing on certain terms within a time limited, and if he did not purchase the lessor might sell; the lessee must make his election in ten days after receiving notice of an offer by a third party, and if he does not so elect the lessor is at liberty to sell, although such offer was made within the year: *Harding v. Gibbs*, 125 Ill. 85; 8 Am. St. Rep. 345, and note; but in *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526, it was held that a lessee with an option to purchase, although the election to purchase rests solely with him, has an equitable estate in the land under this contract of optional purchase and may be transmitted by him.

## RATHBUN v. BERRY.

[49 KANSAS, 735.]

**CHATTEL MORTGAGE WITH POWER TO SELL—WHEN VOID AS AGAINST CREDITORS.** — When a chattel mortgage contains a stipulation authorizing the mortgagor to sell or dispose of the whole of the property, without limitation, in a lump or in any sized lots as he may choose, without providing what shall be done with the proceeds when the goods are sold, and without any agreement between the parties as to how the sale or sales shall be made or what shall be done with the proceeds, such mortgage is void as in fraud of the creditors of the mortgagor, nor is it rendered valid by the fact that the mortgagee takes possession of the property without the consent of the mortgagor, under a stipulation in the mortgage that the mortgagee may take possession whenever he shall deem himself unsafe or insecure.

**CHATTEL MORTGAGES—CHANGE OF POSSESSION AS AFFECTING VALIDITY OF.** — Taking possession of mortgaged property by the chattel mortgagee, to be sufficient to cure irregularities in a void mortgage or render it valid, must be either under the authority of a written instrument valid and sufficient for that purpose, or under some parol consent of the mortgagor.

*R. G. Hays and E. F. Robinson*, for the plaintiff in error.

*A. H. Ellis, E. S. Ellis and F. T. Burnham*, for the defendants in error.

**VALENTINE, J.** This was an action of replevin, brought in the district court of Osborne County on November 27, 1888, by E. B. Rathbun, against W. A. Berry, the Beloit Milling Company, a corporation, George W. Bittman, O. B. Taylor, and W. N. Todd, copartners, doing business as Bittman, Taylor & Co., John Jackson and Andrew Jackson, copartners, doing business as Jackson Brothers, to recover certain goods, wares, and merchandise alleged to be unlawfully detained by the defendants from the plaintiff, and of the aggregate value of \$563.93. The plaintiff claimed the property under a chattel mortgage executed to him on November 21, 1888, by James F. Andrews, to secure a promissory note then given of \$550. The defendants claimed the property by virtue of the levy of certain attachments upon the property as the property of Andrews. The defendant Berry was the officer that levied the attachments, and the other defendants were the attaching creditors. The mortgage was deposited in the office of the register of deeds on November 24, 1888; and, so far as it is necessary to quote it, it reads as follows:—

“This mortgage is hereby made to cover any and all goods

that may be purchased from time to time to replace goods sold that are covered by this mortgage.

"Provided, however, that if said debt and interest be paid as above specified, this sale and transfer shall be void; that the above-described property is now, and (except as herein-after provided) shall remain in the possession of the said first party at Downs, township of Ross, Osborne County, Kansas, until default be made in the payment of the debt and interest as aforesaid, or some part of it.

"Provided always, that in case of a sale or disposal of any of said property, or attempt to dispose of the same, or a removal or attempt to remove the same or any part thereof, from said county, or an unreasonable depreciation in the value, or if for any other cause the said party of the second part shall deem itself unsafe or insecure, then the whole of said debt and interest thereon shall forthwith become due and payable, and the said party of the second part, or its authorized agents, may take said property, or any part thereof, into its own possession, and sell the same at public or private sale, and out of the proceeds of such sale retain the whole of such debt and interest thereon, and all necessary costs incurred in finding and caring for said property, and return the surplus to said party of the first part; and if from any cause said property shall fail to satisfy said debt and interest, and costs incurred, said first party agrees to pay the deficiency. In case of conditions broken, said property or any part thereof may, at the option of the mortgagee, be taken to Downs, Osborne County, Kansas, or to any place in the county where the same may be at the time of taking possession thereof, and there be advertised and sold."

The case was tried before the court and a jury, and the plaintiff, on his own behalf and as a witness, gave the following, among other testimony: —

"Q. When you left the goods in Andrews's possession, what did you intend that he should do with them? A. I supposed that he was going to sell out and put his money in the bank and meet this obligation; that was my intention; I don't know as there was anything said about it. I have no recollection of anything being said as to what he was to do with them at all.

"Q. You had no talk about it whatever? A. No.

"Q. You expected he would go on and sell them out at retail as he had been doing? A. Yes, sir."

It also appears from the evidence that, prior to the execution of the mortgage, Andrews was engaged in a mercantile business in the city of Downs, in Osborne County. He, with his family, resided in the upper story of the building in which he did business, and his goods were kept in the lower story thereof. These goods constituted the property which Andrews mortgaged to the plaintiff. The plaintiff and Andrews were brothers-in-law, having married sisters. The note secured by the mortgage was given for one hundred dollars then loaned, and for a pre-existing debt. Andrews retained the possession of the goods. On November 24, 1888, Andrews left the country, and has never returned. On the next day, which was Sunday, the creditors of Andrews demanded of the plaintiff that he should execute to them a bill of sale for the goods, but he refused, and on the evening of that day he went to the residence (or late residence) of Andrews, for the purpose of obtaining the possession of the goods. Mrs. Andrews was at home, and in the story above the place where the goods were kept, which latter place was called the "store." He procured a key to the "store" from Mrs. Andrews, with the intention, as he informed her, of taking the possession of the goods. He then went down to the "store," unlocked the front door thereof, stepped inside, stayed there for a few minutes with the intention of taking the possession of the goods, and then went out and locked the door behind him. A few hours later, and after midnight, the aforesaid orders of attachment were levied upon the goods, and the officers took the possession of them, and on the next day the plaintiff commenced this action. These are substantially all the facts of the case that are of any importance. The defendants demurred to the plaintiff's evidence, upon the ground that it did not prove any cause of action, and the court below sustained the demurrer, and rendered judgment accordingly; and the plaintiff, as plaintiff in error, brings the case to this court for review.

The only question presented to this court is, whether the aforesaid chattel mortgage is void as against the mortgagor's attaching creditors. Under section 2 of the statute of frauds, every transfer of property, real or personal, made with the intent to hinder, delay, or defraud creditors, is void. It is also true that a chattel mortgage generally has a tendency to hinder and delay the creditors of the mortgagor in the collection of their claims; and it is also a general rule of law that every person is presumed to intend the natural and probable



consequences of his own voluntary acts. But where a chattel mortgage is executed in good faith and for the purpose of securing a real debt, and the terms are reasonable, it will be held to be valid, although it may have a tendency to hinder or delay the creditors of the mortgagor in the collection of their claims. The present mortgage contains the following stipulation: "This mortgage is hereby made to cover any and all goods that may be purchased from time to time to replace goods sold that are covered by this mortgage." This stipulation, it is said in the brief of defendants in error, was in writing, while very nearly all the remainder of the mortgage was in print, a blank printed chattel mortgage having been used in drawing up the mortgage executed. This statement of counsel has not been denied, and it is probably true, although there is no direct evidence in the record tending to show whether the stipulation was in writing or not, or what portion of the mortgage was in writing and what not. The stipulation, however, as found in the record brought to this court, is underscored, and, as we understand, the court below held that the mortgage was void upon the ground that this stipulation rendered it void. Of course the court below had the mortgage before it and knew what part of it was in writing and what was not. Now, for the purpose of upholding and sustaining the decision of the court below, we think that it should be held that this stipulation was in writing, and that the other stipulations in the mortgage which might tend to contradict it or modify it should be held to be in print. And further, this stipulation is an extraordinary one, while the other stipulations in the mortgage are common and ordinary stipulations, such as are generally found in chattel mortgages. And if we should hold that this stipulation was written in the mortgage by the parties, then we must consider that it expressed their exact intention, and that any other stipulations in the mortgage only in print, and which might not be in harmony with it, did not express their true intention; and construing the stipulations in this manner, it would seem to require that the mortgage should be held to be void. We think that by unavoidable implication this stipulation authorized the mortgagor to sell and dispose of the goods—not merely at retail, or in the ordinary course of trade or in the ordinary course of business, which would simply be an authority to release from the encumbrance of the mortgage only a small portion of the goods from time to time—but it gave to the

mortgagor an authority to sell and dispose of the whole of the property at once, or in the lump, or in any sized lots, as he might choose. There is, in fact, no limitation of any kind or amount upon the sale. Besides, the mortgage does not in fact provide what should be done with the proceeds of the sale when the goods are sold. There is no stipulation that the mortgagee should have the proceeds, or that they should be kept or deposited for his benefit. All was left with the mortgagor, and he had the power to do as he chose.

It is true the stipulation contemplates that other goods might be purchased to replace the goods sold, but the purchase of other goods was not obligatory. Of course any sale of any portion of the mortgaged goods would destroy the mortgage encumbrance to that extent, and a sale of all the mortgaged property would completely destroy the mortgage. A power given to the mortgagor to sell the whole of the mortgaged property would really render the mortgage nugatory, and the mortgagor would still remain substantially the owner of the property. Such a power in any mortgage would be inconsistent with any supposed encumbrance granted by the mortgage, and a mortgage granting such a power should be held to be at least *prima facie* if not absolutely void. There is nothing to this case, either in the mortgage or as shown by the extrinsic evidence, that tends to explain how the parties intended that the sale or sales of the mortgaged property should be made, or what should be done with the proceeds. The plaintiff, by his own parol testimony, showed that he understood that the mortgagor would "sell out" the goods, or sell them at retail, as he had been doing, "and put his money in the bank and meet this obligation"; but so far as is shown, there was no agreement or understanding between the parties or on the part of the mortgagor, other than that shown by the mortgage, as to how the sale or sales should be made or what should be done with the proceeds. Hence, under the stipulations of the mortgage and the parol testimony, we must assume that the mortgagor, while in the possession of the mortgaged property, had the absolute control over the same, and the absolute right to sell it as he chose, and the absolute control over the proceeds.

But it is claimed that the plaintiff as mortgagee obtained the possession of the goods before any of the same were sold, and that such possession cured all irregularities and rendered the mortgage valid. The possession, however, was not pro-

cured by any delivery of the goods by the mortgagor or with his consent. The plaintiff took the possession of the property without the mortgagor's consent and only by virtue of the authority given by his void mortgage — not void because it had not been deposited with the register of deeds; not void because of a want of notice to the mortgagor's creditors or subsequent purchasers or encumbrancers; not void because of an insufficient description of the mortgaged property; not void because of a want of a renewal affidavit, and not for any other mere irregularity which was not in contravention of good morals or public policy, but void because of a stipulation contained in the mortgage which must be considered as against public policy, if not in contravention of good morals, and as tending to hinder and delay creditors in the collection of their just claims, and thus hindering and delaying of creditors without any good reason therefor, and providing for such a disposal of the property as must necessarily render the mortgage itself substantially nugatory. What the effect of the delivery of the possession of the mortgaged property by the mortgagor to the mortgagee, or a taking of the possession of the property by the mortgagee with the consent of the mortgagor would be, it is wholly unnecessary in this case to decide, for nothing of that kind took place in this case. It was not shown that the mortgagor ever gave his consent otherwise than by the mortgage. There is no evidence tending to show that the mortgagor's wife had any authority from the mortgagor to deliver the property to the mortgagee, and it cannot be supposed that she had any such authority merely because she was his wife. A taking of the possession of mortgaged property by the mortgagee, to be sufficient to cure all irregularities and to make the mortgage valid, must be either under the authority of a written instrument valid and sufficient for that purpose, or under some valid parol consent of the mortgagor. Such was not this case.

We have given this case a great deal of attention, and carefully considered it in all its aspects. We have also examined many authorities, with a hope that our minds might become thoroughly satisfied, but still we have great doubts. Among the decisions of our own court which we have examined are the following: *Parsons Sav. Bank v. Sargent*, 20 Kan. 576; *Frankhouser v. Ellett*, 22 Kan. 127; 31 Am. Rep. 171; *Dayton v. People's Sav. Bank*, 23 Kan. 421; *Cameron v. Marvin*, 26 Kan. 612; *Muse v. Lehman*, 30 Kan. 514; *Leser v. Glaser*, 32

Kan. 546; *Dolan v. Van Demark*, 35 Kan. 304; *Howard v. Rohlfing*, 36 Kan. 357; *Gagnon v. Brown*, 47 Kan. 83. See also, 3 Am. & Eng. Ency. of Law, 196, 197; Jones's Chattel Mortgages, secs. 164, 178, and the whole of chapter 9, including secs. 379-425.

We think the conclusions which we have reached in this case are in harmony with the spirit of all the decisions heretofore rendered by this court, and are also in harmony with the most of the decisions rendered by other courts. Many decisions of other courts, however, may be found with which the foregoing conclusions are not in harmony. Therefore, while we have very grave doubts as to the correctness of the decision rendered by us in this case, yet, taking into consideration the peculiar facts of this case, with all the reasons for and against the present decision, and taking into consideration all the decisions of other courts sustaining or opposing this decision, we are inclined to think that the decision is correct, and therefore the judgment of the court below will be affirmed.

All the Justices concurring.

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**CHattel Mortgages — Power of Sale by Mortgagor — Validity as to Creditors.** — A chattel mortgage executed upon an agreement that the mortgagor remain in possession and sell the property at retail or wholesale, and use the proceeds substantially as before the execution of the mortgage, is void as to the creditors of the mortgagor: *Mandeville v. Avery*, 124 N. Y. 376; 21 Am. St. Rep. 678. See extended note to *Peabody v. Landon*, 15 Am. St. Rep. 912-917, in which this subject is thoroughly discussed. The following recent cases uphold the doctrine that chattel mortgages, where the possession is kept by the mortgagor, and in which he is given the power to sell the mortgaged chattels, are void as against the creditors of the mortgagor: *Gallagher v. Rosenfield*, 47 Minn. 507; *Rocheleau v. Boyle*, 11 Mont. 451; *Gallagher v. Goldfrank*, 75 Tex. 562; *Brasher v. Christophe*, 10 Col. 284; *Wilher v. Kray*, 73 Tex. 533; *Huschle v. Morris*, 131 Ill. 587; *Standard Implement Co. v. Schultz*, 45 Kan. 52; *Aiken v. Pascall*, 19 Or. 493.



**BOARD OF COMMISSIONERS OF FRANKLIN COUNTY  
v. CITY OF OTTAWA.**

[49 KANSAS, 747.]

**TAXATION — ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT.**

Cities have power to levy upon public grounds the special assessments necessary to improve the streets and sidewalks in front of and around them; and when the proper authorities refuse to pay such assessments, and the property cannot be sold at forced sale, the amount thereof may be adjusted in a judicial proceeding, and the judgment enforced and collected the same as any other judgment against the city or county.

*F. A. Waddle, county attorney, and John W. Deford, for the plaintiff in error.*

*H. A. Richards, for the defendant in error.*

**HORTON, C. J.** The city of Ottawa, in Franklin County, is a city of the second class. Block 85 in that city was granted to the county of Franklin by the Ottawa Town Company for a court-house square, and county buildings have been erected thereon. In 1887, the city of Ottawa, under the provisions of the statute, macadamized Main Street between Tecumseh and Fifth Streets, and a special assessment on account of such macadamizing was made under the statute upon said block 85 amounting to the sum of \$573.10. Subsequently a claim for that amount was presented to the board of county commissioners for allowance. This was refused, and an appeal was taken to the district court. It was there allowed, and judgment rendered accordingly. Complaint is made of this judgment.

The question is, had the city of Ottawa the power to levy a special assessment of \$573.10 for the improvement of Main Street in front of the "court-house square" without the consent of the board of county commissioners, and then collect it by judicial proceedings against the county? Section 5 of article 12 of the constitution ordains: "Provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit shall be so restricted as to prevent the abuse of such power." Paragraph 788, General Statutes of 1889, grants to cities of the second class full authority to enact ordinances "to open and improve streets, avenues, and alleys, . . . within the city, and for the purpose of paying for the same, shall have power to make assessments in the following manner, to wit: . . . For pav-

ing, macadamizing, curbing, and guttering all streets, avenues, and alleys, . . . the assessment shall be made for each block separately on all lots and pieces of ground to the center of the block, on either side of such street or avenue, the distance improved or to be improved": Gen. Stats. of 1889, c. 19, sec. 32. This section authorizes the improvement of streets, and provides that in payment the city shall have power to make assessments upon all lots and pieces of ground abutting upon the improvement, without any exemption or reservation whatever. This court has ruled that section 1, article 11, of the constitution of the state, providing for a uniform and equal rate of assessment and taxation, relates to taxes, and does not apply to such special assessments or taxes as are imposed upon abutting lot owners in cities for street improvements: *Commissioners of Ottawa Co. v. Nelson*, 19 Kan. 234; 27 Am. Rep. 101; *Hines v. Leavenworth*, 3 Kan. 186. It has been decided frequently by this court that a city has exclusive care and control of its streets and sidewalks, and must make them reasonably safe for travel: *City of Atchison v. King*, 9 Kan. 550; *Jansen v. Atchison*, 16 Kan. 358; *Osage City v. Brown*, 27 Kan. 74; *Maulthby v. Leavenworth*, 23 Kan. 747. It follows necessarily that a city must keep in repair its streets and sidewalks. The statute provides how this may be done. There is no exemption in the statute of a court house or other public grounds. Streets and sidewalks in front of or around a court-house square or other public ground should be kept in as safe condition by the city as other streets and sidewalks. It is not just that the other abutting lot owners pay the special assessments intended to improve or benefit the court-house square. It is certainly unfair that the taxpayers of the city should pay for all the special improvements beneficial to the court-house square, when all the taxpayers of the county are equally interested therein.

It is said by Judge Cooley that, "It is no objection to an assessment for a local work that the property assessed is used for a purpose that will not be specially advanced by the improvement; as, for instance, that it is dedicated to the purposes of sepulture, or is occupied by a building erected for the purposes of public worship, or is devoted to school or charitable purposes, or constitutes the track of a railroad, or is put to any use to which the market value of the property is unimportant. There is nothing necessarily permanent in any present use; not sufficiently so, at least, to give it a control-

ling influence in determining principles of taxation. Even public property is often subjected to these special assessments, there being no more reason to excuse the public from paying for such benefits than there would be to excuse from payment when property is taken under eminent domain": Cooley on Taxation, sec. 458; *St. Louis Public School v. St. Louis*, 26 Mo. 468.

In *Mayor of Baltimore v. Green Mountain Cemetery*, 7 Md. 517, it was held that, "the property of the United States of the city and county of Baltimore are all exempted from taxes, and yet it has never, so far as we are informed, been contended that it was not liable for the paving done in front of it, and we can see no reason why that of the appellees should be. If the latter be not responsible, then it is evident the street must forever remain unpaved, or the expense of it be borne wholly and entirely by the proprietors of the lots opposite. Surely this never could have been the intention of the legislature, nor can it be imagined it was its purpose to compel the city generally to do it. It must be viewed practically as a benefit conferred on the property of the appellees, and the mere fact that they were indifferent to it ought not to avail in their favor any more than the like indifference of an individual proprietor would shield him from liability to pay his quota when paving is done in front of his ground."

In *Hassan v. Rochester*, 67 N. Y. 528, Miller, J., in deciding the case, used the following language: "*In the Matter of the Mayor of New York*, 11 Johns. 77, it was held that . . . churches, which were exempt from taxation under the act of 1801, were not exempted from assessments for local improvements. The same rule would render the property of the state liable for such assessments. As these are considered under the decisions as benefits to the property assessed, increasing its value, and not as a tax, no valid reason exists why the state, any more than individuals, should be exempted from paying for the advantages conferred. A different rule would compel individual lot owners to pay assessments levied for improvements which were a benefit to the state lands, without any adequate advantage, and in many instances impose a burden which would be extremely onerous and produce great injustice. This could not have been intended. Although the state cannot be made a party to an action to enforce such a claim and be sued in its sovereign capacity, it may be assumed that

the state will provide means for the liquidation of assessments imposed by virtue of laws enacted by its legislature, and that, as has been frequently done heretofore, appropriations will be made for that purpose."

We do not think that the phrase in paragraph 790, General Statutes of 1889, concerning "the taxable property chargeable therewith," restricts a city from levying special assessments or taxes upon public grounds, because, if construed as is claimed by counsel for Franklin County, then all the property used exclusively for literary, educational, scientific, religious, benevolent, and charitable purposes will also be exempt from the levy or payment of special assessments or taxes. This is contrary to the general view held by the profession, and is opposed to the practice prevailing in the cities. While such property is exempt from taxation under section 1, article 11, of the constitution, it is not exempt from special assessments, or taxes for the improvement of streets or sidewalks.

The serious difficulty in this case is as to the manner of collecting the special assessment. We held, in the case of *Commissioners of Stafford Co. v. First Nat. Bank*, 48 Kan. 561, that as the statute makes special provision for the collection of taxes, they are not a debt in the ordinary sense of the term, and consequently an action will not lie for their recovery. We have no inclination to change that ruling. A court house cannot be sold or disposed of under tax proceedings or at forced sale for special assessments or taxes levied upon the ground thereof. Such grounds are for the uses and purposes of the public, and are essential to the administration of the executive and judicial duties of the county and state, and, therefore, are not subject to sale for taxes or upon judgments rendered against a county. Perhaps it ought to be assumed, when a special assessment is made in accordance with the provisions of the statute for the opening or improvement of a public street, that the officials of the county would allow and provide for the payment of the same without any action or other legal proceedings being necessary. It is presumed that the sovereign or state will do no wrong. If a county, however, refuses to pay the special assessments or taxes legally levied against its property, as such property, on account of the public uses to which it is applied, cannot be sold at a tax or other forced sale, there is no impropriety, after the claim is disallowed, in permitting the district court, on appeal, to



adjust the amount thereof. The judgment can then be paid as other judgments, against a county: Gen. Stats. of 1889, par. 1618. Such rule, it seems to us, will be beneficial to all concerned, will work no hardship upon any one, and permit the streets and sidewalks around public grounds to be improved and repaired as the statute prescribes, and in an equitable manner: *Cooley on Taxation*, 572, 573; *Hassan v. Rochester*, 67 N. Y. 528; *McLean v. Bloomington*, 106 Ill. 209; *Adams Co. v. Quincy*, 130 Ill. 566. The Illinois cases are very much to the point.

Attempt is made in one of the briefs to show that the constitution of Illinois, making special provision for cities and towns to levy special assessments, differs widely from the provisions of the constitution of this state. We have examined the provisions referred to, and do not note the difference claimed.

Our attention is called to the decisions of the courts of Massachusetts and Texas, to the effect that the property of counties is exempt from special assessments or taxes. Notwithstanding the reasoning of the able courts of those states, we are inclined to think, under the provisions of our constitution and statutes, the better rule to be that cities have the power to levy upon public grounds the special assessments necessary to improve the streets and sidewalks in front or around them; and where, for public reasons, the property cannot be sold at forced sale, then that the assessments can be collected as stated.

The judgment of the district court will be affirmed.

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**TAXATION AND ASSESSMENT OF PUBLIC PROPERTY. — *Taxation for Revenue.*** As a general rule, public property of whatever nature, whether of the United States or of a state, or of any of its subordinate political subdivisions, is not liable to taxation for the purposes of revenue. Such property is exempt from taxation on general principles of public policy, and independently of any express provisions to the contrary. Constitutions providing for the taxation of all property within the state, and statutes imposing taxes on such property, do not extend to or include public property of any description, and no exemption law is needed to relieve it of the burden of taxation: *Doyle v. Austin*, 47 Cal. 353; *Mayor etc. Nashville v. Bank of Tennessee*, 1 Swan, 269; *West Hartford v. Board of Water Comm'rs*, 44 Conn. 360; *People v. Doe*, 36 Cal. 220; *Directors v. School Directors*, 42 Pa. St. 22. The use of the words in a state constitution, "that all property in the state" shall be taxed means all private property, and does not include public property: *People v. McCreery*, 34 Cal. 432. While most public property is in terms made exempt from taxation, either by constitutional or statutory enactment, still without such protection it is exempt upon general princi-

ples, for as such property is generally procured by taxation, it would be against principle that the product of one taxation should be made the subject of another: *West Hartford v. Board of Water Comm'rs*, 44 Conn. 260. "Nor can we see how public property can, in any just sense, be considered as a source of revenue to be derived by the exercise of the taxing power, for it was by the exercise of that power that it was separated from private property and became public. No positive law is necessary to exempt the public property of the state from taxation by any of its corporations or quasi corporations, as towns, cities, or counties": *Mayor etc. of Nashville v. Bank of Tennessee*, 1 Swan. 269.

*United States Property.* — "It is familiar law that a state has no power to tax the property of the United States within its limits. This exemption of property from state taxation, and by taxation we mean any taxation by authority of the state, whether it be strictly for state purposes or for mere local and special purposes and objects, is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government, as may tend to destroy its powers or impair their efficiency. If the property of the United States could be subjected to taxation by the state, the object and extent of the taxation would be subject to the state's discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the national government, and in the enforcement of that tax those buildings might be taken from the possession and use of the United States. The constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise:" *Wisconsin Cent. R. R. Co. v. Price County*, 133 U. S. 496-504. In *Fagan v. Chicago*, 84 Ill. 227-233, it was said that "We apprehend that no rule is more uniformly recognized than that property of the government is never taxed unless expressly required by statute. It would only be to pay money from the treasury to be returned thereto. It could be of no kind of benefit. It would be entirely useless, and hence the government never requires such an act to be performed. Nor under our system of government can the states tax the general government, its agents or property, nor can the general government tax the states, their agents or property: *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of United States*, 9 Wheat. 733. In these cases it was held that the states have no power to tax the instrumentalities of the general government employed in the performance of its proper functions. In the case of *Dobbins v. Commissioners of Erie Co.*, 16 Pet. 447, it was held that there was a limitation on the taxing power of the state, which prohibits it from taxing the instruments, emoluments, and persons which the United States may use and employ as necessary and proper means to the exercise of their sovereign power. Now, this block of ground is used and employed by the general government for a customhouse, post office, etc., or in erecting buildings for that purpose. Now customhouses, post offices, and courthouses are necessary instrumentalities, and are proper means to be employed by the general government in executing its sovereign power. This land was purchased by it for the purpose and the legislature of the state gave its consent that it might be so used, and ceded to the United States jurisdiction over the same. This is, then, in its fullest sense, one of the instrumentalities employed by that government in the proper exercise of its sovereign power, and falls within the

principle of those decisions and of *Nathan v. Louisiana*, 8 How. 82. This property, then, could not be taxed or assessed by the state": *Fagan v. Chicago*, 84 Ill. 234. The same principle was announced in *Andrews v. Auditor*, 28 Gratt. 115, where it was decided that when the United States government, under an agreement with the owner of land, erects a building thereon to be used by its operatives employed by it in dressing stone to be used in the erection of its public buildings, such building is not liable to state taxation. In expressing its opinion in this case the court adopted the language used by Chief Justice Marshall in deciding the case of *Weston v. City Council of Charleston*, 2 Pet. 449, where he said that "The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission; but not those means which are employed to carry into execution power conferred by the people of the United States. The attempt to use the power of taxation on the means employed by the government of the Union in pursuance of the constitution is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of constitutional laws to carry into execution the powers vested in the general government."

The states have no power to tax the means and instruments employed by the national government in the discharge of its constitutional functions: *Stetson v. Bangor*, 56 Me. 274-286. The power of taxation by a state cannot be broad enough or extensive enough to embrace property regarded as the means or instruments of conducting the federal government and "the moment that the title to such property becomes vested either in the state or the United States, the property is no longer the subject of taxation. It does not seem to make any difference whether the property is used as a means or instrumentality for the execution of any of the powers of the federal government under the constitution. It is sufficient if the title is in the United States, the exemption from taxation attaches": *People v. United States*, 93 Ill. 30; 34 Am. Rep. 155; citing *McGoon v. Scales*, 9 Wall. 23; *Railway Co. v. Prescott*, 16 Wall. 603. A bridge across a watercourse, the title to which is exclusively in the United States, although half of its expense is paid for by a railroad company, and it is secured to its use, is not taxable by the state, wholly or in part: *Chicago etc. R. R. Co. v. Davenport*, 51 Iowa, 451.

It is not the intention in this note to enter into any extended discussion as to the taxation of public lands, but it may be stated generally in passing that such lands are not taxable by the state so long as they are the property of the United States. They can only be taxed when the United States has issued a patent therefor, or when the purchaser has acquired a "perfect equity." When it is said that land sold by the United States may be taxed before the issuance of patent therefor, this must be understood as applying only when the right to the patent is complete, and the equitable title is fully vested in the purchaser without anything more to be paid, or any act to be done, going to the foundation of his rights. Prior to this and while the title remains in the United States, such land is public property, not subject to taxation: *Central Pac. R. R. Co. v. Howard*, 52 Cal. 227; *People v. Donnelly*, 58 Cal. 144; *Wisconsin Cent. R. R. Co. v. Taylor Co.*, 52 Wis. 37; *Wisconsin Cent. R. R. Co. v. Comstock*, 71 Wis. 88; *Railway Co. v. Prescott*, 16 Wall. 603; *Railway Co. v. McShane*, 22 Wall. 444. These cases also show that land grants made by Congress to railroads, or to the state in trust for public improvements, upon certain conditions to be performed, remain a



part of the public domain and the property of the United States until such conditions are performed, and until then, or as long as the general title remains in the general government, the land is not subject to taxation by the state.

When taxes are levied upon any kind of property while owned by the United States, and are sought to be collected by judgment and sale, it makes no difference who files objection to the collection of such taxes, but it would seem that the district attorney of the United States, resident in the district where the property is situate, is the proper person to interpose such objection: *People v. United States*, 93 Ill. 30; 34 Am. Rep. 155.

*Taxation of State Property.* — No general rule of law is more definitely settled than that public property belonging to the state, no matter in what body or person the legal title may temporarily vest, is not subject to taxation for the purposes of revenue; and the income derived from any state institution owned, controlled, or managed by the state, and devoted to public uses is not taxable for either state or municipal purposes: *Board of Regents v. Hamilton*, 23 Kan. 376; *Aplin v. Regents of University of Michigan*, 83 Mich. 467; *Atlantic etc. R. R. Co. v. Board of Comm'rs*, 75 N. C. 474; *Chicago v. People*, 80 Ill. 384; *Trustees of Public Schools v. Inhabitants of Trenton*, 30 N. J. Eq. 667; *People v. Doe*, 36 Cal. 220; *Doyle v. Austin*, 47 Cal. 353. In the last case it was said to be well settled that the property of a state or of a municipality is not subject to taxation for revenue purposes. In delivering the opinion in the case of *Trustees of Public Schools v. Inhabitants of Trenton*, 30 N. J. Eq. 667-681, the court said: "The immunity of the property of the state and of its political subdivisions from taxation does not result from a want of power in the legislature to subject such property to taxation. The state may, if it sees fit, subject its property and the property owned by its municipal divisions to taxation, in common with other property within its territory; but inasmuch as taxation of public property would necessarily involve other taxation for the payment of the taxes so laid, and thus the public would be taxing itself in order to raise money to pay over to itself, the inference of law is that the general language of statutes prescribing the property which shall be taxable is not applicable to the property of the state or its municipalities. Such property is, therefore, by implication, excluded from the operation of the laws imposing taxation, unless there is a clear expression of intent to include it. Hence crown lands and the property of the state, or its political subdivisions, are not taxable under general statutes providing for taxation. Under the general tax law of this state public property, whether belonging to the state or its subordinate political divisions such as counties, cities, towns, and townships, is not liable to taxation." In the case of *Inhabitants of Worcester v. Worcester*, 116 Mass. 193; 17 Am. Rep. 159, the court said: "The property of the commonwealth is exempt from taxation, because as the sovereign power it receives the taxation through its officers or through the municipalities it creates, that it may from the means thus furnished discharge the duties and pay the expenses of government. Its property constitutes one of the instrumentalities by which it performs its functions. As every tax would to a certain extent diminish its capacity and ability, we would be unwilling to hold that such property was subject to taxation in any form, unless it were made so by express enactment or by clear implication."

Property held by the regents of a state university in their corporate capacity is the public property of the state held by the corporation in trust for the purposes to which it is devoted, and is exempt from taxation: *Aplin v. Regents of*



*University*, 83 Mich. 467; *Regents v. Hamilton*, 28 Kan. 376. In *Aplin v. Regents*, 83 Mich. 470, it was said: "The public property belonging to the state includes the property of all public departments of the state, such as the Michigan University, the reform school, the school for the deaf and dumb, the state prisons, the asylums, the agricultural college, the state normal school, and other public institutions supported by the state through taxation, or by funds or property appropriated by public or private generosity for that purpose. It cannot be supposed that the legislature would make large appropriations for the support of these institutions or levy taxes for the same purpose, and then assess the property held by them in trust to carry out the same object for which such taxes are levied."

*Mortgages in which the State School Fund is Invested* are not subject to state taxation: *Trustees of Public Schools v. City of Trenton*, 30 N. J. Eq. 667; and when the title to the property in which such fund is invested is acquired by the state under foreclosure of the mortgage, and held for school purposes only, it is not liable to taxation by the state: *City of Chicago v. People*, 80 Ill. 384. Lands which are the property of the state are not subject to taxation, and the purchaser thereof takes them free of all tax liens: *Bradford v. La Fargue*, 30 La. Ann. 432; *Braxton v. Rich*, 47 Fed. Rep. 178; and after the title to lands of an alien has become vested in the state by escheat, they are exempt from taxation: *Reid v. State*, 74 Ind. 252. When state lands are conveyed by statute for a term of years, the question whether they are taxable or not depends, not on the qualities of the estate so granted, but on the legislative intention as expressed in such statute: *State v. Haight*, 36 N. J. L. 471. Land held by a state institution as an agricultural college under a mortgage for money loaned by the state and arising from the sale of its lands granted to it by Congress are exempt from taxation: *Regents v. Hamilton*, 28 Kan. 378. Land held by the trustees of a state industrial university, belonging to and under the control of the state, is not subject to taxation: *Board of Trustees v. Board of Supervisors*, 76 Ill. 184. Public school houses, together with the necessary land for their use, are not taxable: *Gerke v. Purcell*, 25 Ohio St. 229; and schools or educational, charitable, or religious institutions established by private donation, but carried on for the public benefit, together with the land necessary for their use, may, by statute, be exempted from taxation: *Gerke v. Purcell*, 25 Ohio St. 229; *Warde v. Manchester*, 56 N. H. 508; 22 Am. Rep. 504; *Curtis v. Whipple*, 24 Wis. 350; 1 Am. Rep. 187. A state lunatic asylum is not subject to taxation by the state: *Williams v. Little White Rock Co.*, Wilson Sup. Ct. (Ind.) 7; nor a bank chartered for the benefit of the state: *Nashville v. Bank of Tennessee*, 1 Swan, 269; nor the income of the state derived from a railroad owned, controlled, and managed by it: *State v. Atkins*, 35 Ga. 315; nor public or state money devoted to the purposes for which it is intended, so long as they are public purposes: *Commonwealth v. Morrison*, 2 A. K. Marsh. 75; *Trustees v. Taylor*, 30 N. J. Eq. 618.

*Taxation of Municipal Property.* — The authorities are generally agreed that the public property of a city or county used only for governmental purposes is exempt from taxation by the state or city for the purposes of revenue: *Low v. Lewis*, 46 Cal. 550; *Doyle v. Austin*, 47 Cal. 353; *People v. Salomon*, 51 Ill. 37; *West Hartford v. Board of Water Comm'rs*, 44 Conn. 360; *Trustees of Public Schools v. Inhabitants of Trenton*, 30 N. J. Eq. 667; *Rochester v. Rush*, 80 N. Y. 302; *Piper v. Singer*, 4 Serg. & R. 353. Buildings and other property owned by municipal corporations, and appropriated to public uses, are but the means and instrumentalities used for ma-

municipal and governmental purposes, and are therefore exempt from general taxation by necessary implication in the absence of any statutory or constitutional prohibition: *Inhabitants of Camden v. Camden*, 77 Me. 530; *Town of West Hartford v. Board of Water Comm'rs*, 44 Conn. 360; *Inhabitants of Worcester County v. Worcester*, 116 Mass. 193; 17 Am. Rep. 159; *Inhabitants of Wayland v. County Comm'rs*, 4 Gray, 500. In *Inhabitants of Camden v. Camden*, 77 Me. 530, the court said: "Towns are public corporations created for similar public purposes in the due administration of the government of the state. As incident to their existence and the objects of their creation, they are allowed to purchase or build townhouses, schoolhouses, poorhouses, and police stations, these being among the recognized functions of the government, and as such, exempted by implication from the general provisions of the statute in relation to taxation as property appropriated to public uses." All municipal property used for public purposes of local improvement, such as halls for municipal meetings, courts, prisons, or the like, is exempt; but property which is not used for the purpose of carrying on the municipal government, but only for the convenience or profit of the municipality, and which is not specifically exempted, is liable to be taxed: *City of Louisville v. Commonwealth*, 1 Duvall, 295; 85 Am. Dec. 624. A state has the power to provide by statute for the taxation of its municipalities or their corporate property, but the intention to do so must clearly appear; it will not be presumed: *Trustees of Public Schools v. Trenton*, 30 N. J. Eq. 667; *Wayland v. County Comm'rs*, 4 Gray, 500; *City of Louisville v. Commonwealth*, 1 Duvall, 295; 85 Am. Dec. 624; *County of Erie v. Erie*, 113 Pa. St. 360; *Stein v. Mayor of Mobile*, 24 Ala. 591; and in the absence of express exemption of the property of counties or cities from taxation, an exemption can be implied only when the property is actually appropriated to public uses; thus when real estate is purchased by a county for enlarging a jail and jail grounds, it is subject to taxation while leased for private purposes and a source of income to the county, and such tax may be levied by the city within which the land is situated: *Essex County v. Salem*, 153 Mass. 141.

Under the general rule that public property belonging to a city or county, and used for public purposes, is not subject to taxation for revenue purposes, it has been decided that a city cemetery is not liable to such taxation: *People v. Doe*, 36 Cal. 220; *Louisville v. Nevin*, 10 Bush, 549; 19 Am. Rep. 78. Nor is a county poor house: *Directors of Poor v. School Directors*, 42 Pa. St. 21. Nor a city and county courthouse and jail: *Louisville v. Commonwealth*, 1 Duvall, 295; 85 Am. Dec. 624; *Inhabitants of Worcester County v. Worcester*, 116 Mass. 193; 17 Am. Rep. 159; *County of Harris v. Boyd*, 70 Tex. 237. Nor state or city parks or commons: *People v. Salomon*, 51 Ill. 37. Nor a city wharf: *Low v. Lewis*, 46 Cal. 550. Nor a city engine house: *County of Erie v. Erie*, 113 Pa. St. 360. Nor land and a reservoir purchased in fee or otherwise acquired by a city or county for the purpose of public water works, and used for that purpose only: *Inhabitants of Wayland v. County Comm'rs*, 4 Gray, 500; *Rochester v. Rush*, 80 N. Y. 302; *Town of West Hartford v. Board of Water Comm'rs*, 44 Conn. 360; *State v. Gaffney*, 34 N. J. L. 131. But when the city owning its water works derives a revenue or income from their use, they are subject to taxation the same as any private property: *County of Erie v. Commissioners of Water Works*, 113 Pa. St. 368. Real estate conveyed to a county for its exclusive use, or acquired by it by any other means, so long as it is not used for any other than county or municipal purposes, is exempt from taxation: *Darkee v. Board of Comm'rs*, 29 Kan. 697; *Inhabitants of Worcester County v. Worcester*, 116 Mass. 193; 17 Am. Rep. 159;

*Gibson v. Howe*, 37 Iowa, 168; *Moore v. Morledge*, 42 Iowa, 26. Under this rule land used as a city ferry landing is not subject to taxation: *Black v. Sherwood*, 84 Va. 906; *People v. Board of Assessors*, 47 Hun, 383. County school lands are not subject to taxation while owned by the counties, no matter whether such lands are leased or not: *Daugherty v. Thompson*, 71 Tex. 192; *Davis v. Burnett*, 77 Tex. 3.

*Assessment of Public Property for Local Improvement.* — Upon the question as to the power of a municipality to levy and collect an assessment, as distinguished from a tax, against public property or property exempted by law from taxation generally, in cases when such assessment is made for the purpose of paying for a work of local improvement, as the grading of a street, the laying of a sewer, or the like, the authorities are in great conflict, and perhaps about equally divided. In the only case upon the subject which we have been able to discover it was held that real property of the United States was not subject to assessment for the purpose of paying the expenses of extending a public street, for the following reasons: "A municipal corporation has no power to assess or to exact from the state or the general government any sum for benefits conferred. The power to levy taxes or impose assessments for benefits can only be exercised on the governed and not on the governing power, whether state or federal. Nor does a fair construction of the statute authorizing these assessments contemplate the exercise of such a power. The whole statute manifestly applies to individuals and individual property. It refers to persons alone, and not to either the state or general government; and it is a familiar rule of interpretation that a law which refers to inferiors is never applied to superiors. Again, all grants are taken most favorably to the government or public. Hence when the power was granted to these municipal governments to make such assessments, it would not be a favorable construction to the government to hold that the assessment might be imposed on government property. Such a power cannot be implied, but can only be exercised when expressly granted": *Fagan v. Chicago*, 84 Ill. 234.

*Cases Exempting from Assessment.* — It would seem to be the better rule, as based upon the reasoning of those adjudications which have been most carefully considered, that the state legislature has power to make the property of the state or of a municipality subject to assessment for local benefits; but that property owned by the state or municipalities, and used for public purposes, is not liable to assessment for local benefits or improvements in the absence of express language in a statute indicating an intention that it should be so assessed: *State v. City of Hartford*, 50 Conn. 89; 47 Am. Rep. 622; *State v. Hotelling*, 44 N. J. L. 347; *Doyle v. Austin*, 47 Cal. 353; *Polk County San. Bank v. State*, 69 Iowa, 24; *Inhabitants of Worcester County v. Worcester*, 116 Mass. 193; 17 Am. Rep. 159. In the last case it was held that the charter of the city of Worcester, authorizing assessments for sewers on all property benefited, did not extend to property of the county, because it was not clearly expressed that such property might be so assessed.

In *Polk County San. Bank v. State*, 69 Iowa, 24, where it was sought to enforce a sewer assessment upon property owned by the state and used for governmental purposes, the court said: "The question whether the city counsel had the power to make said assessments against the property of the state arises upon the record before us, and must be determined. In adopting the ordinance mentioned above, and in making the assessment in question, the city assumed to exercise the power conferred upon it by chapter 162, acts of the seventeenth general assembly. The city has such powers only



with reference to the subject as are conferred upon it by statute; and if the power to assess the cost of said improvement against the property of the state is not conferred by the act referred to above, it does not exist. The first section of the act empowers the council of cities of the first class to provide by ordinance for the construction of sewers, and to pay the cost of constructing the same out of the general fund of the city, or assess the same on the adjacent property, or to levy a sewerage tax within the sewerage district, out of which to pay the cost of constructing the same. Another section of the act provides that special taxes levied under it for the construction of sewers shall be payable by the owners personally at the time of the assessment, and shall be a lien upon the property so assessed, and that the property may be sold for the payment thereof in the same manner and with like effect as in case of sales for the nonpayment of ordinary city taxes. It is apparent, we think, from a casual reading of the statute that the legislature never intended to confer upon cities the authority contended for in this case. It is not conferred in express terms by the provisions of the act. If it had been the intention to confer such power, we would naturally expect to find some provision making it the duty of some officer or agent of the state to pay such assessments when made, and making the necessary appropriations for meeting such charges when they accrued. But no such provisions have been enacted. The power to sell the property assessed for the payment of the tax is as certainly conferred by the act as is the power to make the assessment; and if the position of plaintiffs and the city is correct, it follows that the capital of the state or any of its charitable or reformatory institutions, which may be situated within cities of the first class may be sold for the payment of such assessments, and the title of the state thereto divested. We will not presume that such a result was intended": *Polk County Savings Bank v. State*, 69 Iowa, 29, 30.

A city has no power express or implied, to sell its own real estate to satisfy a special assessment levied upon it for the payment of a local improvement made by its authority. In such case the sale is void, and confers no title on the purchaser: *Taylor v. People*, 66 Ill. 322.

School property or school lands held in trust for school purposes are generally exempt from special assessments as well as from general taxation: *Chicago v. People*, 80 Ill. 384; *People v. Trustees of Schools*, 118 Ill. 52; *City of Toledo v. Board of Education*, 48 Ohio St. 83; *City of Hartford v. West Middle District*, 45 Conn. 462; 29 Am. Rep. 687; *Board of Improvement v. Little Rock School Dist.*, 56 Ark. 000; 37 Am. & Eng. Corp. Cas. 392.

Under existing statutes, many charitable, educational, and religious institutions are exempt from taxation for any purpose, and though a majority of the cases hold that such exemption does not extend to and include special assessments for local benefits, still respectable authority exists to support the proposition that an exemption from general taxation granted to such institutions will also exempt them from liability for local assessments. Thus when a college and its lands are exempted from all "civil impositions, taxes, and rates," they are also exempt from special assessment for street improvement: *Harvard College v. Boston*, 104 Mass. 470; and in *State v. Mayor etc. of Newark*, 36 N. J. L. 478, 13 Am. Rep. 464, the act incorporating the prosecutors, a protestant orphan asylum, declared that their property should not be subject to taxes or assessments, and it was decided that the words "taxes" or "assessments" were not synonymous, and that they exempted the property of such institution from assessments for local benefits as well as from taxes for general revenue purposes.



When church property is exempted from general taxation, it is also exempt from assessment for the cost of a sewer built by the city in the street on which such property fronts. An assessment on a city lot for the cost of municipal improvement in the street on which the lot fronts, is nothing more nor less than a species of local taxation: *City of Erie v. First Universalist Church*, 105 Pa. St. 278. The same doctrine is maintained in *Trustees First etc. Church v. Atlanta*, 76 Ga. 181-190, where the court said: "Where, let us ask, in the legislation of this state can a statute be found, which imposes any tax, or burden in the nature of such tax, either upon 'public property' or upon 'places of religious worship,' or 'places of burial,' or upon 'property used purely for charitable purposes?' When has any municipal corporation, created by our laws, or authorized by our constitution, under any general power to make assessments, ever before set up a claim to impose burdens for the support of the city government, or for the maintenance of its police powers upon property held by the public, or for purposes of religious worship, or charity, or sepulture? If there were nothing else but what is suggested by these considerations, we would find it impossible to conclude, without disregarding every rule of construction applicable to such cases, that the legislature ever intended to confer upon the city rulers and officers the power they are endeavoring to exercise. Does it not surpass belief that the framers of this act thought they were enabling the municipality to burden and encumber the capitol grounds, located in Atlanta, with assessments in order to lay down pavements, to construct sewers, drains, etc., and upon failure or refusal to pay the assessment made for these purposes, to bring the capitol and the ground upon which it stands to sale, and thus force the state to pay its portion of whatever liability was incurred for the making of such improvements? It is inconceivable that the legislature, by any general grant, could have relinquished its power over this subject even temporarily, so as to enable a few persons, owning one third of the land in a block abutting on a street in which its property happened to be located, to burden it with the expense of such costly improvements as the city authorities might see proper to direct, and in certain contingencies to bring it to sale and divest the title of the state and oust it from its use and possession; and if they could not do this to the capitol grounds, why should they be entitled to do it to the county courthouse and jail, the poorhouses, the various public schools, or the premises occupied by churches or charity hospitals, or such as are used for burial purposes? All these establishments are found in the same clause of the constitution, and of the act giving effect to it, with the public property, and so far as concerns their liability to taxation, are placed upon precisely the same footing with it, and there is good reason for the close and intimate association of these several possessions, in that they are devoted as well as the public property, to the attainment of the legitimate ends of government, and each contributes its share to securing that great and paramount object." The court then decides that the policy of the state as exhibited by its constitution and the history of its legislation, is to encourage and advance religion and foster charity, and that a statute allowing local assessments for street improvements will not be construed under general expressions as including the power to levy and collect such assessments against religious or charitable institutions: *Trustees First etc. Church v. Atlanta*, 76 Ga. 181. In *First Presbyterian Church v. Fort Wayne*, 36 Ind. 338, 10 Am. Rep. 35, it was decided that a building and ground used for religious purposes and not subject to state taxation, is not subject to assessment to contribute to the cost of the construction of the sewers of a city.

When a cemetery corporation or association is exempted by statute from all public taxes and assessments, the exemption extends to all assessments for local improvements of any nature, such as a sidewalk laid in front of the property or a sewer laid in the street fronting thereon: *State v. St. Paul*, 36 Minn. 529; *Proprietors of Swan Point Cemetery v. Tripp*, 14 R. I. 199. In *State v. St. Paul*, 36 Minn. 530, the court said: "It is urged that the adjective 'public' implies that there were, in the view of the legislature, taxes and assessments other than those which it designates as public, and the exemption was intended to be limited to those levied upon all property for some general use or purpose, as distinguished from those charges imposed upon the property in a particular locality to defray the expense of some local improvement. To give it the construction contended for renders the language of the statute merely tautological, and the word 'assessments' superfluous. The language used may be neither entirely apt nor happy, but we do not think that the term 'public' was intended to thus limit the exemption. Both 'taxes' and 'assessments' are levied for a public purpose, for the taxing power cannot be used for any other. Just as a general city tax, for example, is levied for a public purpose common to the entire city, so an assessment for the cost of a local improvement is levied for a public purpose, although common only to a particular street or district, and hence levied only upon the property fronting upon it, or benefited by it. But each is a tax, and each is public in the sense that it is levied for a public purpose.

"In our judgment, the manifest intention of the legislature was to exempt the property of cemetery associations from all public charges and burdens imposed in the exercise of the taxing power, whether of a general or local character. This construction is in harmony with the object of this exemption which is not merely to aid cemetery associations in dollars and cents, to the amount of the tax or assessment, which would otherwise be levied against their property, but mainly to preserve cemeteries for the particular use to which they have been appropriated, and secure their perpetuity as places of burial, and thus in accordance with the common sentiment of mankind, guard against the disturbance of the resting place of the dead, which would naturally ensue if the ground was liable to be sold to enforce the collection of taxes or assessments. In our cities these assessments for local improvements are often the most onerous and arbitrary forms of taxation frequently amounting almost to legal confiscation. This is necessarily so from the very nature of the case. If we are correct as to the object of the exemption, there is therefore the greater reason why it should extend to these assessments. And such, we think, was the intention of the legislature. Against this it has been suggested that these assessments are not a burden, like a general tax, but merely an equivalent for the benefit which the property derives from the improvement, and therefore it is not to be presumed that the legislature intended that the property should receive the benefit without paying for it. As against clear and unequivocal language in a statute, such a suggestion is without force. But it seems to us that the supposed distinction between general taxes and local assessments is more apparent than real. Both are taxes, and in that sense are burdens; but for each the property receives an equivalent. In the case of a general city tax this equivalent is the protection of property by the various agencies of the city government, and the benefits derived from public improvements made by the city at large. In the case of an 'assessment' the equivalent is the benefit supposed to be received from the local improvement. To exempt property from

either form of taxation is simply to give it the benefit without requiring it to contribute its share of the cost. The principle is the same in either case."

*Cases Holding Public Property Liable to Local Assessment.* — We now come to a consideration of those cases which hold that public property, though devoted entirely to a public use, is subject to assessment for local improvement, and in this connection we will also consider those cases which maintain that property exempted from general taxation, because it is put to an educational, charitable, or religious use, is not also exempted from local assessment, but must bear its proportion of the cost of any local benefit conferred by order of the municipality in which it is situated. These decisions proceed upon the theory that there is a manifest distinction between a tax and an assessment, and this distinction is stated by Miller, J. in *Hassan v. Rochester*, 67 N. Y. 529, in the following words: "There is a plain distinction between taxes, which are burdens or charges imposed upon persons or property to raise money for public purposes, and assessments for city and village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement. The collection and enforcement of assessment made for local improvement has never been the subject of general regulation by statute, and there is no provision which exempts the property of the state from liability for these assessments. Not being excepted by the statute law of the state, it is left for the legislature, which is vested with ample power for that purpose, to make such enactments on the subject as may be considered needful and proper. While, then, it may be conceded that property belonging to the state is not the subject of taxation in the absence of any exemption by statute, it by no means follows that it is not liable to assessments for local improvements."

The difference in the doctrine maintained by these cases and by those which assert the contrary rule, is thus made plain. The one class holds that in order that public property, or *quasi* public property, may be exempt from the levy and collection of special and local assessments, it must be expressly so made exempt by law, while the other class holds that the power to impose such assessments upon such property will never be implied, and that it is never subject to such assessment unless plainly imposed by legislative enactment.

There is a long line of cases in Illinois, beginning with *Higgins v. Chicago*, 18 Ill. 276, and ending at the present time with *County of Adams v. Quincy*, 130 Ill. 566, which maintain that the public property of the state, or of county or municipal corporations, is subject to special assessments for local improvements. In the latter of these cases, it was said that "this court has repeatedly held that special assessments for local improvements are not taxes, in the strict sense of that term, and that property held for a public use is not exempt from such assessment, although exempt from taxation for general purposes: *Canal Trustees v. Chicago*, 12 Ill. 403; *Higgins v. Chicago*, 18 Ill. 276; *Chicago v. Colby*, 20 Ill. 614; *Peoria v. Kidder*, 26 Ill. 351; *Scammon v. Chicago*, 42 Ill. 192; *Wright v. Chicago*, 46 Ill. 44; *Mix v. Ross*, 57 Ill. 121; *Cook Co. v. Chicago*, 103 Ill. 646; *McLean County v. Bloomington*, 106 Ill. 209." Under this rule, it has been decided that property owned by a county and used as a courthouse is not exempt from special assessment by a city, levied for the purpose of paving a street upon which it abuts: *County of Adams v. Quincy*, 130 Ill. 567; *County of McLean v. Bloomington*, 106 Ill. 209; and when the city owns a public park or square which is bounded by



streets for the improvement of which an assessment is being made, the city must contribute to the necessary expense in common with the owners of private property interested in the same improvement: *Higgins v. Chicago*, 18 Ill. 276; *Scammon v. Chicago*, 42 Ill. 192. In *County of McLean v. Bloomington*, 106 Ill. 213, it was said: "The second objection, that the statute under which the city is proceeding does not authorize any assessment against property of the county, rests entirely upon the assumption that, to include the property of counties, it should be expressly named, — that language, however comprehensive, in general terms only, is not sufficient. The rule held by this court is directly the reverse of this assumption. The exemption, not the inclusion, must specifically appear. General language like that under which the city is proceeding, includes the property of counties, cities, etc., as well as private property." This doctrine also maintains in *New York*, where it has been determined that, under the statute, lands belonging to the state are subject to be assessed for a local street improvement: *Hassan v. Rochester*, 67 N. Y. 528.

The cases are quite numerous in which it is decided under the above rule that the property of charitable, religious, and educational institutions, though exempted by law from general taxation or assessment, are nevertheless liable to assessment for local improvement; and this although such property is used exclusively for the purposes for which the institution is formed or incorporated. Thus an institution of purely public charity, whose property is exempt by statute from taxation, is not exempt from assessment for the cost of curbing laid in front of the property: *Philadelphia v. Pennsylvania Hospital*, 143 Pa. St. 367; *Boston Seaman's Friend Society v. Boston*, 116 Mass. 181; 17 Am. Rep. 153; *Worcester etc. Society v. Worcester*, 116 Mass. 189; or for other street improvement: *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; 11 Am. Rep. 412; *Matter of St. Joseph's Asylum*, 69 N. Y. 353; *Roosevelt Hospital v. Mayor of New York*, 84 N. Y. 108. Church property, or property used exclusively for purposes of public worship, though exempted from state taxation is nevertheless subject to local assessment to pay the costs of improvements made in front of the property, in the absence of a statute also exempting it from such assessments: *Atlanta v. First Presbyterian Church*, 86 Ga. 731; *Chicago v. Baptist etc. Union*, 115 Ill. 245; *Ottawa v. Trustees of Free Church*, 20 Ill. 424; *Lefevre v. Mayor of Detroit*, 2 Mich. 587; *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Lockwood v. St. Louis*, 24 Mo. 20; *Matter of the Mayor of New York*, 11 Johns. 77; *Broadway Baptist Church v. McAtee*, 8 Bush, 508; 8 Am. Rep. 480.

On the same principle lands belonging to cemetery associations, though exempted from general taxation for state, county, or city purposes, are still subject to local assessments for the benefit and improvement of the adjoining street. Some of these exemptions are very strong and comprehensive. Thus in *Mayor of Baltimore v. Proprietors Green Mountain Cemetery*, 7 Md. 517, an exemption from liability for any "tax or imposition whatever" was held to apply only to taxes or impositions for the purposes of revenue and not to relieve the cemetery from liability to pay an assessment levied to pay the cost of paving the street in front. In this case the court said, "The words 'any tax or public imposition whatever' most certainly are very comprehensive and would, if strictly construed, apply to every possible form of taxation or imposition, and as a consequence, necessarily include a paving tax. But on the fullest consideration, we are unable to satisfy our minds that the statute in question should receive such an exposition. We think the legislature intended nothing more than to exempt the property of the



proprietors from all taxes or impositions levied or imposed for the purposes of revenue, and not to relieve it from such charges as are inseparably incident to its location in regard to other property. If the property is not responsible for the assessment, then it is evident the street must forever remain unpaved, or the expense of it be borne wholly and entirely by the proprietors of the lots opposite. Surely this never could have been the intention of the legislature, nor can it be imagined. It was the purpose to compel the city generally to do it. It must be viewed practically as a benefit conferred on the property of the appellees, and the mere fact that they were indifferent to it, ought not to avail in their favor any more than the like indifference of an individual proprietor would shield him from liability to pay his *quota* when paving is done in front of his ground."

The following cases are decided upon the same principle and in the same way: *Lima v. Cemetery Ass'n*, 42 Ohio St. 128; 51 Am. Rep. 809; *Bloomington Cemetery Ass'n v. People*, 139 Ill. 16; *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St. 129; 39 Am. Rep. 732; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506; involving a statute providing that the lands and property of cemetery associations shall be exempt from "all public taxes, rates, and assessments" and the court said: "We think that the current of the authorities in this state and in some of the sister states runs to this result: That public taxes, rates, and assessments are those which are levied and taken out of the property of the person assessed, for some public and general use or purpose, in which he has no direct, immediate, and peculiar interest; being exactions from him toward the expense of carrying on the government, either directly or in general, that of the whole commonwealth or more mediately and particularly through the intervention of municipal corporations; and that those charges and impositions which are laid directly upon the property in a circumscribed locality to effect some work of local convenience, which in its results is of peculiar advantage and importance to the property especially assessed for the expense of it, are not public, but are local and private so far as this statute is concerned."

Under the same principle it has sometimes been determined that public school property, or the property of educational institutions, especially exempted by statute from taxation for the purposes of revenue, is nevertheless liable for assessments made for the improvement of streets in the locality where such property is situated: *Sioux City v. Independent School District*, 55 Iowa, 150; *St. Louis Public Schools v. St. Louis*, 26 Mo. 468; *Matter of College Street*, 8 R. I. 474; *Cincinnati College v. State*, 19 Ohio, 110; *Board of Improvement v. Little Rock School District*, 56 Ark. 000; 37 Am. & Eng. Corp. Cas. 392.

*Collection of Assessment.* — Many of the cases holding that the property of institutions exempted by statute from general taxation is, notwithstanding, subject to assessment for local improvement, fail to point the way to the collection of the assessment when levied. Some of them say that the property may be sold to enforce the collection of the assessment, the same as any private property: *Broadway Baptist Church v. McAtee*, 8 Bush, 508; 8 Am. Rep. 480; *Bloomington Cemetery Ass'n v. People*, 139 Ill. 16; *Atlanta v. First Presbyterian Church*, 86 Ga. 730; but we apprehend that some difficulty might be encountered in finding a purchaser for a cemetery or a pesthouse who would be willing to pay the amount of the assessment for the property assessed. It has been suggested that "while the cemetery land cannot be sold on any legal process, we think the city may, nevertheless, be able to collect the assessment, if indeed occasion should arise for resort-

ing to further proceedings in this case, for the statute plainly authorizes proceeding both at law and in equity, and payment, if not voluntarily made, could doubtless be secured by the appointment of a receiver, by sequestration, or by such other appropriate remedy as equity may afford without in any way disturbing the resting place of those reposing in the city of the dead": *Lima v. Cemetery Ass'n*, 42 Ohio St. 128-133; 51 Am. Rep. 809. More trouble, however, will be encountered in enforcing the collection of special assessments levied against purely public property such as court houses, hospitals, jails, school houses, state or county lands, consisting of public parks and like property. These of course are not subject to forced sale, and this is one of the strongest reasons advanced why they should be deemed exempt by those cases which hold that such property as to such assessments is included in a statute exempting it from general taxation for the purposes of revenue. The only case maintaining the contrary doctrine which has come under our notice as pointing out a method by which the collection of such an assessment may be enforced against public property is that of *County of McLean v. Bloomington*, 106 Ill. 209, where it is decided that the real estate of a county cannot be sold to satisfy a special assessment levied by a city for a local improvement, and the title passed to private parties or to the city. In such case the amount should be paid out of the county treasury, and should this not be done, *mandamus* will lie to compel it; but before this step can be taken a judgment at law must be obtained for the amount. This method of collecting the assessment was adopted in the principal case. To hold to this course is in effect to deny the right to impose the assessment upon public property and merely to affirm that the expense which would be chargeable against the property, if held in private proprietorship, must, when it is held for public uses, be paid out of the public funds.

**CASES**  
IN THE  
**SUPREME COURT**  
OF  
**MISSOURI.**

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**STATE v. MA Foo.**

[110 MISSOURI, 7.]

**CRIMINAL LAW — MAYHEM.** — INSTRUCTION IS CORRECT, which, while it leaves the jury free to find the fact "that the defendant knowingly and willfully threw some corrosive fluid into the face and eyes of the injured person," declares that the law presumes that the defendant intends the natural and probable consequence of his act, and that, from the intentional throwing of such a dangerous instrumentality into the eyes of a child, the jury may infer malice.

**CRIMINAL LAW.** — PRESUMPTION OF GUILT ARISES when the accused person has fled to avoid arrest, but not where he has fled to escape the violence of a mob.

**CRIMINAL LAW — INSTRUCTIONS AS TO GRADES OF OFFENSE.** — Where, under the evidence given, the defendant must either be guilty of a certain offense or entitled to an acquittal, the jury need not be instructed as to other offenses, to which the evidence in the case has no relation.

**CRIMINAL LAW — MARITAL COERCION.** — If a wife commits any felony, with the exception of murder and treason, and perhaps some other felonies, in the presence of her husband, it is presumed that she did it under constraint by him, and she is therefore excused, but this presumption is *prima facie* only, and is rebuttable.

**CRIMINAL LAW — MARITAL COERCION — BURDEN OF PROOF.** — When a married woman has committed a crime in her husband's presence, she may be convicted, if it is proved that the husband was not the inciter or responsible agent in the crime. The state need not show that the husband actually disapproved the crime, nor should the jury be instructed that in the absence of evidence of such disapproval the wife must be acquitted.

*J. E. Merryman and A. H. Bolte*, for the appellant.

*John M. Wood*, attorney-general, for the state.

**GANTT, P. J.** Defendant was indicted under the name of Annie Baker. Under this name she prayed a change of venue,

and upon it being granted, she signed bond for appearance in Franklin circuit court. In the Franklin court she alleged her true name was Annie Ma Foo, and the proceedings were afterwards conducted accordingly.

She was indicted at the January term, 1891, of St. Louis criminal court, for mayhem, under section 3488. The indictment was in three counts, the first two for mayhem differing only in the corrosive fluid used, and the third charged a felonious assault. At the close of the testimony the state entered a *nolle prosequi* as to the third count, and appellant was convicted upon the second, her punishment being assessed at five years' imprisonment in the penitentiary.

After unsuccessful motions for new trial, and in arrest, she was duly sentenced in accordance with the verdict, and from this judgment she has appealed.

The testimony on behalf of the state was substantially as follows: In the city of St. Louis, on the twenty-fifth day of July, A. D., 1890, appellant was engaged in a Chinese laundry on South Broadway, near the corner of Anna Street; she was known as Annie Baker, and was reputed to be the wife of the Chinese proprietor, to whom she had borne a child. On Anna Street, around the corner from Broadway, in the same block, lived Mrs. Kelly, a widow, who had a son named Walter, eleven years of age. On the morning of that day, about ten o'clock, Walter left home to go to a relative's house on Broadway, in company with two little girls. As they reached the laundry they stopped a moment to look into the open door, when appellant came to the door, holding her hands behind her, and exclaiming, "You will look in here, will you?" suddenly dashed the contents of a bowl into the face and upon the body of the boy. The child began to scream with pain, and was led home by some person attracted by his cries, dripping and wailing. Physicians were summoned as speedily as possible, one of them an experienced oculist, and the best known treatment adopted. The boy's eyes were both burned, apparently by some strong alkali, as also the skin of his face, his lips, and one of his arms; his clothing was also discolored and corroded, and smelt of concentrated lye. The eyes ulcerated, burst, and sloughed away, and the lids grew together upon the remnants of the eyeballs; the lad was never able to see from the time the liquid was thrown into his face, and is now totally and incurably blind.

After the child was taken home his mother and an older



brother went to the laundry, where they saw appellant and the Chinaman. Mrs. Kelly said to the appellant: "What did you do that to my poor little boy for?" To which appellant answered: "Yes, I done it, and I will do it again if I have a chance."

There was testimony of an eyewitness that she also said she did not intend it for him, but for another boy (named Berry), adding, "I will make them keep away from my door." The brother addressed the Chinaman, in the presence of the appellant: "What did you do that to my brother for?" and he replied, "Me no do it, my wife do it."

Shortly afterwards appellant went out, back into an alley, crossed over the street, entered a house, went through it and a rear yard into another alley, made her way to the car stables, and took a street car going up town. She was followed by the brother, who got upon the same car. After riding a few blocks she got off, and he did the same, and shortly after, seeing an officer, hailed him, and had her arrested. On the way to the police station the officer had a conversation with her, in which she said it was only soap suds which she had thrown, and when told she had blinded the boy, replied: "If I did, I will do it again."

There was no testimony on the part of the state that the husband of appellant was present at the commission of the act charged, but only that he was in the laundry when the mother and brother of the injured boy came there, several minutes after the deed was done.

Upon the trial the state admitted, "for the purposes of this case," that appellant and the Chinaman, Ma Foo, were married.

Appellant, testifying in her own behalf, said: "On the twenty-fifth day of July, I was ironing at the table, my husband and I, my husband on one side of the room and I on the other. On Thursday we washed, and on Friday we ironed; and I was ironing awhile, and concluded to scrub the floor, and I went back to get some wash water that we used the day before, to wash the floor with. There was a great deal of starch—this Chinese starch, you know—on the front part of the wall and the door, that got on there when he was starching the things, and the door was open. When I washed the floor up I had two dippers full of the water left, and threw it on the edge of the door to wash that off, and I never saw anyone when I threw it, at the time it occurred, until this

little boy cried, and said I threw it in his eyes. If I did it, I did it unintentionally; why would I want to put anyone's eyes out for? . . . . The boy was never in my house, that I know of; I never saw him before. . . . I had no idea or intention in the world of throwing that water in that boy's eyes. . . . There was quite a crowd came into the house, Mr. Kelly and Mrs. Kelly. I don't remember what I said; there was such excitement, and they were making such distress, I didn't know what was said. All I recollect, Mr. Kelly said to my husband, 'If that was you, I would fix you.' . . . . By reason of his making threats, and there was such a crowd outside, I thought I had better go up and see what they could do about it; and I thought I had better go away from there; that they would mob the house, or something. I had to go through the front to get out, and I went down Elm (Lami) Street, and she, Mrs. Kelly, was in the alley. I got on the car, and it did not go, and I got on another, and on that car I was arrested. I was going to Jo Hon Yee, to tell him, and see what I should do. They were making such threats, that scared me; that was my object in going there, and no other object. There were only two places, the front and back way. I went out the back, right out by Mrs. Kelly's house. I could have gone from the house and got on a Fifth Street car, but I went by Mrs. Kelly's house.

"Q. Where was your husband at the time the water was thrown — whatever they call it? A. He was ironing at one side of the room.

"Q. How far were you from him when you threw the water? A. He was ironing at the same table and never moved. The water that I threw was wash water from the day before. I had used it with my hands. I worked myself, and he did also. That was the kind of water that struck the boy."

Dr. Alt and Dr. Fulton were called. Dr. Alt gave it as his opinion, from the examination made that evening, that the injury was caused by a strong alkali thrown into the boy's eyes, perhaps concentrated lye. Dr. Fulton did not analyze the fluid, but it was corrosive.

#### OPINION.

1. As the defendant was convicted under the second count, the instruction as to that count only is here for review.

The court charged that the assault must have been made

with the intent then and there, feloniously, on purpose and of malice aforethought, to maim the boy, and that defendant, in pursuance of this intent, did, feloniously, on purpose, and of her malice aforethought, cast, or throw, the corrosive fluid into the eyes of the boy, and did in this way put out his eyes.

The court correctly defined the terms "malice," "malice aforethought," and "on purpose," and correctly defined a very plain statutory offense.

2. The objection to instruction numbered 4 is equally unfounded. The court did not assume any fact, but left the jury free to find "that the defendant knowingly and willfully threw some corrosive fluid into the face and eyes of Walter Kelly." If she did this, the court correctly told the jury the law presumed she intended the natural consequence of her act, and from the intentional throwing of such a dangerous instrumentality into the eyes of a child the jury might infer malice.

Instructions should be concise. We think this instruction submitted the state's side of the question very clearly, and is not open to the criticism made on it by defendant. Immediately following it, and in the same connection, the court charged the jury that before they could find the defendant guilty, they must believe beyond a reasonable doubt that the defendant intentionally or on purpose, and not accidentally, threw the fluid into the boy's eyes; and warned the jury that the law presumed her innocent until she was proven to be guilty of the charge beyond a reasonable doubt.

The issue was submitted fairly, whether defendant intentionally or accidentally threw this corrosive substance in the child's eyes. The jury found she did it intentionally.

3. The presumption from flight was properly stated. If the jury found she fled to avoid arrest, it raised a presumption of guilt. If she fled from a mob, then no such presumption arose: *State v. Griffin*, 87 Mo. 608; *State v. Brooks*, 92 Mo. 542.

4. The ninth instruction has been approved so often, it is useless to give either reason or authority for it.

5. There was no error in failing to instruct the jury on the offenses denounced in sections 3489-3492.

The evidence for the state, if true, made a case of mayhem alone. The evidence for defendant, if true, entitled her to an acquittal. She was guilty of mayhem or nothing under the evidence in this case. The court properly confined itself to

the charge in the indictment and the offense of which there was evidence in the case.

6. But the defendant earnestly contends that the court erred in not qualifying the seventh instruction by adding thereto these words: "There was no evidence that the defendant's husband disapproved of the acts of the defendant, and, unless that fact is established, the jury should acquit the defendant"; and in refusing instruction, numbered 5, prayed in her behalf, to the effect that if her husband was present the jury must acquit her.

The court gave the following declaration: "7. The court instructs the jury that the evidence in this case is sufficient to show that the defendant, at the time of the alleged commission of the crime, was a married woman, and the wife of Ma Foo. Now, even though you may believe, from the evidence, that the defendant committed the crime as charged in the indictment, yet, if you further believe that she committed the crime in the presence of her husband, Ma Foo, and that he was present at the time when she threw the fluid, then the law, in the absence of other and further culpatory and explanatory evidence against the defendant herself, presumes that she acted under the immediate coercion of her husband, and, in such case, you will find the defendant not guilty. This presumption of law, however, that a wife acting in the presence of her husband is acting under his coercion, and that she is, therefore, not guilty of a crime committed in his presence, is *prima facie*, only, and may be rebutted by other proper evidence in the case. And if, in this case, you believe from all the testimony before you that the defendant was the sole acting party, and committed the crime as charged without any incitement on the part of her husband, and without his consent, or that the defendant was the sole instigator of the crime, and committed the same as charged in the indictment, then you will find the defendant guilty, even though you may believe that her husband was present when she committed the act."

A married woman's responsibility for crime, committed in the presence of her husband, is variously stated by the text writers.

Blackstone, in his commentaries, book 1, page 444, says: "And in some felonies, and in some inferior offenses committed by her through constraint of her husband, the law excuses her; but this extends not to treason or murder." And



in his fourth book he says: "And she will be guilty in the same manner of all those crimes, which, like murder, are *mala in se*, and prohibited by the law of nature." See also Russell on Crimes, 9th ed. p. 34.

From a close examination and comparison of the cases and the text writers, the general rule admitted by all seems to be that if a wife commit any felony, with the exception of murder and treason, and perhaps some other heinous felonies, in the presence of her husband, it is presumed, in the absence of evidence to the contrary, that she did it under constraint by him, and is, therefore, excused: 1 Bennett's Leading Criminal Cases, 81; *Commonwealth v. Neal*, 10 Mass. 152; 6 Am. Dec. 105; 1 Bishop's Criminal Law, 452; *State v. Williams*, 65 N. C. 398.

But the authorities are equally agreed, that this presumption is only *prima facie*, and rebuttable. So it is said in Russell on Crimes, pages 32, 33: "But this is only the presumption of law, so that, if upon the evidence it clearly appears that the wife was not drawn to the offense by her husband, but that she was the principal inciter of it, she is guilty." "And if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of murder, treason, or robbery in company with, or by coercion of, her husband, she is punishable as if she were sole." And this is the doctrine of all the states in the United States: 1 Wharton on Criminal Law, sec. 79; *Seiler v. People*, 77 N. Y. 411; *Tabler v. State*, 34 Ohio St. 127; *Uhl v. Commonwealth*, 6 Gratt. 706; *State v. Williams*, 65 N. C. 398; *Miller v. State*, 25 Wis. 384.

In Arkansas, by force of a statute, the presence of the husband merely is no defense to the wife unless it "appear from the circumstances in the case that violence, threats, commands, or coercion were used": *Freel v. State*, 21 Ark. 212.

It will be observed that learned counsel for defendant desire us to ingraft an additional modification on this rule of evidence, and require the state to go further and prove that the husband not only was not the inciter or responsible criminal agent in the commission of the crime, but that he actually disapproved it, and in the absence of evidence of his disapproval, the wife must be acquitted. This is not the law. There is little in the present organization of society upon which the *prima facie* presumption itself can stand, and certainly nothing calling for any extension of the presumption.

The statutory rule in Arkansas, *supra*, is more in accord with the spirit of the age in which we live. In New York, by the Penal Code of 1881, sections 17 and 24, the presumption is entirely abolished.

In this case, if the wife is guilty at all, she alone committed the criminal act which forever deprived the boy of his eyesight. By her own evidence she exonerates her husband of all complicity in the crime. There is not a semblance of constraint. Her responsibility was fairly submitted to the jury. The instruction gave her the full benefit of the presumption, and the jury must have found that she was neither coerced nor constrained by act, deed, or word of her husband to do what she did, but that she acted from her own free will. Had the act resulted in death, under the common-law authorities she would not have been entitled to the benefit of the presumption of constraint.

What difference there is in principle between the culpability of one who, on purpose and of malice aforethought, destroys the sight of a little child, and one who kills, we leave to others to state. We confess we are unable to formulate any. The defendant has been fairly tried, and the jury have convicted her. This was their peculiar province. We can but regret for the sake of humanity that she could not have been shown innocent of the charge. At this distance it is hard to conceive of such a crime by a woman, and that woman a mother, with so little provocation or motive.

The remarks of Mr. Harvey did not transcend the bounds of legitimate argument. He expressly subordinated his own views of the law to those expressed by the court in its instructions.

Finding no error in the record, the judgment is affirmed. All concur.

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MALICE, IMPLIED — DEFINED. — "Implied malice is that which the law infers from or imputes to certain acts": *Martinez v. State*, 30 Tex. App. 129; 28 Am. St. Rep. 895, and note with cases collected. Malice is always inferred where one deliberately injures another: *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320. An intent to commit a crime is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act: *High v. State*, 26 Tex. App. 545; 8 Am. St. Rep. 488; *State v. Deschamps*, 42 La. Ann. 567; 21 Am. St. Rep. 392, and note.

CRIMINAL LAW — MARITAL COERCION. — For a full discussion of this subject, see *Bibb v. State*, 94 Ala. 31; *ante*, p. 88, and extended note.

## BENSIECK v. COOK.

[110 MISSOURI, 173.]

**EJECTMENT — MARRIED WOMAN, WHEN A PROPER PARTY DEFENDANT. —**

When the husband is confined in a lunatic asylum, and the wife is the active defendant in the cause, withholding the premises sued for, and making a defense of an affirmative character, she must be regarded as a proper party defendant.

**PLEADING AND PRACTICE — INCONSISTENT DEFENSES. —** Parties litigant are not allowed to assume inconsistent positions in court. Hence where a married woman has assumed the role of being a proper and necessary party defendant in an action of ejectment, she cannot, after being cast in the suit, change front, and insist that error occurred in making her a party defendant.**PARTIES, IMPROPER JOINDER OF, OBJECTION TO, HOW TAKEN. —** If a married woman is improperly joined as party defendant, the Missouri statute requires that the objection to such misjoinder be taken by demurrer, since the defect appears on the face of the petition. If the objection is not taken in this way, it is deemed to have been waived.**PARTIES, IMPROPER JOINDER OF, NOT A GROUND FOR REVERSAL OF JUDGMENT. —** The misjoinder of a married woman as a party defendant is not a defect which will cause a reversal of the judgment, because her name can be stricken out even in an appellate court.**INSANE PERSONS. — APPOINTMENT OF GUARDIAN AD LITEM** for a lunatic who is made a party defendant in an ejectment suit is proper, and the court has power, after such appointment, to render a judgment as binding on the lunatic and his property as a similar judgment would be upon a sane person.**EJECTMENT — INCOMPETENT EVIDENCE. —** In an action of ejectment, brought by the purchaser at a trustee's sale of the premises, evidence of payments made by the party defendant showing a partial discharge of the notes secured by the deed of trust, is rightly excluded. Such evidence does not show a satisfaction of the debt.**TRUST DEEDS — RIGHTS OF TRUSTOR TO PURCHASE AT TRUSTEE'S SALE. —** Where premises, subject to the lien of a deed of trust executed to secure a debt, are conveyed to one who assumes the payment of the debt, and are afterwards sold in pursuance of the power contained in the deed of trust, the trustor is fully authorized and competent to bid at the sale, and may, as incident to this right, pay the customary amount of earnest money on the bid, and deduct the sum out of the amount paid by the person to whom he transfers the rights acquired by his bid, and to whom the trustee's deed is finally made.**MORTGAGES. — ASSUMPTION OF MORTGAGE DEBT BY PURCHASER OF LAND** may be shown by parol evidence.**MORTGAGES — SATISFACTION, WHAT DOES NOT AMOUNT TO A. —** When premises subject to a debt secured by a deed of trust are conveyed to a purchaser who assumes the debt, and who takes under a conveyance expressly excepting the deed of trust from a warranty otherwise general, the trustor is not bound to pay off the deed of trust, and when he subsequently bids in the property at the trustee's sale, and then substitutes, as purchaser, another party who pays the price and receives a conveyance from the trustee, these circumstances do not show a proper

case for the application of the rule that, when one is bound to pay a mortgage debt and does so, a satisfaction and discharge of the mortgage is thereby effected. The position and rights of the party thus substituted as purchaser are precisely the same as if he had personally bid in the property at the sale.

**TRUST DEEDS.** — **VALIDITY OF SALE UNDER DEED OF TRUST** is not affected by the insanity of one who purchased the premises subject to the lien of that deed, and who assumed the payment of the debt secured by it as a part of the consideration of his purchase, nor is the case altered if the purchaser at the trustee's sale has actual knowledge of such insanity.

**MORTGAGES.** — **PURCHASER AT A FORECLOSURE SALE** is under no obligation, either moral or legal, to reimburse one who bought the premises subject to the debt secured by the mortgage and assumed its payment, for sums of money expended to protect his equity of redemption.

*H. D. Laughlin*, for the appellant.

*Lubke and Muench*, for the respondent.

SHERWOOD, P. J. Ejectment against Ann Cook and Joseph Cook, her husband, for possession of second and third floors of the south half of premises 1113 North Broadway, in the city of St. Louis. Petition in usual form, except that it alleged that plaintiff was entitled to the possession of the premises on such a day; that afterwards, on such a day, the defendant, Ann Cook, entered into the possession of the premises, and unlawfully withheld the same from plaintiff; that at the time of such entry and ouster the defendants were and are still living separate and apart from each other, and that the aforesaid acts of the wife were done without the knowledge of the husband.

Summons issued and was served on both of the defendants in May, 1888. Joseph Cook being insane and in confinement, a guardian *ad litem* was appointed for him, who answered in usual form. Ann Cook answered separately in a lengthy answer, filed in June, 1889. This answer was a general denial, and in substance stated that Joseph Cook for more than five years last past had been insane and was now insane, and for that space of time confined in an insane asylum and incapable of attending to any business or of defending the suit, or of understanding the nature of the same; that for three years prior to the fourth day of November, 1882, said Joseph had been insane, an inmate of an insane asylum during said three years, and at said date was insane, and wholly incapable of attending to business, or of understanding the nature of a contract; that at said date the property in question was owned by Joshua Sartore and Francis W. Dungey, on which prop-



erty was a deed of trust made by Sartore and Dungey to secure a debt due to Jacob Schopp for five thousand dollars, due in installments and interest notes, having several years to run; that on said date Sartore and Dungey sold the premises of which that in litigation forms part to Joseph Cook for the consideration of seven thousand dollars, two thousand dollars of which consisted in cash paid by said Cook, and the assumption by him of the five thousand dollars indebtedness aforesaid; and thereupon said Cook entered into possession of the premises so sold to him, and defendant, Ann Cook, has been in possession of said premises ever since; that immediately after said transaction Joseph Cook became so violently insane that he had to be confined in the insane asylum, and has been there confined ever since; that thereafter Ann Cook paid on said deed of trust due Schopp two thousand two hundred dollars, which with the amount paid by said Joseph aggregates the sum of four thousand two hundred dollars; that in addition thereto said defendant Ann has paid taxes and made improvements on the property amounting with the sums already mentioned to five thousand five hundred dollars; that the improvements were made in good faith; that at the time Sartore and Dungey sold to said Joseph said property they well knew he was insane and unable to transact business, and so did plaintiff; and they, Sartore and Dungey, made said Joseph a general warranty deed for said property, except as against said deed of trust; that said premises were benefited to the extent of said money paid and improvements made in good faith by defendants, and they prayed for judgment for that sum.

The answer then alleges that on April 11, 1888, the property in question was at the instance of Sartore and Dungey and plaintiff advertised for sale under the Schopp deed of trust and was knocked down to Sartore and Dungey; that, instead of taking a deed from the trustee to themselves, Sartore and Dungey caused one to be made to plaintiff for the purpose of injuring and defrauding defendant, and that these acts constitute a payment of the deed of trust.

The reply admits the insanity of Joseph Cook, and his confinement in the insane asylum, but denies Ann Cook's possession of the whole of said two houses, and reiterates that she is only in possession of the second and third stories of 1113 North Broadway; denies that Joseph Cook became violently insane immediately after buying the property from Sartore

and Dungey; denies the payments made by Ann Cook; denies that he or Sartore and Dungey knew Cook was insane; denies each and every allegation contained in defendant's last special defense, and says that plaintiff did buy the property at a sale under said deed of trust, and that he bought the same for himself in good faith, and denies that there was any fraud whatever connected with the sale and purchase.

The deed made from Sartore and Dungey to Joseph Cook recited a consideration of seven thousand dollars; was a general warranty deed, but excepted from the warranty the deed of trust previously given by Sartore and Dungey to Schopp. The deed of trust previously made by Sartore and Dungey, under which the property was sold, was in ordinary form, and made the recitals of the trustee's deed *prima facie* evidence. Other facts necessary to a determination will be noticed in discussing the various points to which they pertain.

At the close of all the evidence defendants asked a series of instructions to the effect that plaintiff could not recover; that if Sartore and Dungey bid in the property at the trustee's sale, plaintiff could not recover; that if Sartore and Dungey, or either of them, bid in the property at the trustee's sale, this satisfied the deed of trust and perfected Cook's title; that the trustee had no right to make a deed to any one but the actual bidder at the sale; that defendant, Ann Cook, being a married woman, and her husband being insane, the plaintiff was not entitled to recover.

All these instructions were refused by the court, and defendants excepted. The court then gave to the jury a peremptory instruction to find for plaintiff on defendants' counterclaim, and to find for him as to possession, and to assess the damages and monthly values of the property according to the reasonable value thereof. The jury found as directed, judgment was entered for plaintiff; but defendant Ann alone has appealed.

#### OPINION.

1. The wife was a necessary party to the suit; she withheld possession of the premises, and was the only active defendant in the cause; she alone filed a motion for a new trial and in arrest, based upon the idea that she, being a married woman, and her husband insane, no judgment could be rendered in the cause against either of them: 1. Because her husband was insane; and 2. Because she was a married woman. Our

statute requires that ejectment shall be brought against the person in possession of the premises: Rev. Stats. 1889, sec. 4629. Here, considering the situation of the husband, his enforced absence and confinement, his unfortunate mental condition, the affirmative character of the defense made by the wife, and her withholding the possession, she must be regarded as a proper party defendant: Sedgwick and Wait on Trial of Titles to Land, 2d ed., sec. 255.

2. But having assumed the role of being a proper and necessary party defendant, having pleaded to the merits, she cannot, after being cast in the suit, now change front and insist that error occurred in making her a party defendant. Courts of justice cannot be trifled with in this way. Parties litigant are not allowed to assume inconsistent positions in court, to play fast and loose, to blow hot and cold. Having elected to adopt a certain course of action, they will be confined to that course which they adopt: Bigelow on Estoppel, 5th ed., 673, 717; *Brown v. Bowen*, 90 Mo. 184; *McClanahan v. West*, 100 Mo. 309; *Tower v. Moore*, 52 Mo. 118; *Smiley v. Cockrell*, 92 Mo. *loc. cit.* 112, and cases cited.

3. Furthermore, if the defendant Ann was improperly joined as a party defendant, the course indicated by the statute should have been pursued, and the objection taken by demurrer, as the defect appeared on the face of the petition. Failing to take the objection in this way, it must be deemed to be waived: Rev. Stats. 1889, secs. 2043, 2047. The authorities in this court on this point are too numerous for citation. The petition, in any event, stated a cause of action as to the husband, and if the wife was improperly joined as party defendant, the objection on that score as to the wife had been waived, and could not be raised by objecting to the introduction of any evidence, or by instructions to the jury: *Horstkotte v. Menier*, 50 Mo. 158; *Dunn v. Hannibal etc. R. R. Co.*, 68 Mo. 268.

4. Moreover, granting that Ann Cook was improperly joined as a party defendant, this defect cannot cause a reversal of the judgment, because her name can be stricken out even in this court; and this would be in accordance with the statute, and with a long line of decisions in this court, beginning with *Cruchon v. Brown*, 57 Mo. 38, and ending with the recent case of *State v. Tate*, 109 Mo. 265, 32 Am. St. Rep. 664; where many of the authorities on this point are collated.

5. The trial court pursued the right course in appointing a

guardian *ad litem* for defendant, Joseph Cook: *Mitchell v. Kingman*, 5 Pick. 431; Buswell on Insanity, sec. 132; *Sturges v. Longworth*, 1 Ohio St. 544. And the power of the court to appoint such a guardian, of necessity, concedes the power of the court, upon the proper basis of facts being presented, to render a judgment as binding on the lunatic and his property interests, as a similar judgment would be upon a sane person.

6. On the part of defendants evidence was offered tending to show that Joseph Cook was placed in an insane asylum thirteen or fourteen years ago; that he was discharged, and in 1882 was living on Biddle Street, and later at the premises on North Broadway; that at the trustee's sale in April, 1888, the property was struck off to Sartore for \$5,301, who paid down \$50 earnest money; that Cook carried on the blacksmithing business in the North Broadway premises in 1882; that afterwards he was again placed in an asylum, and was there at the time of the trial; that after Cook was last sent away his wife and nephew continued the blacksmithing business, and occupied the premises in question, and that when Cook bought the property from Sartore and Dungey he consulted with friends and also had the title examined by an investigator before the trade was closed.

A son of Cook's testified to several short street conversations which his father had with Bensieck some seven or eight years ago, when Bensieck was having some building done, and this was before the sale by Sartore and Dungey to Cook, and the latter certainly gave no indications at that time of being insane, and had been several years before discharged from the asylum. Whether Bensieck, the plaintiff, was acquainted with Joseph Cook, is by no means clear; he denies any acquaintance, nor does it appear, if he was acquainted with him, that he knew of his mental affliction.

Defendant, Ann Cook, testified that she was in possession of the property in question from the time her husband was last sent to an asylum after 1883; that she paid to Mr. Espenschied, the holder of the notes secured by the Schopp deed of trust, five of the interest notes aggregating \$570, and one of the principal notes amounting to \$1,000; also, that she made him three other payments aggregating \$360, and another amounting to \$175.

When the notes and receipts were offered in evidence plaintiff's counsel objected for the reason that these payments were insufficient to show a liquidation of the deed of trust.



The court sustained the objection, and defendants excepted. Inasmuch as the notes and receipts did not amount to a satisfaction of the debt secured by the deed of trust, the court below did right in excluding them when offered, and the ruling was also correct which denied the admission in evidence of receipts showing the amount Ann Cook had paid out for taxes on the property.

7. The evidence discloses that Mrs. Cook offered to sell the property to plaintiff about a year before he bought it; that he knew Sartore and Dungey; that about a week before plaintiff bought the property Sartore and Dungey offered it to him; that he took time "to study about it"; that after a week he decided to buy it and had the title examined by an investigator, and at the office of the trustee he closed the matter, paid down \$5,500, got the trustee's deed and put that on record the same morning. He also paid \$353.25 back taxes. Although the trustee's deed called for only \$5,301, he actually paid \$5,500. Plaintiff stated that he is a livery-stable proprietor; that he did not attend the trustee's sale, but bargained for the property with Sartore and Dungey, who had bid it off at that sale, and that the trustee's deed was made to plaintiff by their authority and consent.

Sartore and Dungey had the undoubted right to have the mortgaged property applied to the payment of the mortgage, so far as was necessary for their individual protection against personal liability on the notes. "Where the mortgagor has conveyed the equity of redemption to one who has assumed the payment of the mortgage debt, so that in effect the mortgagor becomes a surety of the debt, he has the right to have the property first applied to the payment of the debt, or restored to him upon his paying it": 1 Jones on Mortgages, 4th ed., sec. 678a. As a corollary to this right and necessarily incident thereto, Sartore and Dungey were fully authorized and competent to bid at the sale under their own deed of trust: 2 Jones on Mortgages, 4th ed., secs. 1636, 1837; *Houston v. Nord*, 39 Minn. 490; *Mooring v. Little*, 98 N. C. 472.

8. And Sartore, as an incident to the rights aforesaid, had the further right to pay fifty dollars earnest money which he paid on his bid, which it seems is customary, and to deduct that sum out of the amount paid by Bensieck, the plaintiff.

9. Having bid in the property for their own protection, Sartore, the bidder, was undoubtedly entitled to have Bensieck substituted as purchaser upon the latter consummating the

purchase. This is every day practice: Jones on Mortgages, sec. 1652, and cases cited; *Massey v. Young*, 73 Mo. 260, and cases cited.

10. The answer of the defendant wife contains the express admission that her husband bought the property of Sartore and Dungey for seven thousand dollars; two thousand dollars of which he paid in cash, and assumed the payment of the deed of trust to Jacob Schopp, amounting to five thousand dollars; and the deed of Sartore and Dungey to Cook, excepted out of their warranty the Schopp indebtedness. This assumption by Cook of the Schopp debt was capable of being established by parol: *Burnham v. Dorr*, 72 Me. 198. And the facts that Cook, as shown by the evidence, paid two thousand dollars cash down at the time of his purchase, and that his wife subsequently paid off a portion of the mortgage debt to Espenschied, the holder of the notes secured by the Schopp deed of trust, and the exception contained in the warranty deed of Sartore and Dungey to Cook, abundantly support the theory of Cook having made a parol assumption of the indebtedness secured by the Schopp deed. These things being taken as true, it clearly appears that Sartore and Dungey were not bound to pay off the deed of trust which they had expressly excepted out of their warranty to Cook, and which Cook had agreed to pay. This being the case, there is no ground to apply the rule which holds that when one is bound to pay a mortgage debt, and does so, this amounts to a satisfaction and discharge of the mortgage.

There is therefore no basis in this instance for the operation of such a rule, because it was Bensieck and Bensieck's money that bought the property and paid therefor, and he being properly substituted as a bidder at the trustee's sale, the result is precisely the same as if he had personally bid in the property at the court-house door when the trustee's hammer fell.

11. Of course, when the trustee's sale was consummated by his deed to Bensieck, Cook's prior title went by the board: *Plum v. Studebaker Bros. Mfg. Co.*, 89 Mo. 162.

12. It is not seen what possible relevancy Cook's insanity, even if known to Bensieck, and there is no evidence of this, could have by way of countervailing the force and effect of a deed of trust not made by him and which was in existence long before he purchased, subject to which he bought and which he assumed as part of the consideration of his own purchase.

13. Nor is it at all apparent what counterclaim Mrs. Cook or her husband can have against Bensieck for moneys which she paid out to protect her husband's equity of redemption. All that Mrs. Cook proved was that while enjoying for years the possession, rents, and profits of the property, she paid some of the notes secured by the deed of trust, and thus prevented an earlier foreclosure. Certainly Bensieck, the purchaser at the foreclosure sale, in absence of an express promise grounded upon a valuable consideration, was under neither a moral or legal obligation to reimburse her for sums thus expended. The judgment should therefore be affirmed. All concur.

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MARRIED WOMEN. — WHEN MAY BE SUED ALONE: See note to *White v. Foote Lumber Co.*, 6 Am. St. Rep. 653; *Shupp v. Hoffman*, 72 Md. 359; 20 Am. St. Rep. 476, and note; *Le Grand v. Eufala Nat. Bank*, 81 Ala. 123; 60 Am. Rep. 140. A married woman who has real estate separately settled upon her, the legal title being in the husband as trustee, may be sued alone for damages received by one who was injured by reason of a sidewalk being out of repair: *Merrill v. St. Louis*, 83 Mo. 244; 53 Am. Rep. 576.

PARTIES — IMPROPER JOINDER — HOW OBJECTED TO. — An improper joinder of parties should be taken advantage of by demurrer where the defect appears on the face of the complaint, and if not demurred to will be deemed waived: *Alvarez v. Brannan*, 7 Cal. 503; 68 Am. Dec. 274, and note; *Metcalfe v. Brand*, 86 Ky. 331; 9 Am. St. Rep. 232; *Grain v. Aldrich*, 33 Cal. 514; 99 Am. Dec. 423. The general rule is that an objection to a bill on the ground of misjoinder of parties should be made by demurrer: *Hinchman v. Patterson etc. R. R. Co.*, 17 N. J. Eq. 75; 86 Am. Dec. 252, and note.

APPEAL — EFFECT OF MISJOINDER OF PARTIES ON. — The court may, in affirming a judgment, strike therefrom the name of a party against whom it was irregularly rendered because of his death prior to the commencement of the action: *State v. Tate*, 109 Mo. 265; 32 Am. St. Rep. 664.

INSANE PERSONS — GUARDIAN AD LITEM — APPOINTMENT OF. — The court may, in its discretion, appoint a guardian *ad litem* for a person *non compos mentis*: *King v. Robinson*, 33 Me. 114; 54 Am. Dec. 614, and note. See also *Owings' Case*, 1 Bland, 370; 17 Am. Dec. 311.

## HAEUSSLER v. MISSOURI IRON COMPANY.

[110 MISSOURI, 188.]

**PARTITION, WHO MAY SUE FOR.** — One tenant in common cannot maintain an action for partition against his cotenant where he has been disseised; but where it appears that the defendant holds possession by virtue of an instrument transferring the rights of parties acquired under conveyances of certain undivided portions of the lands, and under a lease which grants the sole and perpetual right and privilege to enter upon said lands for the purpose of mining, etc., all the iron ore which may be upon or in said lands, and contains the proviso that such parts of the lands as do not contain iron ore, and such as shall not be needed for the use of the lessees in carrying on their business, shall "remain in the joint possession and for the mutual use, etc., of all the aforesaid parties to the deed, according to their respective interests therein," the possession is not antagonistic or adverse to, but consistent with, the interests of the other parties to the conveyance and the deed of lease.

**CONTRACT BETWEEN COTENANTS NOT TO SUE FOR PARTITION, WHEN VOID.** A stipulation in a deed conveying an undivided interest in land, whereby the parties covenant for themselves, their heirs, and assigns never to institute proceedings for the partition of a certain specified portion of that land, is an unreasonable restraint of the enjoyment and use of the property, and therefore void.

*Broadhead and Hezel, and J. M. Orchard, and E. A. Seay,*  
for the appellant.

*L. B. Woodside,* for the respondent.

THOMAS, J. This is a proceeding for the partition of the southwest quarter and the northwest quarter of the southwest quarter, and the north half of the southeast quarter of section 24, township 34, range 6 west, situated in Dent County, containing 280 acres.

This record discloses the following facts: On the fourth day of June, 1870, C. C. Simmons and W. P. Billings, being seised of said lands in fee by separate conveyances, conveyed two undivided fourths thereof in fee to Alexander L. Crawford and William L. Scott, each of which conveyances contained this stipulation: "And it is also further mutually covenanted and agreed by and between the parties to this conveyance that neither they nor their heirs or assigns, nor any or either of them, shall or will ever institute, or commence or cause to be instituted or commenced, any proceedings in partition, or otherwise in law or equity, to obtain or procure a partition, allotment, or division or sale of so much or of such parts or portion of said lands as have been leased for mining purposes to said parties of the second part by deed of lease bearing



even date herewith, and made and executed by said Walter P. Billings and Cyrenius C. Simmons, and duly recorded in the office of the recorder of deeds of said Dent County, without the written consent of all the parties interested in said property at the time of the commencement of such proceedings, and made a part of the record thereof."

The "deed of lease" mentioned in the foregoing stipulation was an indenture which witnessed that the said Simmons and Billings, as parties of the first part, granted, bargained, sold, and conveyed perpetually and forever to said Crawford and Scott, as parties of the second part, their heirs, assigns, and legal representatives, "the sole and exclusive right and privilege to enter upon and into said lands for the purpose of searching for, digging, mining, quarrying, and taking away all the iron ore which may be upon or in said lands; and also for the purpose of smelting and manufacturing of iron on said lands to any extent that the parties of the second part, their heirs, assigns, and legal representatives may deem advisable," with the proviso that "such parts or portions of said pieces or parcels of land as do not contain iron ore, and such as shall not be needed or used by said parties of the second part for mining, storing waste material, railroad tracks and switches, manufacturing purposes, or for the erection of buildings, machinery, and fixtures required or needful for the use of said parties of the second part, in carrying on their business aforesaid, shall be and remain in the joint possession and for the mutual use, benefit, and enjoyment of all the aforesaid parties hereto, according to their respective interests and shares therein."

It was provided by this deed of lease that said Crawford and Scott, their heirs, assigns, or legal representatives, should pay to said Simmons and Billings, their heirs, assigns, or legal representatives, the sum of twelve and a half cents per ton gross of 2,240 pounds for the one half of all the iron ore that should be mined, dug, or quarried and taken away, used, or sold from said lands, the payments to be made quarterly, on the fifteenth days of January, April, July, and October in each year. Crawford and Scott agreed to organize a corporation under the laws of Missouri for the purpose of carrying on mining operations on said lands, which was done, the name of the corporation being "Missouri Iron Company," to which said Crawford and Scott in due time conveyed the interests in said lands acquired by them by virtue of the said

conveyances and deed of lease. This corporation took from these lands from 1873 to the time of the trial of this cause in October, 1889, two hundred thousand tons of iron ore.

The record shows the interests of the parties other than the Missouri Iron Company in said lands to be as follows: Plaintiff, one fourth; defendant Cook or his representatives, one eighth; and Walter and Maud Billings, one sixteenth each, all subject to the terms and conditions of the conveyances and deed of lease executed by Simmons and Billings to Crawford and Scott as above set forth.

Defendant, the Missouri Iron Company, resisted the partition of the lands on two grounds: 1. It claimed to be in the adverse possession of them; and 2. It had not consented in writing to such partition as provided by the conveyances of Simmons and Billings to Crawford and Scott, dated June 4, 1870.

Defendants, Maud and Walter Billings, were minors, and appeared by guardian *ad litem*, and Cook's representatives made default.

Upon these facts the court refused partition of the lands, and the plaintiff appealed. No instructions were asked or given.

1. One tenant in common cannot maintain an action for partition against his cotenant where he has been disseised: *Wommack v. Whitmore*, 58 Mo. 448.

While it is conceded that the Missouri Iron Company is in the actual possession of the lands, partition of which is sought in this case, we do not think such possession is adverse to plaintiff's interest in them; nor does it amount to an ouster of plaintiff. Three distinct interests in the lands are created by the conveyances and deed of lease: 1. All the parties are seised of the lands in fee as tenants in common, subject to the mining right of the Missouri Iron Company; 2. The Missouri Iron Company owns in severalty the right to mine the iron ore on and in said lands, and this right is sole and perpetual; 3. Plaintiff Cook's representatives and Maud and Walter Billings are owners in common in perpetuity of the royalties to be paid under the provisions of the deed of lease. The possession of this property held by the Missouri Iron Company is under the deed of lease, and is not, therefore, antagonistic or adverse to, but consistent with, the interests of the other parties therein.

2. The real controversy here turns upon the construction

and effect to be given the stipulation against the institution of partition proceedings without the written consent of all the parties, contained in the conveyances of Simmons and Billings to Crawford and Scott, dated June 4, 1870. The iron company insists that it is valid and binding, while plaintiff, on the other hand, claims that it is an unreasonable restraint upon the alienation of the property and upon the right of each party to have partition and the use and enjoyment of his interest in severalty, and, therefore, void.

Plaintiff concedes in his argument in this court that the mining right is not joint property, but is held in severalty by said company, and, hence, is not the subject of partition, and this seems to be the theory of his petition. We will, therefore, take it for granted, that plaintiff seeks partition or sale of the lands, subject to such mining right.

This brings us to the discussion of the question: Does the stipulation against the institution of proceedings for the partition of these lands without the written consent of all the parties preclude plaintiff from maintaining this action? It must be noted at the threshold of this inquiry that the stipulation in question is not a restraint upon the alienation of the lands. The several owners are left free to dispose of their interests in any manner they see proper. The only restraint is upon the right of severing the interest of one owner from the others by a proceeding *in invitum*. Is this restraint unreasonable, and void because unreasonable? This stipulation is a perpetual inhibition of partition, the language being that neither the parties, nor their heirs or assigns shall ever institute proceedings for partition without the written consent of all the parties.

The civil law refused to enforce agreements perpetually waiving the right of partition. Domat says: "It is always free for every one of those who have anything in common among them to divide it; and, although they may agree to put off the partition to a certain time, yet they can make no such agreement as never to come to a partition. For it would be contrary to good manners that the proprietors be forced to have always an occasion of falling out, by reason of the undivided possession of a common thing": Domat's Civil Law by Strahan, pt. 1, book 2, tit. 5, sec. 11, par. 9.

And Mr. Freeman in his work on Cotenancy and Partition, sec. 442, maintains that this is the rule in England and the United States. Restraints and fetters upon the alienation

and enjoyment of property are opposed to the common law and especially to the jurisprudence of to-day, which in the United States, at least, has almost wholly lost the spirit and genius of the feudal system and feudal tenures: 9 Am. Law Reg. N. S. 393, 457. Primogeniture and estates tail with all their incidents find but little favor in the laws of this century.

The right of partition is an absolute right which yields to no consideration of hardship or inconvenience: Freeman on Cotenancy and Partition, sec. 443. Anything that militates against this right is repugnant to the essential characteristics of cotenancy: *Mitchell v. Starbuck*, 10 Mass. 11; and the tendency of our times is to greater freedom of sale and transfer of property unfettered by conditions or limitation of the right of alienation.

In the case at bar, if the right of involuntary partition of these lands does not exist now, it will not exist five hundred or one thousand years hence. In time, by the sale and descent of undivided interests, the owners would become so numerous, and the interests so small, that the estate would be almost, if not wholly, valueless. Here is a tract of land containing 280 acres, which may be suited to agricultural and various other purposes, and the joint owners may want to have their interests set off so that they can utilize them for such purposes. The partition in kind or sale under partition proceedings of these lands subject to the mining right, instead of being detrimental, would be beneficial to the owner of that right, for it is more difficult and unsatisfactory to deal with many than one. The many can exercise control over the lands subject to the mining right, and that is all one owner could do; hence there is no reason why the title to the property, subject to this right, should not be vested in one person, but many reasons why it should be so vested; and we hold that the stipulation in question, as applied to the title to these lands, subject to said mining right, is an unreasonable restraint of their enjoyment and use, and therefore void.

The judgment is reversed, and the cause remanded, with directions to the circuit court to decree that partition of the lands be made subject to said mining right, and if this interest in the lands cannot be divided in kind without great prejudice to the owners, that it be sold as provided by statute. The decree of partition must also specifically reserve the right to the royalties on the iron ore to be paid under the provisions of the deed of lease to plaintiff, Cook's representatives, and



Maud and Walter Billings, their heirs and assigns, forever. This right is also subject of partition, but said company, having no interest in it, it cannot be disposed of in this proceeding, except by consent of all parties, and then only by a separate sale. All concur.

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**PARTITION — EFFECT OF DISSEISIN ON COTENANT'S RIGHT TO SUE FOR.** — If an ouster by one cotenant of another amounts to a disseisin, they no longer hold the estate together, and partition cannot be maintained: *Brock v. Eastman*, 28 Vt. 658; 67 Am. Dec. 733, and note; *Barnard v. Pope*, 14 Mass. 434; 7 Am. Dec. 225, and note with cases collected; extended note to *Nichols v. Nichols*, 67 Am. Dec. 704; but in some states a disseised cotenant may have partition by virtue of the statute: Note to *King v. Mason*, 89 Am. Dec. 433.

**PARTITION.** — One tenant in common cannot have a partition of lands which they have purchased for a certain use, and which enters into the consideration of the contract creating it: *Appeal of Latshaw*, 122 Pa. St. 142; 9 Am. St. Rep. 76.

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## WILLI v. LUCAS.

[110 MISSOURI, 219.]

**PRINCIPALS, WHO ARE REGARDED AS.** — All persons who are present at the commission of a wrongful act, and participate therein by counsel and advice, are regarded as principals, and held liable as such; and the same rule prevails even in criminal cases.

**EVIDENCE, SUFFICIENCY OF CIRCUMSTANTIAL.** — It is not necessary to prove by direct evidence that a party advised an act or aided in its commission, but such facts may, like any others, be established by circumstantial evidence.

**ASSAULT — EVIDENCE OF PARTICIPATION SUFFICIENT TO BE SUBMITTED TO THE JURY.** — When the testimony shows that the person who is charged with aiding another in the commission of an assault was carrying the latter in his buggy; that he stopped the vehicle in which the injured person was being driven three times, by blocking the road in front of it with his buggy, and that, when he was asked to let it pass, he replied in a way clearly indicating that he not only knew the assailant's purposes, but that he intended to assist him actually in executing them, there is sufficient evidence to go to the jury on the issue whether the defendant was present, aiding, assisting, advising, or counseling the assault, and a nonsuit should not be granted.

*Sol. Hughlett and John M. Barker*, for the appellant.

*Emil Rosenberger*, for the respondent.

**THOMAS, J.** This is an action for injuries to the plaintiff's person by reason of an assault upon her, her damages being laid at ten thousand dollars. The petition avers that the defendant, together with one Isaac Willi, not made a party, shot

her in August, 1888, with a pistol by which she was seriously wounded and injured. The answer was a general denial.

The evidence on the part of the plaintiff, preserved in the bill of exceptions, tends to show that on the twenty-ninth day of August, 1888, plaintiff left Montgomery City, in a single buggy, in company with her brother, sixteen or seventeen years old, and her little daughter, one year and a half old, to go to her mother's at New Florence, and when about two miles from Montgomery City, defendant, who kept a livery stable, and Isaac Willi, the latter being plaintiff's husband, came up in a two-horse buggy, defendant driving the team, passed plaintiff, and pulled the team across the road in front of plaintiff's horse. Isaac Willi then attempted to get out of the buggy, but plaintiff's brother drove around the team in charge of defendant, and went off in a lope. Defendant again passed plaintiff, drove in front of her horse, and stopped it. Plaintiff's brother drove around defendant's team again and went off in a lope, but defendant the third time passed her and crowded her horse into a fence corner. Her brother told defendant to get out of the way, and he replied, "Shut your damn mouth, I am driving this team according to orders." Willi then got out of defendant's buggy, caught plaintiff's horse by the bridle, and shot plaintiff with a pistol, inflicting serious wounds upon her, saying, "God damn you, I told you I would kill you, and I have made my words good."

Plaintiff then begged defendant to take her in his buggy, which he did not do, but turned around and drove back to Montgomery City, leaving plaintiff, her brother, husband, and baby there. The husband got into the buggy and told plaintiff he had killed her, and asked her to forgive him and kiss him, which she refused to do. Mr. Powell, the constable, coming up at this juncture, induced Willi to take his wife to a neighbor's house where she was cared for till she could be taken home. Lucas sat in his buggy while Willi shot his wife, in such a position that he could not have seen plaintiff without looking out from the side of the buggy, the back curtain being down, and the hind end of the buggy being toward her. In the January following, Willi was killed while attempting to kill his wife. At the close of plaintiff's evidence, the court at the instance of defendant, directed a nonsuit, and plaintiff appeals.

The court erred in directing a nonsuit. All present, participating in an act by counsel and advice, are, even in crimi-

nal cases, regarded as principals, and held liable as such, and a party may be charged with doing an act himself and be held liable under such a charge, for being present, aiding, and assisting another in doing it: *State v. Orrick*, 106 Mo. 111; *Canifax v. Chapman*, 7 Mo. 175; *Page v. Freeman*, 19 Mo. 421; *Allred v. Bray*, 41 Mo. 484; 97 Am. Dec. 283; *Murphy v. Wilson*, 44 Mo. 313; 100 Am. Dec. 290; *Cooper v. Johnson*, 81 Mo. 483.

Nor is it necessary to prove by direct evidence that a party advised an act, or aided in its commission, but such fact, like any other, may be established by circumstantial evidence: *State v. Gooch*, 105 Mo. 392.

We cannot say, as a matter of law, that defendant did not participate in this assault; indeed, the evidence tends strongly to show that he willfully assisted Willi in making it. He stopped plaintiff's horse three times by driving across the road in front of it, and when asked to let it pass he replied in a way clearly indicating that he not only knew the husband's purposes, but that he intended to actively assist him in executing them. At all events, there was sufficient evidence to go to the jury on the issue whether defendant was present aiding, assisting, advising, or counseling the assault, and the judgment is accordingly reversed, and the cause remanded for new trial. All concur.

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ACCESSARIES — PRINCIPAL, WHO IS. — "One who directly or indirectly counsels, commands, induces, or procures another to commit a crime is a principal": *People v. Bliven*, 112 N. Y. 79; 8 Am. St. Rep. 701, and note; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320, and note; *Leonard v. Poole*, 114 N. Y. 371; 11 Am. St. Rep. 667, and note with cases collected.

ASSAULT — WHO GUILTY AS PRINCIPAL. — One may be convicted as principal in a felonious assault where he advised, procured, or incited the assault: *State v. Noeninger*, 103 Mo. 166; *State v. Lymburn*, 1 Brev. 397; 2 Am. Dec. 659. When one of two persons resisting arrest aids, abets, advises, or encourages the other by signs or motions to assault an arresting officer, he is guilty of such assault the same as if made by him personally: *White v. People*, 139 Ill. 143; 32 Am. St. Rep. 196.

## LARSON v. METROPOLITAN STREET R'y Co.

(110 MISSOURI, 234.)

**INDEPENDENT CONTRACTOR, LIABILITY FOR ACTS OF.** — The supervision of a work of construction may be retained without interfering with the independent action or liability of contractors who have engaged to execute either the whole or a part of it; but where the contract under which an excavation is made for the foundations of a house declares that it shall be carried to such general depth, and that the operations shall proceed at such times, and to such extent as the representative of the landowner may require, any injuries caused to an adjoining house in consequence of making the excavations in strict pursuance of the orders of such representative, will be deemed to have been due to the exercise of the discretion or judgment vested in the supervising authority; and for that exercise of judgment the landowner must respond.

**LATERAL SUPPORT.** — A landowner who exercises his right to remove the earth from his own premises, adjacent to another's building, must use ordinary care to cause no unnecessary damage to his neighbor's property.

**LATERAL SUPPORT — NOTICE — ALTERATION OF PLAN OF EXCAVATION.** — Where a landowner has actual notice of the fact that an excavation is being made adjacent to his house, but is also assured by the authorized agent of the person for whom it is made that the earth will be taken out in a manner which the evidence of experts shows to be customary and reasonably safe, he has a right to assume that the course foretold will be followed, at least until he had notice to the contrary and a proper opportunity thereafter to act upon such later notice; and if an injury to his house results from this change in the plan, before he has had sufficient time to take measures for its protection, the party for whom the work is done will be liable for damages.

**LATERAL SUPPORT — EXCAVATION, CHANGE IN MODE OF.** — The fact that an additional outlay would be necessary to carry out the work of excavation in "sections" is immaterial when the person excavating has expressly promised to pursue that method, and thus led the owner of the adjacent premises to act upon that hypothesis and refrain from taking steps which would otherwise have been reasonably necessary and prudent to insure the safety of his property. Under such circumstances the proposed method must be continued, or timely notice of a change of plan given to the adjacent proprietor.

**EVIDENCE — RES GESTÆ.** — THE STATEMENTS OF AN AGENT appointed to superintend the work of excavating land near a house, when made during the progress of the work and the discharge of his functions, may be relied on by the owner of the house.

**TRIAL — DEMURRER TO EVIDENCE.** — When the trial court has forced the plaintiff to a nonsuit by an instruction in the nature of a demurrer to the evidence, he is entitled to the most favorable view of his case that the evidence warrants, and to every reasonable inference therefrom.

*Gage, Ladd, and Small, for the appellant.*

*Pratt, Ferry, and Hagerman, for the respondent.*

BARCLAY, J. Plaintiff's case is for damages occasioned by the fall of a building, occupied by him as lessee of the Ackerson estate, in Kansas City, Missouri.



The gist of his petition is that "the defendant wrongfully, carelessly, and negligently dug out and carried away the soil, immediately adjoining, and under the west wall of said building, by means of which . . . the said west wall was made to fall, . . . thereby destroying and damaging the property of plaintiff therein contained . . . to the extent of three thousand dollars."

The answer is a general denial.

The circuit court forced plaintiff to a nonsuit by giving an instruction in the nature of a demurrer to the evidence. It is, therefore, proper to outline the facts upon which plaintiff relies as constituting his cause of action. In so doing, he is entitled to the benefit of the most favorable view of his case that the evidence warrants, and of every reasonable inference therefrom. So viewed the substance of his case is this:—

The plaintiff's building was a two-story brick, in which he carried on business. It stood two inches from the eastern boundary of defendant's property, and extended from the street line some seventy-two feet southward.

The excavation to which the damage is ascribed was made upon defendant's lot close along that boundary line. This line ran at a right angle to Ninth Street on which plaintiff's house fronted; both the lots reached southward from the street, one hundred and twenty-five feet, to an alley.

The defendant proposed erecting an engine house on its lot; and, in prosecuting that purpose, contracted in writing with a firm for the necessary excavating and masonry for the foundations.

Some of the terms of that contract will be mentioned later.

The contractors sublet the excavating to another, who began its performance, having a foreman there in charge of a number of workmen and teams.

The defendant's chief engineer occasionally visited the work, but the actual superintendence, under the first contract mentioned, was mainly exercised by Mr. Butts, the engineer's assistant, who remained on the ground. The foreman of the digging party testified that the subcontractor placed him under the orders of Mr. Butts, and that the work was accordingly done as the latter directed.

About the time the excavating began, plaintiff had an interview with Mr. Butts in which he asked, "if he though it was not dangerous to be taking dirt away," (namely from "alongside of the wall,") to which Mr. Butts replied that

"there was not going to be any injury to the building; of course he was going to take it out in sections, and wall it up as they went along." Plaintiff says that that "kind of satisfied" him. The house fell about a week later. Plaintiff observed the work meanwhile.

A trench, some five feet wide, and from seven to eleven feet deep, was first dug, near defendant's east boundary line, from the street to a point about opposite the south end of plaintiff's building, some seventy-two or three feet. The foundation of the latter was at a depth of eleven feet from the natural surface. They then began at the street line and carried the trench to a further depth of about two feet (a total depth of about thirteen feet) for a distance of twenty-five or thirty feet from the street.

The concrete and footing stone of defendant's foundation wall were then laid in that space or section. Three days later, according to the testimony of the foreman of the excavators, Mr. Butts directed him to "take out the remainder of the ditch," and he proceeded to do so, excavating to the additional dept of twenty-four to twenty-six inches (to correspond with the level of the first section), along the entire building line opposite plaintiff's house, a stretch of forty odd feet from the end of the first section. Mr. Butts was present while this work was being done. The job was begun at half past two o'clock and was finished about half past five o'clock of the same afternoon. That night about ten o'clock a large part of plaintiff's building slipped into the excavation, on account (as is claimed) of that removal of its lateral support; but that portion of the house which faced the masonry work of the first section of defendant's foundation (for a distance of twenty-six feet from the street front) remained in place.

The soil of the locality is that of the Missouri River bottom, a mixture of sand and loam, formed by alluvial deposit.

There was abundant evidence of experienced builders and civil engineers that the customary way of removing such soil for foundations, adjacent to and below that of other buildings, is to take out the earth in sections of ten to sixteen feet each, in length, and to substitute the new foundation in each section before opening the next one; that any other mode of doing such work is likely to result as in the present case; but that building in sections involves an expense from eighteen to thirty per cent greater than the cost of proceeding without subdividing the work in that manner.

On these facts the trial court declared that plaintiff had no cause of action, and he has appealed against that ruling.

1. Before reaching the main issue it will be well to dispose of a subordinate one touching the responsible connection between defendant and the digging force, to whose acts the consequences complained of are ascribed. The defendant claims that those acts were done, in effect, by a contractor independent of its control, and that it is not liable on account thereof.

It is now an accepted rule that supervision of such work may be retained without interfering with the independent action or liability of contractors who have engaged to perform it or subdivisions of it; but in the case at bar the contract, under which the work was done, goes much further. It declares that "the excavation shall be carried to such general depth as may be indicated by the engineer; excavations for the trenches and piers will be made as required from time to time in the progress of the work, and to such an extent as may be indicated by the engineer." Along with this language are statements that the engineer was "in charge of the work," and that men who refused or neglected to obey his orders were to be discharged by the contractors.

Now, the very act complained of here is the digging of the trench too long and too deep in the circumstances. That act is charged as negligence. It was ordered by defendant's representative on the spot, acting for the chief engineer who had express power to direct "by his authorized agent," as well as personally. The work was done precisely as ordered. Thus it was the exercise of the discretion or judgment vested in the supervising authority, which caused the catastrophe; and for that exercise of judgment defendant must respond: *Lancaster v. Connecticut Ins. Co.*, 92 Mo. 460; 1 Am. St. Rep. 739; *Bower v. Peate*, 1 Q. B. Div. 321.

2. The chief question in the case is to determine what duty toward plaintiff rested upon defendant in view of the facts.

Very much has been written upon the right of lateral support and its limitations under the English law. It will not be necessary to restate the general principles governing that right. They were discussed very lucidly here, years ago, in *Charles v. Rankin*, 22 Mo. 573, 66 Am. Dec. 642, which remains a leading case on that subject. For present purposes it will suffice to say, it is settled law that the unquestionable right of a landowner to remove the earth from his own premises,

adjacent to another's building, is subject to the qualification that he shall use ordinary care to cause no unnecessary damage to his neighbor's property in so doing.

We need not inquire how such a principle became ingrafted upon a system which traces its origin to the English common law; but that it is there, is evidenced by abundant decisions of which a few leaders, besides that above cited, may be mentioned: *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771; *Austin v. Hudson Riv. R. R. Co.*, 25 N. Y. 334; *Quincy v. Jones*, 76 Ill. 240; 20 Am. Rep. 243.

The underlying principle of legal ethics on which this rule rests is well stated in *Charles v. Rankin*, 22 Mo. 573, 66 Am. Dec. 642, to be that, "if a man, in the exercise of his own rights of property, do damage to his neighbor, he is liable, if it might have been avoided by reasonable care."

The reports furnish many illustrations of its application, but we need not stop to emphasize the statement of it by references to them, since its force, in cases of this character, is now fully recognized.

What is the standard of ordinary care which one excavating on his own estate must use to avoid damage to his neighbor's building, is a question of some difficulty. In many localities the subject is regulated by statutes, defining the reciprocal rights of the parties.

It may be stated generally in the absence of a statutory rule that the care required of a party so excavating is that of a man of ordinary prudence in the circumstances of the particular situation; but that statement affords meager aid in determining the exact duty imposed by the rule in its practical application to any given case.

The fact is that the particular circumstances so largely shape and indicate the duty that any attempt to reduce the rule to greater certainty would probably tend to impede rather than to promote the administration of justice.

Quite recently it has been definitely held, following supposed indications in earlier cases, that prior notice to the neighbor whose property may be endangered by an excavation is an essential part of the ordinary care referred to: *Schultz v. Byers*, 53 N. J. L. 442; 26 Am. St. Rep. 435; but that ruling was accompanied by a vigorous dissent, and can scarcely be considered as settling the point. It is not necessary to decide it in the case at bar, for it is here con-



ceded that plaintiff had ample notice, in fact, of the intended excavation. He also had notice that it was to be made in a particular manner, namely, by removing the dirt "in sections," and walling "it up as they went along." The defendant's superintendent in charge so stated to him at the outset, when plaintiff suggested the danger of the undertaking; and the former, as a witness in the cause, did not deny the plaintiff's account of that interview.

It was in evidence that that course was the one indicated by ordinary prudence, and by the uniform custom of builders in that locality, in view of the nature of the surrounding soil.

But for that information as to the mode of excavation and construction to be pursued, the plaintiff might have taken effective steps to shore up and protect his building—steps which were unnecessary if the work was done in sections.

We think that plaintiff had the right to rely upon the statement of the superintendent, made during the progress of the work and of his agency, and, hence, *res gestæ*, as to the care which defendant intended to exercise towards the property of plaintiff with reference to which that statement was made. He had the right to assume that the course foretold would be followed, at least until he had notice to the contrary and a reasonable opportunity thereafter to act upon such later notice. We have added this last observation to meet the suggestion of defendant that plaintiff was duly advised that the excavation was not being done in sections. But on this point it appears that one section was first built, substantially as promised; and that the long and dangerous excavation later, to which the fall of the building is charged, occurred between half past two and five o'clock of the afternoon preceding the injury.

On these facts the court cannot justly declare, as a conclusion of law, that plaintiff, in the exercise of reasonable care, was chargeable with notice that the plan of construction, previously indicated by the superintendent, was not to be followed, and should have taken measures of his own for the protection of his domicile.

Nor do we think plaintiff's case concluded by the consideration that the removal of the earth in sections would have involved some additional outlay, and would have lessened, in some slight degree, the strength of its foundation wall.

As to the latter fact, it is not claimed that the utility or value of the wall, for the purposes of its construction, would be in anywise impaired by the building in sections.

As to the former fact of extra expense, we regard it immaterial, in view of the other evidence already alluded to, not to mention broader considerations bearing on that point: *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163; 45 Am. Rep. 30. If defendant notified plaintiff that a certain mode of proceeding was to be pursued, and thus led him to act upon that hypothesis and refrain from taking steps which would otherwise have been necessary and prudent to insure the safety of his property, the risk of injury to the plaintiff in the premises imposed on defendant the duty toward him of conforming to the plan of work of which it had advised him, or to reasonably notify him of a change in that plan in season to admit of his adopting protective measures of his own.

The evidence tends to prove that no such notice was given, and, in default thereof, the measure of reasonable and proper care on defendant's part, in the circumstances, was that indicated in the statement of the superintendent.

As to whether the same measure of care would rest upon defendant in the absence of the peculiar facts here presented, we are not called upon to say. In the view we take of the case, the fact, that the promised course of construction involved a greater expense than some other one, can have no material bearing on the rights of the parties.

On the whole case we think it fairly a question of fact whether defendant exercised ordinary care in directing the excavation to be made as it did, in view of the circumstances mentioned, and whether the fall of the building was caused or contributed to by any want of such care. The trial court we consider erred in instructing to the contrary.

The judgment should be reversed and the cause remanded. It is so ordered.

BLACK, BRACE, MACFARLANE, and THOMAS, JJ., concur.

SHERWOOD, C. J., and GANTT, J., dissent.

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**INDEPENDENT CONTRACTOR.** — For a general discussion of a master's liability for the acts of an independent contractor, see *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161; 27 Am. St. Rep. 231, and note; and see also the monographic note which follows as to his liability where the contractor is engaged in making excavations.

**The Right to Lateral Support.\***

**DEFINITIONS.** — The right to lateral support may be defined as the right which a landowner has to have his soil, either in its natural state, or, in certain cases, with the additional weight of the buildings or other structures thereon, sustained by the soil of the adjoining proprietors, or, in a more special sense, the right which such landowner has to have those buildings or structures sustained by adjacent buildings or structures upon which they lean. In the recent case of *Birmingham v. Allen*, L. R. 6 Ch. Div. 284, it became necessary for the first time to decide precisely what is meant by a "neighboring or adjacent landowner," and Sir George Jessel, M. R., thus discussed the question in his usual clear and incisive style: "The judges have said, 'support by his neighbor.' What does that mean? Who is his neighbor? It was contended that all the landowners in England, however distant, were neighbors for this purpose, if their operations in any remote degree injured the land. But surely that cannot be the meaning of it. The neighboring landowner to me for this purpose must be the owner of that portion of land, whether a wider or a narrower strip of land, the existence of which in its natural state is necessary for the support of my land. As long as that land remains in its natural state, and it supports my land, I have no rights beyond it, and therefore it seems to me that he is my neighbor for this purpose. There might be land of so solid a character, consisting of solid stone, that a foot of it would be enough to support the land. There might be other land so friable, and of such an unsolid character, that you would want a quarter of a mile of it. But whatever it is, as long as you have got enough land on your boundary which, left untouched, will support your land, you have got your neighbor's land, whose support you are entitled to. Beyond that, it would appear to me, you have no rights." In that case it appeared that, if an intervening strip of land had not previously been mined by a third party, no damage could possibly have accrued to the plaintiff's premises from the proposed excavations of the defendants on the other side of the strip, and the court, accordingly, declined to restrain the excavations. This decision was sustained by the court of appeals, Brett, L. J., saying: "Although it is a case of first impression, that is to say, a case in which we have after the master of the rolls, for the first time, to decide what is the proper definition of 'adjacent lands,' I think the master of the rolls has given a very happy definition of them, and one which we ought to accept." Similar views seem to have been entertained by the court in *Keating v. Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421, which holds that a city which excavates a street is liable for the subsidence of a lot which does not abut upon the street. The liability of a city for injuries of this character is, as will be seen below, disputed, but it is presumed that a similar rule would have been applied in the case of a private owner, and as it commends itself to reason, and is accepted by English courts of high authority, its correctness will probably not be questioned in other jurisdictions.

**THE RULES OF LAW AS TO ADJACENT AND SUBJACENT SUPPORT ARE THE SAME.** — The identity of the principles governing the rights of landowners, whether their tenements are separated by vertical or horizontal sections, was first relied upon in *Humphries v. Brogden*, 12 Q. B. 739, where Lord Campbell used the following language: "Where portions of the freehold, lying over one another perpendicularly, belong to different individuals, and

\* REFERENCE TO MONOGRAPHIC NOTES.

constitute, as it were, separate closes, the degree of support to which the upper is entitled from the lower has as yet by no means been distinctly defined. But in the case of adjoining closes, which belong respectively to different persons from the surface to the center of the earth, the law of England has long settled the degree of lateral support which each may claim from the other; and the principle upon which this rests may guide us to a safe solution of the question before us": Page 743. Among subsequent English cases which assume the correctness of this statement of the law, it is sufficient to refer to *Rowbotham v. Wilson*, 8 El. & B. 123; *Bonomi v. Backhouse*, El. B. & E. 622; *Dalton v. Angus*, L. R. 6 App. C. 740. The language of the courts in this country is equally explicit: *Sterncuson v. Wallace*, 27 Gratt. 77; *Marvin v. Brewster Iron etc. Co.*, 55 N. Y. 538; 14 Am. Rep. 322; *Jones v. Wagner*, 66 Pa. St. 429; 5 Am. Rep. 385; *Horner v. Watson*, 79 Pa. St. 242; 21 Am. Rep. 55; *Coleman v. Chudwick*, 80 Pa. St. 81; 21 Am. Rep. 93. In view of this unanimity of opinion we have deemed it permissible to render the present discussion of the subject more complete and comprehensive, by drawing our illustrations from both classes of cases indifferently, merely stating in each instance whether lateral or subjacent support was involved.

A RIGHT TO SUPPORT FROM THE ADJOINING LAND IS INCIDENTAL TO LAND IN ITS NATURAL CONDITION. — So recently as 1853, Justice Harris, in delivering the opinion of the court in *Farrand v. Marshall*, 19 Barb. 380, expressed his surprise that, "the question, how far the owner of land adjacent to land owned by another may remove the earth, and thus withdraw the natural support of his neighbor's soil, without being liable for the injury, should have remained until then unsettled," and stated that "although opinions had frequently been expressed on the subject, and that, too, by eminent jurists, these opinions were *obiter*." This statement, although literally correct, was perhaps somewhat misleading. It is true that in all the cases which had arisen up to that time, the precise point in judgment was the extent of the right where buildings had been erected on the land for which support was claimed, — the circumstances by which litigation is obviously most likely to be engendered; but in at least three of those cases: *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57, *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524, and *Humphries v. Brogden*, 12 Ad. & E. 739, the character of the right of support for land in its natural condition had been so clearly defined and explained that the question, so far as it could be settled without any direct adjudication, was no longer an open one. For the reason just alluded to, the cases in the books in which the subject is not complicated by the existence of artificial structures are still few in number, the following being all that we have found: *Farrand v. Marshall*, 19 Barb. 380; *Bibby v. Carter*, 4 Hurl. & N. 153; *Richardson v. Vermont Cent. R. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283; *McMough v. Burke*, 12 R. I. 499; *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49; *Mears v. Dole*, 135 Mass. 508; *Hendricks v. Spring Valley Min. Co.*, 58 Cal. 190. Taking all the authorities together, however, — both those in which the question was directly presented, and those in which it was assumed by the court to be settled in a certain manner, — it may be said that there is a virtual unanimity as regards the doctrine that the right which a landowner has to have his soil, while in its natural condition, supported by the adjoining soil, exists *jure naturæ*; that it is "a right by law; a right of the owner to the enjoyment of his own property as distinguished from an easement supposed to be gained by grant; a right for injury which an adjoining proprietor is responsible on the principle, *Sic utere*



*tuoi ut alienum non laedas*": Lord Selborne in *Dalton v. Angus*, L. R. 6 App. C. 791. The absolute nature of the right may be illustrated by a few extracts from the leading decisions. "The general right which a man *prima facie* has at common law to the support of his land, either subjacent or adjacent, is a natural right analogous to the right to flowing water": *Rowbotham v. Wilson*, 8 El. & B. 150, a passage cited approvingly by Justice Willes in *Bonomi v. Backhouse*, El. B. & E. 654. "This right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but it is a right of property passing with the soil": *Humphries v. Broyden*, 12 Ad. & E. 744. "I have a natural right to the use of my land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots. And the owners of those lots will not be permitted to destroy my land by removing this natural support or barrier": *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524. "The right of lateral support must be regarded as an incident to the soil. It is a right of property necessarily and naturally attached to the soil": *Farrand v. Marshall*, 19 Barb. 380. "In the case of land which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor, and if the neighbor digs upon or improves his own land so as to injure this right, may maintain an action against him without proof of negligence": *Gilmore v. Driscoll*, 122 Mass. 199; 23 Am. Rep. 312. "The decided weight of authority and sound principle concur in support of the position that there is incident to land in its natural condition a right to support from the adjoining land; and that if the land sinks or falls away in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained": *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49. The only judicial dissent from the doctrine thus generally held seems to be contained in Judge Bronson's opinion in *Radcliff's Ex'rs v. Mayor etc. of Brooklyn*, 4 N. Y. 203. Referring to the passage cited above from *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524, he said: "But still I think the reasoning unsound, especially in reference to property in cities and large towns. If the doctrine were carried to its legitimate consequences it would often deprive men of the whole beneficial use of their property. An unimproved lot of land in the city of Brooklyn would be worth little or nothing to the owner unless he were allowed to dig in it for the purposes of building; and if he may not dig because it will remove the natural support of his neighbor's soil, he has but a nominal right to his property, which can only be made good by negotiation and compact with his neighbor. A city could never be built under such a doctrine. I think the law has superseded the necessity of negotiation by giving every man such a title to his own land that he may use it for all the purposes to which such land is usually applied, provided he exercise proper skill and care to prevent any unnecessary injury to the adjoining land owner." Justice Harris, however, who was a member of the court for which the above opinion was written, expressly states, in *Farrand v. Marshall*, 19 Barb. 380, that the other judges did not consider themselves to be committed to a support of these doctrines, and as they were not needed for the decision, and are also inconsistent with the language of the same court in the later case of *Dorrity v. Rapp*, 72 N. Y. 307, the above passage cannot be deemed authoritative, and it has been quoted mainly because it has been sometimes alluded to by judges as a clear and vigorous exposition of that extreme view of a proprietor's rights which would throw upon every landowner the duty of protecting himself against the effects of his neighbor's excavation.

EXTENT OF NEIGHBOR'S RIGHT TO EXCAVATE ON HIS LAND. — The law of this subject may perhaps be regarded as the result of a compromise between the two principles embodied in the maxims, *Cujus est solum, ejus est usque ad cælum et ad inferos*, and, *Sic utere tuo ut alienum non lædas*. "It is a common principle of the civil and of the common law that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it. The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own as not to injure the property or impair the existing rights of another": *Thurston v. Hancock*, 12 Mass. 220; 7 Am. Dec. 57. It is in fact sufficiently obvious that, unless the rule of civil responsibility which renders a man liable for the natural and probable, and therefore, *a fortiori*, for the necessary consequences of his acts, is to be ignored in this instance, the excavation of a person's land up to the boundary line cannot but involve, in the vast majority of cases, an injury for which the law should compel him to answer in damages. Every material of which the earth consists, after being exposed for a certain time to the action of the elements, will, as is well known, settle permanently at a slope, which varies in steepness according to the greater or less degree of hardness or cohesiveness of the material, but which is never perpendicular except in the case of some of the harder rocks. From this physical law it results that a person who excavates his land up to its extreme limit must inevitably deprive his neighbor of a portion of his soil, unless artificial means are resorted to for the purpose of checking the subsidence which will follow. The necessary consequence of the use of land in this way, therefore, is a conflict of rights, which can only be adjusted by throwing upon one or other of the parties the duty of self-protection. A possible alternative, of course, would have been to cast that duty upon the owner of the threatened soil, and thus carry to its extreme conclusion the principle expressed in the first of the above maxims. At least one eminent judge has, as we have seen, considered this to be the true doctrine. The view which has prevailed, however, is that the given circumstances present a proper case for the operation of the rule that all property must be so used as not to injure the property of others. In other words, a theoretically absolute right of the individual has in this case, as in others, been made to yield to the great and universal rule of social conduct. Another more special and practical consideration which may have had some effect in shaping the law is, that excavations at the extreme limits of land are rarely made except for the purpose of erecting buildings. It may have seemed more conformable to justice to throw the expense of protecting the adjacent soil on him who is assuming the distinctly aggressive role in preparing his land for artificial structures than upon the person who merely wishes to be left to enjoy his property in its undisturbed condition. The cases in which surface excavations are made for the sake of the materials in the land itself are comparatively rare, and if considered at all when the general rule was first formulated, were probably deemed too exceptional to be taken into account. Besides, the character of the latter class of excavations is commonly such as to furnish an additional reason for compelling the excavator to sustain the adjacent soil, viz., that they are not an ordinary nor a reasonable use of land. Thus in *Farrand v. Marshall*, 19 Barb. 380, the defendant had dug to a depth of fifty feet to procure earth for brickmaking, and the court pointed out that, even if the doctrine proposed by Judge Bronson (as quoted above) were adopted, such an excavation as this one would

be made at the defendant's peril. But the rule does not need the support of these extraneous considerations. So long as the law acknowledges that there are any absolute rights of property to protect, it seems difficult to conceive a right which should be more inviolable than that of the undisturbed possession of land; and since it is apparent from the properties of matter, already explained, that an excavation cannot be made within a certain ascertainable distance of a neighbor's boundary line without causing his soil to slip, and thus depriving him of its use *pro tanto*, the doctrine which makes the person excavating liable for the damage so caused seems to rest upon as strong a foundation as any in our jurisprudence. It would be a flagrant inconsistency to say that one who enters on another's close and abstracts a shovelful of dirt is guilty of a trespass for which he must answer, but the same person, if he happens to own the land adjacent to the same close, may dig up to its border, and let down as much of it as the operation of physical laws will abstract from its substance.

But whatever we may prefer to regard as the foundation of this rule, it is now firmly established, and a person digging in his own soil is held liable for all the subsidences of his neighbor's land which may result from his operations. Nor is his liability in anywise dependent upon the degree of skill or care which he exercises. (See the cases already cited in this subdivision.) The question in every case is not whether the defendant has excavated within a certain distance of the boundary line, which is apparently reasonable, but whether he has dug so close that the operation of the elements, without the intervention of any intermediate agency or the weight of some artificial structure, have produced a subsidence. A strong illustration of the absolute nature of the liability is furnished by *Mears v. Dole*, 135 Mass. 508, where defendant was held responsible for so excavating his land that the sea entered thereon and undermined his neighbor's soil, although the excavation was not made so near the boundary line that the soil would have fallen without the abrasion produced by the water. Similarly, the person excavating an underlying *stratum* must, at his peril, leave a sufficient number of pillars to support the surface, unless the terms of the conveyance under which he acquired his rights qualify his responsibilities: *Harris v. Ryding*, 5 Mees. & W. 59; *Humphries v. Brogden*, 12 Q. B. 743; *Rowbotham v. Wilson*, 8 El. & B. 123; *Jones v. Wagner*, 66 Pa. St. 429; 5 Am. Rep. 385; *Horne v. Watson*, 79 Pa. St. 242; 21 Am. Rep. 55. The last case also decides that a custom not to leave such pillars is unreasonable, and therefore not a valid defense to an action for damages caused by subsidence. (See further the following subdivision.) In *Hendricks v. Spring Valley etc. Co.*, 58 Cal. 190, an exception to the general rule was declared to exist in the case of lands taken up for mining purposes, and intended to be worked by the hydraulic process. The court expressed its views in the following language: "The very purpose of locating the ground, both on the part of the plaintiff and the defendant, was to tear it down and wash it away. Its only value consisted in the gold it contained. To apply the doctrine of lateral support contended for by the appellant to ground of this character would therefore, to a great extent, defeat the very purpose for which it was located." Since the court admitted in this case that the defendant would have been liable for the gold in the soil thus abstracted from the plaintiff's claim, if the cost of getting it out of the soil had not exceeded its value, and the decision might therefore have been placed upon the ground that the plaintiff had received no appreciable damage, it may be doubted whether it was worth while to introduce this exception to the general rule. The arguments of the learned judge would apparently be



equally applicable to land occupied for the express purpose of brickmaking, or to any other cases in which the excavations are made for the sake of the materials in the land itself, not excluding the cases in which mining is conducted by ordinary methods. The mere fact that the excavation is made by means of a jet of water, instead of the more usual agents, can surely make no difference as regards the rights of the parties. In fact, it almost seems that there is a special reason in the very case before the court why the rule should have been rigidly enforced. The portions of soil carried away from such claims must presumably be of more than average value on account of unusually rich deposits of the precious metal, and thus it might easily happen that the owner might never be able to ascertain the real extent of his loss. At all events, he may prefer, and often has good reasons for preferring, to extract the gold himself at his own times and by his own agents, and, considering the danger of fraud and dishonesty which would attend from the practical working of the doctrine announced by the court, we are inclined to think that this innovation upon the law was impolitic, as it certainly was uncalled for in the circumstances upon which the decision was rendered.

**EFFECT OF GRANTS OR SPECIAL AGREEMENTS UPON THE RIGHT OF SUPPORT OF THE NATURAL SOIL.** — The general rule is thus stated in *Caledonian R'y v. Sprot*, 2 Macq. 479: "All which a grantor can reasonably be considered to grant or warrant is such a measure of support subjacent and adjacent, as is necessary for the land in its condition at the time of the grant, or in the state for the purpose of putting it into which the grant was made." Most of the cases in which this rule has been applied have related to subjacent support, and the authorities are entirely harmonious as to the doctrine that where a landowner grants the surface and reserves the right of taking out the minerals underneath, or grants the minerals and reserves the surface, a covenant is implied on the part of the person who is to work the mines that he will so conduct his operations as to leave sufficient support for the surface: *Richards v. Jenkins*, 18 L. T., N. S., 437; *Whitehouse v. Bayley*, 34 L. T., N. S., 93; *Yandes v. Wright*, 66 Ind. 319; 32 Am. Rep. 109; *Livingston v. Moingona Coal Co.*, 49 Iowa, 369; *Harris v. Ryding*, 5 Mees. & W. 60; *Humphries v. Brogden*, 12 Ad. & E., N. S., 739; *Earl of Glasgow v. The Harlet Alum Co.*, 3 H. L. Cas. 25; 8 Eng. L. & Eq. 13; *Rowbotham v. Wilson*, 8 H. L. Cas. 348; *Pennington v. Gallard*, 9 Ex. 1; *Jones v. Wagner*, 66 Pa. St. 429; 5 Am. Rep. 385. A custom that sufficient supports shall not be left is not good: *Hilton v. Lord Granville*, 5 Ad. & E., N. S., 701; *Humphries v. Brogden*, 12 Ad. & E., N. S., 739; *Horner v. Watson*, 79 Pa. St. 242; 21 Am. Rep. 55; *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93. The rights of the parties may, however, be modified by express agreement on the principles embodied in the familiar maxims, *Mortus et conventio vincunt legem*, and *Quilibet potest renunciare juri pro se introducto*. Thus the grantee of mines is not liable for damage to the surface, where his deed declares that he should not be subject to any action for damages on account of working and getting the mines: *Rowbotham v. Wilson*, 8 H. L. Cas. 348. So, also, where a parcel of land on which a cotton mill was to be built was conveyed, the grantor reserving all the minerals with power to take the same, making compensation for damages to be done to the mill, it was held that he could not be restrained from working the mine, although the mill must necessarily be damaged thereby: *Asplen v. Seidton*, 10 L. R. Ch. 394. And where the grantor excepted all the minerals under a tract sold in lots, and reserved the power to work them, without being answerable for any injury to the land or buildings thereon, or liable to an action for such injury, a purchaser of one of the lots was held not to



be entitled against the grantor to either vertical or lateral support for the surface of his land: *Williams v. Bagnall*, 12 Jur., N. S., 987. In *Seranton v. Phillips*, 94 Pa. St. 15, the grantee received under the conveyance "a full and unconditional release and discharge forever from any liability that might result to the surface," and the court held upon a consideration of this and other provisions of the deed that it was the undoubted intention of the parties that the grantee might remove the minerals without any obligation to support the surface or liability in case it fell, and *Smith v. Darby*, L. R. 7 Q. B. 716, was referred to as an authority for the right of the parties to make any bargain they liked. Similarly, when a grantor of land reserves the right to enter upon a certain portion of the land granted and "to dig and take therefrom the clay and sand that may be found thereon fit for brickmaking," he is entitled to take the materials anywhere within the boundaries specified, the decision being placed upon the ground that the doctrine of lateral support, relating to adjacent lands owned by different proprietors, was not applicable to a reservation of this kind: *Ryckman v. Gillis*, 57 N. Y. 68, 15 Am. Rep. 464. The distinction seems to be somewhat shadowy and technical, and the following arguments, stated in the dissenting opinion in the case, are difficult to answer: "I think it impossible to maintain that a larger right passes by the right to dig within certain bounds than by the grant of land within the same bounds. All particular rights must be less than the full dominion of the land. The sense of the rule requires us to reject such a distinction. The rule expresses the legal consequence of two adjoining pieces of land being subject to separate ownerships. It is the separation of ownerships, and not their extent or quality in point of estate that is material. From the separation of ownership rights result in respect to support, not from the greater or less interests of the separate owners. The right claimed on the part of the defendant is made up of two distinct elements; a right to dig within the prescribed bounds, and a right to deprive of support the adjoining ground beyond the bounds. The grant does not profess to give both. It only expresses the right to dig. The cases before cited [relating to the severance of ownership for mining purposes] show that the right to dig, given with the property in the thing to be got out, would fail to carry the right to disturb the adjoining ground. It must, in analogy to those cases, be limited to such digging as can be done without injury to the land of the plaintiff, beyond the prescribed bounds." But, to entitle the excavator to immunity for damage to the adjoining land or to the surface above his tenement, the wording of the instrument which defines his rights must be clear and unambiguous. A mere implication from language not necessarily importing such immunity will not affect the right of support. Thus the right still exists, although the person who has the privilege of mining, stipulates to "do as little damage as possible": *Williams v. Hay*, 120 Pa. St. 435; 6 Am. St. Rep. 719; or "to pay treble damages" for the resulting injuries: *Smart v. Morton*, 5 El. & B. 30; or retains the power "to come upon the premises and take away every part and parcel" of the minerals: *Harris v. Ryding*, 5 Mees. & W. 61; or has been granted the minerals and all privileges necessary for the convenient working, etc., of coal and "the rights incident or usually appurtenant to working and using coal mines": *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93; or has been granted "all the underlying coal with the right to mine and remove the same": *Burgner v. Humphrey*, 41 Ohio St. 340; *Mickle v. Douglas*, 75 Iowa, 78. The rationale of these cases is best expressed in a pregnant remark of Baron Parke in *Harris v. Ryding*, 5 Mees. & W. 60, which has frequently

been quoted with approval: "I do not mean to say that all the coal does not belong to the defendants, but they cannot get it without leaving sufficient supports."

*The Right of Lateral Support for Buildings and Other Artificial Structures.*—The fountain of the law on this subject is *Wilde v. Minsterley*, the substance of which is thus given in 2 Rolle Abr., *Trespass*, [I] pl. 1: "If A be seised in fee of copyhold land next adjoining the land of B, and A erect a new house on his copyhold land, and some part of the house is erected on the confines of his land next adjoining the land of B; if B afterwards digs his land so near the foundation of A's house (but no part of the land of A), that thereby the foundation of the house and the house itself falls into the pit, yet no action lies by A against B, because it was A's own fault that he built his house so near B's land; for he by his act cannot hinder B from making the best use of his own land that he can. But *semble*, that a man who has land next adjoining my land cannot dig his land so near mine that thereby my land shall go into his pit; and therefore, if the action had been brought for that, it would lie." The principle here enunciated that a landowner who has built upon his land has no right to the support of his neighbor's soil for the additional weight thus placed upon it, has been accepted in numerous subsequent cases: *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Partridge v. Scott*, 3 Mees. & W. 220; *Humphries v. Brogden*, 12 Q. B. 739; *Gayford v. Nicholls*, 9 Ex. 702; *Bonomi v. Buckhouse*, El. B. & E. 653; *Angus v. Dalton*, L. R. 6 App. Cas. 740; *Thurston v. Hancock*, 12 Mass. 220; 7 Am. Dec. 57; *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771; *Gilmore v. Driscoll*, 122 Mass. 199; 23 Am. Rep. 312; *Farrand v. Marshall*, 19 Barb. 380; *Dorrity v. Rapp*, 72 N. Y. 307; *Richart v. Scott*, 7 Watts. 460; 32 Am. Dec. 779; *Winn v. Abels*, 35 Kan. 85; 57 Am. Rep. 138; *Mamer v. Lussem*, 65 Ill. 484; *Panton v. Holland*, 17 Johns. 92; 8 Am. Dec. 369; *Lasala v. Holbrook*, 4 Paige, 169; 25 Am. Dec. 521; *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49; *Richardson v. Vermont etc. R. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283; *Beard v. Murphy*, 37 Vt. 99; 86 Am. Dec. 693; *Shrieve v. Stokes*, 8 B. Mon. 453; 48 Am. Dec. 401; *Myer v. Hobbs*, 57 Ala. 175; 29 Am. Rep. 719; *Marvin v. Brewster*, 55 N. Y. 538; 14 Am. Rep. 322; *Transportation Co. v. Chicago*, 99 U. S. 635. In *O'Neil v. Harkins*, 8 Bush. 650, the court introduced an exception to the general rule in the case of fences, which, on the ground that it was the policy of the commonwealth to encourage the inclosure of land, were held to be entitled to protection. This decision, however, is opposed to the general current of authority, and hardly sustainable on the reason assigned: See *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771. The reason which is given in *Wilde v. Minsterley*, 2 Rolle Abr., *Trespass*, [I] pl. 1, for the nonexistence of the right of lateral support in such cases was repeated in *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57, and in *Farrand v. Marshall*, 19 Barb. 380, was even expanded into a formal statement of a principle that where the complaining party "has himself erected buildings on the margin of his own land, he has been regarded as himself in fault, and therefore not entitled to recover on the familiar doctrine that he who complains of the use which another makes of his property must be himself free from fault." Such an explanation seems to be hardly satisfactory. Upon what is this fault predicated? To say that a person who erects a house extending to the limits of a town lot is in fault seems to be a misuse of language, if the test of prudent conduct is the conduct of the average member of the community in which we live. The use to which he is thus putting his premises is the ordinary use to which similar parcels of ground are everywhere applied, and for which

every purchaser may certainly be assumed to know that they are expressly intended. Apparently, then, we are driven to the conclusion that the landowner who builds a house on the margin of his premises is regarded as being in fault because he is doing something which no prudent man would do unless he was entitled to have his foundations supported, or was at least prepared to protect them from the consequences of any future excavations on the adjacent lot. But if the fault so imputed arises in this manner, it can only be by assuming the existence of some legal rule, the transgression of which renders the supposed conduct faulty, and clearly such hypothesis will involve us in a vicious circle. The fault cannot precede and generate the rule, and be at the same time a result of its existence. Nor is the theory placed upon a sounder basis by adopting an intimation of the court in *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57, and saying that the fault of such proprietor consists in "not foreseeing the probable use to which his neighbor will put the adjoining land." With due deference to the learned judge who penned that opinion, we think that the facts before him show very conclusively that such a reason is altogether insufficient to sustain the rule in the shape in which it is generally received. The plaintiff had taken the precaution to sink his foundations fifteen feet below the surface. Surely he had good ground for supposing that he had thus protected himself fully against the consequences of any "probable use" to which the adjacent land would be put. If regard is to be had to the ordinary conduct of landowners, he had done his whole duty. But the law was plainly far more exacting. It required him to provide against any and all uses of the adjoining land, and not merely against any probable uses. If a man chooses to excavate his soil to a depth of hundreds of feet, his neighbor must protect his own buildings. How, then, can the failure to foresee the "probable use" of a neighbor's land be made the foundation of a rule of law which imposes this unlimited responsibility? Such a reason might be adequate, if the rule were qualified in accordance with the suggestion of Justice Harris in *Farrand v. Marshall*, 19 Barb. 380, that an inordinate excavation would be an unreasonable use of the land. But a sufficient answer to this suggestion is, that there is no authority whatever for thus breaking in upon the severe simplicity of the rule under which a landowner is justified in digging as deep as he pleases on his own land, provided he furnishes sufficient support for his neighbor's soil in its natural condition, and that it would introduce entirely new considerations which would render it necessary to revise the whole law of this subject. The explanation offered in *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243, that "neither owner has the right to burden the support [of the neighboring soil] by any additional weight, because this would, to that extent, appropriate the use of property of the one to the benefit of the other," seems to suggest a much more rational foundation for the rule than a failure to foresee what a neighbor will do. If we accept this theory, we shall merely be required to entertain the very reasonable hypothesis that every landowner occupies his premises under an implied agreement that he is to support his neighbor's soil, but not such burdens as his neighbor chooses to put upon it. The reason why the law implies such an agreement may possibly be that the natural condition of the soil is assumed to be its normal condition. From such an assumption it would follow that the owner who, in each case, puts it to the use which removes it the farthest from the natural condition should stand in the least favored position before the law. The owner who excavates his land must see to it that he does not bring down the soil which remains undisturbed, but the owner who goes further still and makes



his land a mere resting place and support for artificial structures, thus appropriating to some extent the sustaining powers of the adjoining land also, has plainly interfered still more decidedly with the normal state of the land, and it is quite reasonable that he should be placed on the defensive. The courts do not seem to have referred directly and in terms to this gradation from the less to the more artificial as a basis for the rules which define the rights and duties of adjoining owners, but we know of nothing in the decisions on the subject that would prevent the acceptance of the explanation here suggested.

But while there is no difficulty in accounting for the law as it now stands without resorting to the hypothesis of a "fault" committed by the person who builds, it cannot be denied that on general considerations of public policy much reason might be given for the adoption of the doctrine which is clearly and forcibly stated in the following extract from the opinion of Lord Penzance in the recent English case of *Dalton v. Angus*, L. R. 6 App. Cas. 804: "If this matter were *res integra*, I think it would not be inconsistent with legal principles to hold that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbor's house to the ground. It would be, I think, no unreasonable application of the principle, *Sic utere tuo ut alienum non lædas*, to hold that the owner of adjacent soil, if desirous of excavating it, should take reasonable precautions by way of shoring, or otherwise, to prevent the excavation from disastrously affecting his neighbor. A burden would no doubt be cast on one man by the act of another done without his consent, but the advantages of such a rule would be reciprocal; and regard being had to the practicability of shoring up during excavation, the restriction thus placed on excavation would not seriously impair the rights of ownership." This doctrine was also advocated by Justice Fry (see p. 772 of the report), in the opinion which he submitted to the House of Lords. But all these utterances were merely *obiter dicta*, and aside from the inherent weight of the considerations which they present, are of course without authority. The truth is, the rigid application of either of these antagonistic doctrines involves some unfairness in the extreme cases that occasionally arise, and when a community is thus confronted with a serious conflict between an absolute legal right and a wholesome and beneficial rule of civil conduct, there is plainly only one adequate solution of the difficulty, — the interference of the legislature, which by compelling each landowner to surrender some of his rights, can effect a compromise which, on the whole, is for the advantage of both parties. As will be seen in a following subdivision of the present note, this method of cutting the Gordian knot has been adopted in some of the states.

**SUPPORT FROM UNDERGROUND WATER.** — The question how far a surface owner is entitled to the support afforded by the upward pressure of water seems to have been mooted only in the cases of land burdened by artificial structures and of land sustaining streams of water. In *Northeastern R'y Co. v. Elliot*, 10 H. L. Cas. 333, the facts were that the plaintiffs had built a bridge adjacent to land underneath which was a mine, which at some previous time had been accidentally flooded, and the House of Lords affirmed the decision of Vice Chancellor Page-Wood that there was no right to have the bridge supported by the water. The reasons assigned for the ruling were that the water had got into the mine by accident, that the flooding was known to be accidental, and that as all parties concerned were living in a mining district, where



it was well known that a drowned mine is often revived after a long period of time, it was for the company to have stipulated that the accidental circumstances should not be varied if it was intended that the company, when it purchased the land, should have the benefit of the support from the water. In *Popplewell v. Hodkinson*, L. R. 4 Ex. 248, it was decided that the owner of houses built on wet, spongy land could not recover for injuries resulting from excavations on the adjoining land which drew the water from underneath his land. If, however, the underground water supports other water which flows in a well-defined channel, it cannot be meddled with in any way so as to cause the water in the stream to sink: *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. App. 483.

THE RIGHT OF LATERAL SUPPORT FOR BUILDINGS CAN ONLY BE ACQUIRED BY: 1. *Grant, express or implied*; 2. *Statute*; 3. *Prescription*.

1. *Grant*. — The general rule governing these cases is thus stated by Lord Selborne in *Dutton v. Angus*, L. R. 6 App. Cas. 792: "If, at the time of the severance of the land from that of the adjoining proprietor, it was not in its original state, but had buildings standing on it up to the dividing line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied grant of such support as the actual state or the contemplated use of the land would require, and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of the natural." The foundation of the rule is thus explained by Lord Blackburn in a subsequent part of the same case (p. 826): "One who conveys a house, grants, by implication and without express words, all that is necessary and essential for the enjoyment of the house, and neither he, nor any who claim under him, can derogate from his grant by using his land so as to injure what is necessary and essential to the house." The same learned judge also states that this doctrine was first laid down in the old case of *Shury v. Pigott*, 3 Bulst. 339 (1625), the authority of which was followed in *Palmer v. Fleshees*, 1 Sid. 167. This doctrine has been applied in several cases: *Richards v. Rose*, 9 Ex. 218; *Caledonian R'y Co. v. Sprot*, 2 Macq. H. L. Cas. 449; *Elliott v. N. E. R'y Co.*, 10 H. L. Cas. 333; *Siddons v. Short*, 2 L. R. C. P. D. 572; *Rigby v. Bennett*, L. R. 21 Ch. Div. 559; *Tunstall v. Christian*, 80 Va. 1; 56 Am. Rep. 581; and is recognized as correct in *Stevenson v. Wallace*, 27 Gratt. 77; *Partridge v. Gilbert*, 15 N. Y. 601; 69 Am. Dec. 632 (a case where the support was given by a party wall); *Lampman v. Milks*, 21 N. Y. 505. In the last named case it is stated to be a branch of the wider rule that where the owner of an entire tract has, by an artificial arrangement, imposed a burden on one portion for the benefit of another, on a subsequent sale of several parcels of such land to different purchasers, the grantee of the servient tenement takes the same charged with the servitude thus openly and visibly imposed upon it. The right of support is the same, although the houses are sold at different times: *Richards v. Rose*, 9 Ex. 218. In *Murchie v. Black*, 19 Com. B., N. S., 190, the defendant and the plaintiff became the purchasers of two adjacent lots, the conveyance of the former being prior in point of time, and both stipulated to build according to a certain specified plan. The plaintiff built a house that was, on the whole, lighter than one built according to the specifications would have been, but in doing so, the ancient wall of a building that stood on the boundary line was raised several feet. The defendant then excavated for his own building without taking sufficient precautions to support the plaintiff's house, which consequently fell. It was held that, as the defendant in making the excavation was only doing what

he had bound himself to do, the plaintiff could not recover, the court remarking that he stood in exactly the same position as the vendor after the conveyance to the defendant. Considering that the grant in this case was made expressly for building purposes, and that the defendant was apparently chargeable with notice that a sale of the adjoining lots to others for the same purposes was contemplated, the decision seems to be rendered on very narrow and technical grounds, — to say nothing of the objection that it is scarcely reconcilable with the remarks of Lord Selborne quoted above. Provided none of the grantees of land, who take their conveyances with the knowledge that artificial structures are to be placed on the land, impose a heavier burden upon it than they are entitled by the terms of their contracts to impose upon it, it is difficult to see on what principle any of the grantees should be exempted by the mere priority of his conveyance from the duty of furnishing lateral support for a building erected in compliance with an agreement into which all have entered. If such priority of conveyance makes no difference as regards the rights and obligations of the grantees of buildings already erected (see above), it seems a reasonable and almost necessary extension of the doctrine, that the conveyances of parties who are entering upon the land with a knowledge that every grantee of a parcel has bound or will bind himself to build, should, for the purpose of determining their reciprocal duties, be regarded as contemporaneous. The precise point involved in *Murchie v. Black*, 19 Com. B., N. S., 190, does not seem to have arisen again in any court, but in the later case of *Rigby v. Bennett*, L. R. 21 Ch. Div. 559, it was held that, where a grantee, with the consent of his grantor, had, in order to avoid penetrating a soft stratum, sunk his foundations to a less depth than the terms of the contract of sale called for, the subsequent grantee of the adjoining lot could not excavate his soil so as to endanger those foundations, the court remarking that the defendant could not be in a better position than the grantor, who would certainly not have been entitled, under the circumstances, to have let down the plaintiff's land. This case presents a state of facts precisely the converse of *Murchie v. Black*, 19 Com. B., N. S., 190, and therefore cannot be regarded as inconsistent with the ruling of the latter, but Sir George Jessel, who delivered one of the opinions said that "if they [the grantors] granted the house to the plaintiff as it then stood, or granted the land on which the house was standing, they granted with it the easement or implied obligation or warranty that the house should not be let down by anything done on the adjoining land" — a rule which is virtually the same which was applied in *Siddons v. Short*, 2 L. R. C. P. D. 572, which holds that "the vendor of land adjoining other land of his own, under which are mines and minerals, and who knows at the time of the sale that the vendee is about to erect upon the land so purchased substantial buildings implied by covenants that he will not use, or permit the adjoining land to be used, in such a manner as to derogate from the grant." Strictly speaking, the doctrine here set forth merely defines the mutual rights existing between the landlord and the vendee, but, at least in the cases where the vendee asking for relief is the one whose conveyance is prior in time, it must be considered as involving the further doctrine that the defendant is also liable for the consequences of an excavation which causes damage. In fact it was adjudged in *Rigby v. Bennett*, that the defendant was chargeable with the expense of the work which his excavation rendered necessary for the protection of the plaintiff's house. In view of these two later decisions, it may perhaps be thought that *Murchie v. Black*, 19 Com. B., N. S., 190, can only be supported on the ground that the vendee who asked for relief acquired

his land by the later of the two conveyances, and that his remedy, if any, was against his grantor, and not against the first vendee. The distinction, however, does not seem to be satisfactory, and, if the same state of facts is again presented it is not impossible that the principle of the two later cases may be held to be applicable, whatever may be the order of the conveyances; or, in other words, that the rights and duties of grantees who take with knowledge that the adjoining lots are to be used for building should be estimated by the same rule that is admitted to define those rights and duties when the buildings have been erected before the conveyances are made. *Stevenson v. Wallace*, 27 Gratt. 77, turned on the words of a deed which were construed as reserving to the grantor a right to the lateral support of a parcel and building which he had already conveyed. This case is cited in *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581, as an authority for the doctrine that the grantor is presumed to reserve the right of support in his own favor, even when there is no express stipulation at the time the property is severed by sale, but this is certainly not a correct statement of the purport of the earlier case, the *ratio decidendi* being, as we have just stated, the peculiar language of the deed in question. The broader rule enunciated by the court in the older case that the grantor is presumed to reserve the right of lateral support where property which consists of a house and unimproved land is severed by sale is laid down on the authority of Goddard's Easements, Bennett's ed., 227. But the only case cited by this author in which such circumstances were involved is *Murchie v. Black*, 19 Com. B., N. S., 190, which clearly does not support his position, for it merely decides that, where the second of two grantees of land conveyed for building purposes has erected a building before the other grantee, the latter is protected against the consequences of any injuries which result to that building from his own subsequent excavations, by the fact of his having made an express contract to build — a very different, not to say inconsistent, proposition. The reference to the earlier case, however, was in this respect *obiter*, for the point actually decided in *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581, was that even supposing that there was, under the given circumstances, a reservation of this right by the grantor, it was confined to the condition of things at the time of the grant, and that, if an increased weight was afterwards placed on the land, an action would not lie for injuries which would not have occurred but for that increased weight. This doctrine is supported by the opinion of Willes, J. in *Murchie v. Black*, 19 Com. B., N. S., 190, "Where an addition," it was there said, "is made to the weight of a building, the whole must be considered as one entire weight." The rights acquired are the same, whether the grant be compulsory or voluntary. Thus, where a vendor had sold land near a river to a railway company, which, by the provisions of an act of parliament had the power of forcing him to convey, he was held to be chargeable with the knowledge that some of the land was to be used for bridge abutments, and that he must therefore be taken to have granted by implication the right of support for such structures: *Elliott v. Northeastern R'y Co.*, 10 H. L. Cas. 333.

2. *Statute.* — The difficulty of adjusting the rights of adjoining owners in cities has led the legislatures of some of the states to regulate the matter by statute. In New York it is provided that, "whenever excavations on any lot in the city of New York shall be intended to be carried to a depth of more than ten feet below the curb, and there shall be any party or other wall wholly or partly on adjoining land, and standing upon or near the boundary lines of such lot, the person causing such excavation to be made,



if afforded the necessary license to enter on the adjoining lan<sup>d</sup>, and not otherwise, shall at all times from the commencement unto the completion of such excavations, preserve such wall from injury, and so support the same by a proper foundation that it shall remain as stable as before the excavations were commenced": Laws of 1882, c. 410, sec. 474. Under this statute it has been held that, where the landowner who is about to build has obtained the required license by parol, and has thereupon shored up the party wall and removed its foundation, he may, notwithstanding the revocation of the license, proceed and build up a new foundation wall so as to sustain the party wall, and for that purpose has the right to enter upon so much of the adjoining premises as is necessary without being held a trespasser: *Ketchum v. Newman*, 116 N. Y. 422. The supreme court of that state has also held that the duty of supporting the wall on the adjoining premises does not cease with the completion of the excavation: *Bernheimer v. Kilpatrick*, 53 Hun, 316. Under a statute of substantially the same tenor, passed in 1855, it was decided that the person whose duty it is to provide support must ask for the necessary license, and, if he fails to do so, he is liable for any injuries which may be caused by the excavation, since it is not the duty of the owner of the threatened building to tender the license: *Dorrity v. Rapp*, 72 N. Y. 307. The only other state in which a similar enactment has been construed by the court of last resort is in Ohio. There a landowner in any city or village, who, by an excavation carried to a greater depth than twelve feet below the curb, or if there is no curb, below the surface of the adjoining lots, causes damage to the buildings on such lots, is by the statute made liable to the party injured, for the full amount of the damage. Under these provisions it was held that, when a landowner erected a building, it was at his own peril, if he so constructed it that the owner of the adjoining lot could not dig thereon to the depth allowed by the statute, and that the latter was under no obligation to furnish other support in lieu of the earth removed by him.

5. *Prescription—The English Doctrine.*—The earliest case in which there is any suggestion that an ancient building was more favored in this respect than one recently erected is *Pulmer v. Fleshees*, 1 Sid. 167 (1674), in which the judges in their first resolution say that "if a man being seised of land leases forty feet to A. to build a house thereon, and forty feet to B. for a like purpose, and one of them builds a house and then the other digs a cellar in his land which causes the wall of the first adjoining house to fall, no action will lie, for everyone may deal with his own to the best advantage; but, *semble*, that it would be otherwise if the wall or house were an ancient one." This expression of opinion, however, was merely an *obiter dictum*, and the point was not directly ruled upon by any judge until 1803, when Lord Ellenborough, in *Stansell v. Jollard*, 1 Selw. (N. P.) 457, 11th ed., directed a jury that, "when a man has built at the extremity of his land, and has enjoyed his building above twenty years, by analogy as to the rule of lights, etc., he has acquired a right to support, or, as it were, of leaning on his neighbor's soil, so that his neighbor cannot dig so near as to remove that support." In *Wyatt v. Harrison*, 3 Barn. & Adol. 871, and *Dodd v. Holme*, 1 Ad. & E. 493, the judges used some language favoring the same view, but decided against the plaintiff on the ground that his building was not alleged to be ancient. In *Hide v. Thornborough*, 2 Car. & K. 254, Parke B. cited *Stansell v. Jollard*, 1 Selw. (N. P.) 457, 11th ed., and ruled that, if there were twenty years enjoyment by the plaintiff of the support of the house from the defendant's land, and it was known that the defendant's land supported the plain-



tiff's, that was sufficient to give him the right of support. In *Partridge v. Scott*, 3 Mees. & W. 220, which was a case of subjacent excavation, the court affirmed in substance that an easement of support might be acquired by twenty years' enjoyment, but ruled against the plaintiff on the ground that he had built the house on ground which had been so excavated as not to afford sufficient support for it, and thus had caused the injury to himself. In *Humphries v. Brogden*, 12 Q. B. 749, the question was between the occupier of land unbuilt on, and the occupier of subjacent minerals, but in the elaborate opinion delivered by Lord Campbell, he refers to *Stansell v. Jollard*, 1 Selw. (N. P.) 457, 11th ed., and *Hide v. Thornborough*, 2 Car. & K. 254, and lays it down that, "where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action by the owner of the house." This seems to be the first distinct and deliberate recognition of the prescriptive right by a court of appeal, and the case has since been always referred to as an authority for the doctrine by the courts of England and of this country. In *Gayford v. Nichols*, 9 Ex. 708; *Rowbotham v. Wilson*, 6 El. & B. 593; 8 El. & B. 123; 8 H. L. Cas. 348; *Rogers v. Taylor*, 2 Hurl. & N. 828; the doctrine seems to be recognized as settled law, though the cases went off on other points. In *Bonomi v. Backhouse*, El. B. & E. 622; the language of the court distinctly assumes the existence of such a right, for Justice Willes, in delivering the judgment of the Court of Exchequer Chamber, said that the right of support for buildings "must be founded on prescription, or grant, express or implied," and that the character of the right when acquired was the same as that of the absolute right appertaining to the natural soil. Such was the state of the authorities, when the much discussed case of *Solomon v. Vintners Co.*, 4 Hurl. & N. 585, came before the Court of Exchequer in 1859. The facts as given in the opinion of Pollock, C. B., were these: "The plaintiff was the owner of a house in Pilgrim Street in the city of London. His house was built on a hill having a descent towards the west. There was a house next below his and adjoining to the plaintiff's house, belonging to a third person, and the defendants were the owners of the two houses next adjoining. One of the defendants' houses was a corner house of the street. For upwards of thirty years the four houses were all of them out of the perpendicular, leaning to the west, and this might have been seen by anyone passing by. There was no evidence when the houses were built, or that there was any connection between the houses either in title, occupation, possession, or otherwise." Upon the expiring of a lease of defendants' houses they entered into a contract to have their houses pulled down and two others erected in their place, and in consequence of the demolition of the buildings, plaintiff's house was injured. The court held that defendant was not liable for the damage, but the judges rested their decisions on different grounds. The Chief Baron, with whose views two of his colleagues concurred, remarked that, "If the house removed had been the next adjoining the plaintiff's, they would have felt much embarrassed by some cases and dicta," and mentioned *Stansell v. Jollard*, 1 Selw. (N. P.) 435, 11th ed., *Hide v. Thornborough*, 2 Car. & K. 254, and *Humphries v. Brogden*, 12 Q. B. 749, but stated that, as the defendant's houses were not next adjoining the plaintiff's, and there was no intermediate one, it was not necessary to decide whether the principles recognized in those cases were sound, and concluded thus: "The question, therefore, really comes to this: Is there any authority in the law for the existence of such a right as that claimed by the plaintiff? We find none where the houses do

not adjoin, and although we might possibly have acted upon cases before referred to, if the circumstances had been the same, we are not disposed to extend the principle further than we feel ourselves compelled to by authority." Bramwell, B., delivered a separate opinion, and after saying, that although he did not dissent from any of the reasons given in the opinion of his colleague, he preferred not to give an opinion upon them without more consideration, and would decide in defendant's favor on the ground that, supposing it possible for the right of support here claimed, to arise by lapse of time, it certainly could not do so unless the support had been openly and visibly enjoyed for the requisite period. An enjoyment which will create a right by prescription, "must neither be *vi*, *precario*, nor *clam* — it must be open. Now when one house leans toward another, a person may make a tolerably shrewd guess that it is partly supported by the other; but it will be only a conjecture. No one can say but that both may have slipped and both stand — I think the expression is, — 'upon the square,' or self-supporting. But it may turn out to be the fact, that the house which leans toward the other affords as much support to that other by their natural cohesion as the other affords to it . . . . Therefore, supposing that the plaintiff, for more than twenty years, had an enjoyment, which he says now, ought to continue, it was an enjoyment *clam*, not open, and consequently, not of right." It is clear that this decision was for the special reasons assigned, not inconsistent with those which preceded it, but the intimations thrown out by the judges as to the possible unsoundness of the doctrine, allowing the acquisition of a right of support for buildings by prescription, may, perhaps, have been the principal reason why the whole question was reopened twenty-two years later in the case of *Angus v. Dalton*, L. R. 3 Q. B. D. 85; 4 L. R. Q. B. D. 162; S. C. *sub nom.*, *Dalton v. Angus*, L. R. 6 App. C. 740.

There seems, indeed, to have been a very prevalent feeling that the doctrine did not, as yet, rest upon a sufficiently rational and satisfactory basis, a feeling which was perhaps due in some degree to the fact that some of the courts of this country had very decidedly refused to accept it: See the cases cited below. Even in *Humphries v. Brogden*, 12 Q. B. 749, the case to which, more than to any other, it owed its place in English jurisprudence, Lord Campbell had spoken of the difficulty there might be "in discovering whence the grant of the easement, in respect of the house, is to be presumed, as the owner of the adjoining house cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss and inconvenience to himself." The suggestion here thrown out was taken up by the queen's bench, sitting in bank, in *Angus v. Dalton*, L. R. 3 Q. B. D. 85; L. R. 4 Q. B. D. 162, and made the basis of the judgment, in which that court denied (Lush, J., dissenting) the possibility of acquiring the right of support for a building by prescription. A lengthy extract from Chief Justice Cockburn's opinion is given in the note to *Thurston v. Hancock*, 7 Am. Dec. 62, and the arguments there used present what is perhaps the strongest and clearest elaboration of this view of the question yet made by any judge. The court of appeals, however, reversed the judgment of the queen's bench, and the case was then carried up to the House of Lords. In view of the unusual importance of the question, a special hearing was ordered to be had before seven of the judges, who, after taking time to consider, delivered their opinions *seriatim*. The first question put to them was, whether "the owner of an ancient building has a right of action against the owner of lands adjoining it if he disturbs his land so as to take away the lateral support previously afforded by that land." This question they all answered in the

affirmative, but more than one of them referred to the difficulty of finding any rational ground for applying the doctrine of prescription in the supposed case. These opinions exhaust the subject and should be read by any one who wishes to obtain a knowledge of the development of the doctrine in the English courts. The House of Lords accepted the view of the judges as correct, and decided in the plaintiff's favor. The principal opinion was delivered by Lord Selborne, and as it contains an authoritative statement of the law which must now be regarded as established in England, we shall give some extracts, which will show how he arrived at his conclusions. After some preliminary observations as to the nature of the right of lateral support, he proceeded as follows: "I think it clear that any such right of support to a building, or part of a building, is an easement, and I agree with Lindley, J., and Bowen, J. [two of the judges before whom the special hearing was had], that it is both scientifically and practically inaccurate to describe it as one of a merely negative kind. What is support? The force of gravity causes the superincumbent land or building to press downward upon what is below it, whether artificial or natural, and it has also a tendency to thrust outwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using the language of the law of easements, I say that in the case, alike of vertical or lateral support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which by the servient tenement arises, not from its own pressure upon the servient tenement, but from the power of the servient tenement to resist that pressure, and from its actual sustenance of the burden so imposed; but the burden and its sustenance are reciprocal, and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight." He then referred to the urban servitude *oneris ferendi* of the Roman law, and pointed out that, "in principle, the nature of such a servitude must be the same, whether it is claimed against a building on which another structure may wholly or partially rest, or against land from which lateral or vertical support is necessary for the safety and stability of the structure." After combating the views of those judges who considered that the right of lateral support could not be gained by prescription, because it could not be the subject of grant, he goes on to deal with the most serious objection that can be brought against the doctrine which allows the acquisition of the right in this manner. "The policy and purpose of the law on which both prescription and the presumptions which have supplied its place, when length of possession has been less than immemorial rest, would be defeated, or rendered very insecure, if exceptions to it were admitted on such grounds as that a particular servitude (capable of a lawful origin) is negative rather than positive; or that the inchoate enjoyment of it before it has matured into a right is not an actionable wrong; or that resistance to or interruption of it may not be conveniently practicable. I assume, for the present purpose, that a man who places on his own land, where it adjoins that of his neighbor, a weight which increases its pressure upon his neighbor's land, is not thereby guilty of an actionable wrong. If this be so, the reason probably is, that the act is lawfully done upon his own land, and that the owner of the adjoining land suffers no actual or appreciable damage from the increased amount of pressure which it has to bear, except so far as the continuance of that pressure, if uninterrupted, may tend to ripen into a right, and so to enlarge the servitude to which his land was previously sub-



ject. But against this he has his own remedy, if he chooses to prevent and interrupt it. That power of resistance by interruption does, and must in all such cases, exist, otherwise no question like the present could arise. It is true, that, in some cases (of which the present is an example), a man acting with a reasonable regard to his own interest would never exercise it for the mere purpose of preventing his neighbor from enlarging or extending such a servitude; but, on the other hand, it would not be reasonably consistent with the policy of the law in favor of possessory titles that they should depend in each particular case upon the greater or less facility or difficulty, convenience or inconvenience, of practically interrupting them. They can always be interrupted, and that without difficulty or inconvenience when a man wishes, and finds it for his interest to make such a use of his land as will have that effect. So long as it does not suit his purpose or his interest to do this, the law which allows a servitude to be established or enlarged by long and open enjoyment, against one whose preponderating interest it has been to be passive during the whole time necessary for its acquisition, seems more reasonable, and more consistent with public convenience and natural equity than one which would enable him at any distance of time, whenever his views of his interests may have undergone a change, to destroy the fruits of his neighbor's diligence, industry, and expenditure." If the law of easements is to be a consistent and harmonious whole, the considerations here set forth appear to be unanswerable. The *argumentum ab inconvenienti* is clearly out of place in this instance. It is perhaps deserving of consideration whether the opposing views may not be reconciled on the common ground of a doctrine which would admit of the interruption of the running of the prescription by means of a formal protest on the part of the landowner who wishes to reserve, as against his neighbors, the liberty of excavating his soil. A suggestion to this effect was thrown out by Lindley, J., and Bowen, J., in the opinions which they submitted to the House of Lords in *Dalton v. Angus*, L. R. 6 App. C. (see pp. 766 and 786 of the report); but the former stated that he could find no authority for the sufficiency of a protest in the case of any easement. It would certainly seem more conformable to the social conditions and methods of business in modern times to hold that any clear and convincing evidence that assent has been withheld should avail to prevent the acquisition of a right which comes into existence as the result of a presumed assent: *Sturges v. Bridgman*, L. R. 11 Ch. Div. 862. The rule which requires a man against whose property a servitude is day by day maturing to protect himself by overt physical acts, or by a lawsuit, seems to savor too strongly of a rude age when every acquisition or divestiture of a right was accompanied by its peculiar symbolic ceremony. The policy which has abolished livery of seisin and similar antiquated rituals seems to point very decidedly to the propriety of abolishing the doctrine that the running of the prescriptive period in the case of easements can be interrupted, apart from legal proceedings, only by such forceful operations as fencing off a road or raising a wall to darken a neighbor's windows. But on the whole, we are inclined to think that the best way of dealing with this troublesome question is that the legislature should define the rights of the parties on some principle of compromise, based upon considerations of what is beneficial for landowners generally, and the statutes in New York and Ohio appear to us to indicate the proper lines upon which such legislation should be framed.

*The American Decisions* regarding the acquisition of the right by prescription are hopelessly at variance. In the following cases the question was



not directly involved, but the courts seem, by their language, to recognize the possibility of this mode of gaining the right: *Aston v. Nolan*, 63 Cal. 269 (overruled — see below); *Casselberry v. Ames*, 13 Mo. App. 575 (overruled — see below); *Lusala v. Holbrook*, 4 Paige, 169; 25 Am. Dec. 524; *Richardson v. Vermont etc. R. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283; *Shafer v. Wilson*, 44 Md. 268; *Charles v. Rankin*, 22 Mo. 566; 66 Am. Dec. 642; *Thurston v. Hancock*, 12 Mass. 220; 7 Am. Dec. 57; *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771; *Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 243; *Mamer v. Lussem*, 65 Ill. 484. In all these cases the observations made upon the subject were purely obiter, and the prescriptive right was recognized mainly, as it seems, in deference to the English authorities. In *Stevenson v. Wallace*, 27 Gratt. 77, the court committed itself in more definite terms to the doctrine, and ruled that, "where it was shown that the plaintiff had a building on her lot which was supported by the land and the building of the defendant for twenty years or more, with the knowledge of the defendant, prior to a fire which destroyed both buildings, a grant of the easement of support would be presumed; and that said easement was not lost or extinguished by the destruction of the building, but adhered to the building which the plaintiff caused to be erected on the ruins." This decision, however, must be regarded as overruled by *Tunstall v. Christian*, 80 Va. 1, noticed below. So far as our researches extend, therefore, it would seem that no American case, in which the question has been directly raised, except one, has sustained the right, and that this single exception is no longer deemed a sound authority in the court from which it emanated. On the other hand, there are several cases in which courts of last resort have emphatically rejected as unsound the theory that the right of support can be gained by prescription. In the earliest of these cases (*Richart v. Scott*, 7 Watts. 460, 32 Am. Dec. 779) the court remarked that it was "difficult, if not impossible, to conceive how an implication or presumption of a license or grant can be made where there is no adverse user, encroachment upon, or possession had or taken of any right or thing belonging to another, and nothing to which any other can make even the slightest color of objection." This statement of the reasons for condemning the doctrine of a prescriptive right preceded, it may be observed in passing, the first hint of such an objection in the English courts by about twelve years, for Lord Campbell's opinion in *Humphries v. Broyden*, 12 Q. B. 743, was not delivered till 1850. The argument thus tersely presented was expanded in *Mitchell v. Mayor etc. of Rome*, 49 Ga. 19, 15 Am. Rep. 669, in the following words: "Neither in the case of the window opening out on another man's land, nor of a building erected on the dividing line, has the owner committed an act against which his neighbor can protest. He has not touched his property or invaded any right or given any cause of action. He had a right to use or build on his lot to the furthest limit of his boundary. He has only done this, and never has had any use or possession, or enjoyment of any right, corporeal or incorporeal, belonging to another, to which objection could in any form be made, and it would therefore be a misuse, as well as an abuse, of the terms 'license,' 'grant,' and 'acquiescence' to say he has acquired a right by means thereof from the owner of the adjacent lot." Finally, in *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581, the views of the courts of Pennsylvania and Georgia were adopted, and *Stevenson v. Wallace*, 27 Gratt. 77, expressly overruled. To these authorities may be added *Hanlan v. McManus*, 42 Mo. App. 551, which reversed the ruling in *Casselberry v. Ames*, 13 Mo. App. 575. The very recent case of *Sullivan v. Zenier*, 98 Cal. 346 (May 24, 1893), must

strictly speaking, be considered apart from these cases, as it was made to turn upon the meaning of a section of the Civil Code of the state; but in the opinion no particular stress is laid upon this fact, and the language is so entirely general that it may reasonably be inferred that, apart from the code, the decision would have followed the lead of the four courts whose decisions have just been referred to. *Mitchell v. Mayor etc. of Rome*, 49 Ga. 19, 15 Am. Rep. 669, is in fact cited with approbation. In *Napier v. Bulwinkle*, 5 Rich. 311, the question was one of ancient lights, but the doctrine of the acquisition of the right of lateral support by prescription was plainly condemned in terms which leave no doubt as to the manner in which the court would have ruled on that point if it had been directly presented. In *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312, also, Judge Gray, in his learned discussion of the subject, intimates very strongly his doubts as to the soundness of the doctrine, and perhaps this expression of opinion, although merely *obiter*, may be taken as an indication that the supreme court of Massachusetts is disposed to revise its earlier views, and may possibly decide against the prescriptive right when the issue is directly presented; but whether this be so or not, it is evident that the above state of the decisions, shows a great preponderance of authority against the existence of that right. The ruling of the House of Lords in the most recent English case does not appear to have exercised any influence on the views of the courts who have dealt with the subject since it was delivered, and seems not to have been even cited, though it is obvious that the acquisition of the right by prescription has, by the discussions in that case, been placed upon a much sounder basis than in the earlier ones to which the judges of the country have hitherto referred.

RIGHT OF LATERAL SUPPORT, AS AGAINST MUNICIPAL CORPORATIONS. Ever since the case of *Callender v. Marsh*, 1 Pick. 418, was decided, the prevailing doctrine in the courts of this country has been that the withdrawal of lateral support from the premises of an abutting landowner by the grading of streets or highways will not raise a cause of action in favor of such landowner, as against the public body or officers who carry out the work, provided it is done under lawful authority and with due skill and care. In the above case the plaintiff was held not entitled to recover for the removal of earth in the street and the resulting cost of the foundation of his house, whereby he was put to considerable expense and inconvenience. The opinion of Chief Justice Parker fully develops the doctrine and explains the principles upon which it is based. The essence of the reasoning in this and similar cases is that the given circumstances fall under the general rule that a public body acting within its jurisdiction, and not charged with malice, want of good faith, or negligence, cannot be held liable for injuries which are merely incidental to the exercise of their authority: *Cooley, J., in Pontiac v. Carter*, 32 Mich. 171; and that the constitutional provisions giving compensation to individuals whose property is taken for public uses do not cover these any more than the other consequential damages resulting from the right use of property already belonging to the public. In *O'Connor v. Pittsburgh*, 18 Pa. St. 187, it was stated that this doctrine had been accepted in all the states except Ohio. See further the notes to *Perry v. City of Worcester*, 66 Am. Dec. 434-442; *Fellowes v. New Haven*, 26 Am. Rep. 457-462; *Radcliff's Ex'rs v. Brooklyn*, 53 Am. Dec. 366-370; *O'Brien v. Philadelphia*, 30 Am. St. Rep. 835-850; as to the application of the general rule to the injuries caused by the grading of streets. In the following cases it

was held that landslides caused by excavations on streets or highways for the purpose of grading them for the public use come under the head of consequential injuries, for which a landowner cannot recover: *Radcliff's Ex'rs v. Brooklyn*, 4 N. Y. 195; 53 Am. Dec. 357; *Rome v. Omberg*, 28 Ga. 46; 73 Am. Dec. 748; *Taylor v. St. Louis*, 14 Mo. 20; 55 Am. Dec. 89; *Fellowes v. New Haven*, 44 Conn. 241; 26 Am. Rep. 417. *A fortiori*, under such a doctrine, will there be no liability for damages to buildings: *Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 243; and in this case the courts, even of Ohio, hold that there is no liability: *Cincinnati v. Penny*, 21 Ohio St. 499. *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243, holds further that an abutting owner cannot acquire any prescriptive right to the lateral support of the soil on the street; for a corporation "cannot bind itself by contract, through all time, not to improve a street," and as the landowner for this reason cannot gain the right by grant, he cannot gain it by lapse of time.

The above doctrine however has from the first been strongly protested against in many quarters, and even in *Callender v. Marsh*, 1 Pick. 418, the court referred to the hardships which individuals would suffer, and expressed an opinion that it was a proper occasion for the interference of the legislature. It is noteworthy, too, that the English case upon the authority of which *Callender v. Marsh*, 1 Pick. 418, and *Radcliff's Ex'rs v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 366-370, the leading decisions in this country, were perhaps mainly decided, was merely one where access to the abutting premises had been made more difficult by the alterations in the street—a damage which appears to be of an essentially different character from that of letting down a portion of the soil itself. As has been truly remarked, "a case of landslide caused by grading involves no question of inconvenience to the owner caused by the making of a neighboring or abutting public improvement, leaving the *corpus* of the property intact; but the case is one of the invasion or injury of the property itself": *Keating v. Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421. The subsidence which must follow under such circumstances was held in the recent case of *Stearns v. Richmond*, 88 Va. 992, 29 Am. St. Rep. 758, to amount to a "taking" of the landowner's property, and damages were allowed by the court not merely for injuries to the soil itself but to the buildings on it, which the evidence showed were not the cause of the landslide. In Minnesota, also, this rule has been applied as against municipal corporations: *Dyer v. St. Paul*, 27 Minn. 457, referring to the more general doctrine announced in *O'Brien v. St. Paul*, 25 Minn. 331; 33 Am. Rep. 470. Some states have embodied in statutory or constitutional provisions the principles which underlie the decisions just cited, and under these provisions landowners will undoubtedly be held to have a right to the lateral support of the street in many cases where it would not previously have been admitted. Thus in California there is a constitutional prohibition against the "taking or damaging property for public use without just compensation," and this was held to cover an injury caused by the squeezing outward and upward of the soft, spongy soil on which the plaintiff's house stood, by the deposit of heavy materials on the roadway for the purpose of forming an embankment: *Reardon v. San Francisco*, 66 Cal. 492; 56 Am. Rep. 109. As to the construction of such a provision generally, see note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 837-848. The addition of some such guaranty to the constitution is perhaps the most feasible method of insuring that justice shall be done in these cases, for there is not much likelihood that the bold course of the Virginia court in *Stearns v. Richmond*, 88 Va. 992, 29 Am. St. Rep. 758, will be followed in many states. When the weight of authority



in favor of a legal principle of this sort is so great that the doctrine of *stare decisis* is felt to be controlling, and at the same time the highest tribunal of the country has declared itself of the opinion, "that the decisions in favor of the principle have gone to the uttermost limit of sound judicial construction, and in some cases beyond it" (see *Pumpelly v. Green Bay Co.*, 13 Wall. 180), the true solution of the difficulty would seem to be the establishment of a more equitable rule by an alteration in the organic law.

**RIGHT OF LATERAL SUPPORT AGAINST PRIVATE CORPORATIONS ACTING UNDER LEGISLATIVE AUTHORITY.** — In *Richardson v. Vermont etc. R. R. Co.*, 25 Vt. 465, 60 Am. Dec. 283, it was held that a railroad company is liable for an injury caused by making excavations on its own land so near to the land of an adjoining owner that his soil, without any artificial weight imposed upon it, slides into the excavation; and in *Baltimore etc. R. R. Co. v. Reaney*, 42 Md. 117, the plaintiff was allowed under these circumstances to recover for injuries to a house also. On the other hand, *Boothby v. Androscoggin etc. R. R. Co.*, 51 Me. 318, is an authority for the proposition that such an injury is consequential and does not raise any liability, the court saying that the "principle of common law that a man must not dig so near the land of another as thereby to withdraw the natural support of the soil" was not applicable to "excavations made in pursuance of a license from the legislature, if within its constitutional limits, affords as ample protection as a license from the injured party." The importance of the words italicized is obvious, and it is to be regretted that the court did not think it worth while to explain at greater length its reasons for holding that the license in question was within the powers of the legislature. It is quite possible without any inconsistency to argue that a municipal corporation, while exercising the sovereign powers delegated to it for the good of the community, may with impunity cause damages of this sort to land abutting on the streets, and at the same time to dispute the proposition that a private corporation, while carrying on operations solely for its own profit and advantage, can protect itself by any legislative license whatever. Indeed, even a municipal corporation would apparently not be protected if injuries of this character were caused by operations undertaken for the mere pecuniary advantage of the citizens composing the corporation: See *Hill v. Boston*, 122 Mass. 344; 23 Am. Rep. 332; and note to *Goddard v. Harpswell*, 30 Am. St. Rep. 376. In New York it has recently been decided that a legislative charter is no protection to a railroad company which cuts off the access of a riparian owner to navigable water: *Runsey v. New York etc. R'y Co.*, 133 N. Y. 79; 28 Am. St. Rep. 600. Plainly the principle there enunciated is quite irreconcilable with that of the Maine case, and since the latter decision seems to have entirely ignored the fundamental distinction between the liability of persons or bodies invested with a portion of the sovereign power for their own emolument, and those invested with similar powers for the good of the public, we venture to think it was not a correct expression of the law, even when it was pronounced. That it would be condemned in most courts at the present day, hardly admits of a doubt, in view of the tendency which is apparent to hold even municipal corporations liable for injuries of this kind. The ruling in *Richardson v. Vermont etc. R. R. Co.*, 25 Vt. 465, 60 Am. Dec. 283, is strongly supported by *Williams v. Natural Bridge etc. Co.*, 21 Mo. 580, which laid it down that a corporation formed upon an enactment regulating the construction of plank roads could not so excavate along the line of a county road on which they had located their own road as to endanger the stability



of the abutting premises, — the court expressly declaring that the cases relating to the grading of streets in cities stood upon different considerations.

**LIABILITY FOR NEGLIGENT EXCAVATIONS.** — The authorities are entirely harmonious on the proposition that if the excavation is made in a negligent, wrongful, or reckless manner, the person excavating will be liable for the full consequences of his acts, — not merely for the injury to the soil itself, but to the improvement or superstructures thereon: *Charless v. Rankin*, 22 Mo. 566; 66 Am. Dec. 642, and note; *Shriene v. Stokes*, 8 B. Mon. 453; 48 Am. Dec. 401; *Shafer v. Wilson*, 44 Md. 268; *Moody v. McClelland*, 39 Ala. 45; 84 Am. Dec. 770; *Myer v. Hobbs*, 57 Ala. 175; 29 Am. Rep. 719; *Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 243; *Beard v. Murphy*, 27 Vt. 99; *Austin v. Hudson River R. R. Co.*, 25 N. Y. 334; *Trower v. Chadwick*, 4 Bing. N. C. 1; *Moellering v. Evans*, 121 Ind. 195; *Jones v. Bird*, 5 Barn. & Adol. 837; *Brown v. Windsor*, 1 Crompt. & J. 20; *Conboy v. Dickinson*, 92 Cal. 600; *Louisville etc. R. R. Co. v. Bonhays*, Kentucky Ct. App., Feb. 1893; *Covington v. Geylor*, Kentucky Ct. App., June, 1892; *Hummell v. Terrace Co.*, 20 Or. 401; *Dunton v. Niles*, 95 Cal. 495; *Jeffries v. Williams*, 5 Ex. 792. The mere fact of contiguity of buildings imposes an obligation on the owner of one which is being removed to use due care and skill not to damage the other: *Sterenson v. Wallace*, 27 Gratt. 77. The degree of care to be used is somewhat difficult to define with precision. In *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642, it was held to be error to instruct a jury that the care should be such as a prudent man, experienced in such work, would have exercised if he had been himself the owner of the building, the court remarking that under such circumstances "he would have shored up, and would have submitted to many inconveniences, and, indeed, would have incurred considerable additional expense in doing the new work rather than expose the building already erected to any risk." In *Conboy v. Dickinson*, 92 Cal. 600, it was held to be negligence to open an excavation to a depth of forty feet within four feet of the boundary line of the lot, at a season of the year when heavy rains might be expected. So also it is negligence to drive piles so that the vibration cracks the walls of the neighboring houses, and to conduct operations so that the action of the elements causes avoidable damage: *Austin v. Hudson River R. R. Co.*, 25 N. Y. 334. So where the defendant undertakes to construct a retaining wall on his own land, which materially increases the risk of the adjoining property to landslides, he is bound to take into account or anticipate such storms or rainfalls as might reasonably be expected: *Hummell v. Terrace Co.*, 20 Or. 401. From *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 642, and the principal case, it would seem that the person excavating must, in Missouri, carry on the work in sections or be answerable for the consequences, unless he gives reasonable notice that he will pursue another method. If the defendant has undertaken to brace or underpin his neighbor's house, he must, at his peril, use reasonable care: *Covington v. Geylor*, Kentucky Ct. App., June, 1892; but if he has declined to do this he must give the adjoining owner reasonable facilities for obtaining artificial support, including a temporary privilege of shoring up the house by temporary supports based upon the excavator's land: 2 Shearman and Redfield on Negligence, sec. 701. In *Louisville etc. R. R. Co. v. Bonhays*, Kentucky Ct. App., Feb. 1893, it was ruled that heavy blasting was negligence, but in *Martin v. Brewster etc. Co.*, 55 N. Y. 538, 14 Am. Rep. 322, the court held that the right to blast in a mine so as to shake or injure the dwelling of the surface owner and disturb his enjoyment is to be tested by the necessity therefor, and that so long as the surface of the ground itself is not affected, the mine owner is not answerable for the crack-

ing and crumbling of the houses. "Is it not the rule," asked Justice Folger in his opinion, "that whatever an adjacent owner can do upon his own land, confined within that, and necessary for the convenient and beneficial enjoyment of it, which works no physical injury to his neighbor's possession in its natural state, he may do without liability to his neighbor, although it may work physical injury to a building lately erected thereon by his neighbor? Is this exemption from liability confined to a case of lateral pressure? . . . He is not bound to support the building so long as he affords a support sufficient for the soil without the building." To us the rule of the first of these two cases seems the more correct. That it is scientifically inaccurate to speak of blasting as something which is "confined to the land" on which it is carried on seems to us perfectly clear. The vibrations caused thereby extend over a greater or less area, according to the violence of the explosion. Can any valid distinction be drawn between the invisible movements of the particles of air and earth which produce the vibrations and jars from which damage ensues, and the visible movements of the solid matter which is often scattered upon the adjoining land by such explosions,—a consequence which undeniably raises a liability for damage: *Hay v. Cohoes Co.*, 2 N. Y. 162; 51 Am. Dec. 279. The doctrine laid down in *Marvin v. Brewster etc. Co.*, 55 N. Y. 538, 14 Am. Rep. 322, must, we think, be regarded as a hasty generalization made without a due regard to the startling results to which it leads. Common sense revolts at the idea that a landowner can lawfully let off a heavy charge of powder within a few feet of his neighbor's building, and escape all liability for its destruction if the shock would not have injured the natural surface, and from the explanation of the rationale of the shock which physical science furnishes, it is apparent that common sense in this instance, as in many others, conducts us to a conclusion which is legally sound and fully justified by analogies. The decision in the New York case, however, may very well rest on the more special ground that the extent of the mining rights depended on a reservation in a deed, and that the grantee of the surface, and those who succeeded to his rights, being fairly chargeable with the knowledge that blasting is usual in mining operations, must be regarded as having built with a full understanding of the risks they were running and an implied promise not to hold the mine owner answerable for injuries caused by the vibrations. So it has been held that if the plaintiff has impliedly agreed that the excavation may be made by blasting, and the blasting is not negligently done, he cannot recover for the resulting injuries: *Casselberry v. Ames*, 13 Mo. App. 575. If the defendant, in excavating, has injured his own wall, and thus damaged one belonging to his neighbor, who by his permission had rested it on the wall from which the support has been withdrawn, he will be liable for the injuries: *Brown v. Windsor*, 1 Cramp. & J. 20; but there is no implied obligation between the owners of distinct parts of buildings which will enable either to maintain an action against the other for mere refusal or neglect to repair his tenement whereby the plaintiff's part is injured: *Pierce v. Dyer*, 109 Mass. 374; 12 Am. Rep. 716. The person excavating is not liable for damages to an adjacent building unless he knew, or had good reason to believe, that the removal of the earth would occasion the damages before the necessary support could be obtained: *Shriener v. Stokes*, 8 B. Mon. 453; 48 Am. Dec. 401; and if the house be so weak that it cannot stand the reasonable improvement of the defendant's property when conducted with skill and care, any loss sustained by the plaintiff is *damnum absque injuria*: *Shaffer v. Wilson*, 44 Md. 268. But if negligence is shown, the mere fact that the house was in bad condition and ready to fall

in a few months will not excuse the defendant: *Dodd v. Holme*, 1 Ad. & E. 493; *Shafer v. Wilson*, 44 Md. 268. The removal of support by the drainage of one's own land will not raise a cause of action: *Popplewell v. Hodkinson*, L. R. 4 Ex. 248. Evidence of what is usually done by builders in digging under such circumstances is admissible as bearing on the question of reasonable care: *Shrieve v. Stokes*, 8 B. Mon. 453; 48 Am. Dec. 401; and testimony that the defendant consulted a skilled architect as to the steps necessary to protect the building is competent evidence on that point: *Winn v. Abeles*, 35 Kan. 85; 57 Am. Rep. 138. It is, of course, the province of the jury to decide whether there has been negligence or not: *Panton v. Holland*, 17 Johns. 92; 8 Am. Dec. 369; *Quincy v. Jones*, 76 Ill. 231; 20 Am. Rep. 243; *Conboy v. Dickinson*, 92 Cal. 600; *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49.

**DUTY OF PERSON EXCAVATING TO GIVE NOTICE TO THE OWNER OF THE ADJACENT BUILDING.** — A number of decisions, both in this country and in England, have established the reasonable rule that before excavations are begun notice must be given to the owner of the premises which will be endangered: *Peyton v. Mayor etc. of London*, 9 Barn. & C. 324; *Massey v. Goyder*, 4 Car. & P. 161; *Jones v. Bird*, 5 Barn. & Adol. 837; *Beard v. Murphy*, 37 Vt. 99; 86 Am. Dec. 693; *Shafer v. Wilson*, 44 Md. 268; *Winn v. Abeles*, 35 Kan. 85; 57 Am. Rep. 138; *Covington v. Geylor* (Ky.), June, 1892; *Schultz v. Byers*, 53 N. J. L. 442; 26 Am. St. Rep. 435, and the principal case. In *Schultz v. Byers*, 53 N. J. L. 442, 26 Am. St. Rep. 435, a vigorous dissenting opinion, a portion of which is cited in the note to the case in the present series, was delivered by Justice Magie, and concurred in by Justice Reed. The essence of the objection made to the rule was that a judicial determination that notice was necessary in such cases could not prescribe the form of notice, or fix the time, or provide for constructive notice, and reference was made to the English case, *Chadwick v. Trower*, 6 Bing. N. C. 1, in which it was held that the mere juxtaposition of two buildings does not impose the duty of giving notice upon one who is about to pull down his own wall. The question is not free from difficulty, but the doctrine that the failure to give notice is negligence *per se* is perhaps sufficiently supported by adverting to the intolerable consequences of establishing any other rule. For our own part, we think that a landowner who should proceed with his excavation without regard to the existence of a building on the adjoining land, and without taking steps to warn the owner of the building, and give him an opportunity to protect himself, is guilty of a gross violation of neighborly comity, which certainly does not entitle him to any favor. Judged by the standards of everyday life and conduct, such a course is certainly an omission to do what no reasonable and fair-minded man would omit to do, and if the courts in such a case think proper to crystallize the common opinion of mankind into a legal rule, they are merely repeating in another instance the process by which the entire law of negligence has been built up. The difficulties which Justice Magie dwells upon would, we fancy, be found very trifling in practice, or rather they have been found so, for the general acceptance of the doctrine that notice is necessary has undoubtedly been the principal reason why the rapid growth of our great cities has gone on with so little friction between landowners, and so little damage to buildings. Before the enormous advantages that arise from thus compelling the parties to act in a spirit of mutual forbearance, the objections levelled against the doctrine seem to sink into significance. It was probably a regard for these consider-



ations which led the legislature of California to provide that such notice must be given: Cal. Civ. Code, sec. 832. The object of this notices is that the owner of the building may have his attention called to the work, and, if necessary, shore up his wall and strengthen his foundation; and the giving of the notice does not relieve the person excavating from the duty of using ordinary care and skill, and taking the proper precautions to sustain the land of the coterminous proprietor: *Conboy v. Dickinson*, 92 Cal. 600. Provided the notice be given, the rights of the parties are the same as they are at common law, and therefore, if the work is so conducted that the land, without the weight of the edifice, would not have fallen, the whole duty of the excavator has been performed: *Aston v. Nolan*, 63 Cal. 269. This statutory provision does not avail to create a right in favor of the excavator against the adjacent owner, and if the former, after notifying the latter of his intention to excavate, expends money in support of the walls of the building endangered, the expenditure is for his own use and benefit, and he cannot recover the outlay from the owner of the building: *First Nat. Bank v. Villegra*, 92 Cal. 96.

#### Remedies for the Violation of the Right of Lateral Support.

**INJUNCTIONS.**—The considerations which lead a court of equity to interfere in aid of the right of lateral support are the same as those which lead it to interfere in the case of other trespasses, and preventive relief will be given if the acts done, or threatened to be done, would be ruinous or irreparable, or would impair the just enjoyment of the property in the future: 2 Story's Equity Jurisprudence, sec. 926; Kerr on Injunctions, 366; *Hunt v. Peake*, 1 John. (Eng.) 705; *Birmingham v. Allen*, L. R. 6 Ch. Div. 284. Thus an injunction will issue to restrain an excavation so close to a boundary line that the neighbor's land will fall into it, though the pecuniary damage threatened is slight: *Trowbridge v. True*, 52 Conn. 190; 52 Am. Rep. 579; and will *a fortiori* be granted where the excavation is unreasonably deep: *Farrand v. Marshall*, 19 Barb. 380. On the ground that the damage from the excavation in a mine would be irreparable if carried up to the line allowed by an act of parliament, it has been held that the operations might be restrained beyond that line and to as great a distance as might be considered reasonably necessary for safety: *Midland R'y v. Checkley*, L. R. 4 Eq. 28. So also, in a proper case the person excavating may be prevented from endangering an adjacent building by digging below a certain level: *Rigby v. Bennett*, L. R. 21 Ch. Div. 559, the facts of which have already been noticed. Since persons entering upon the surface of land in the exercise of the right of eminent domain are not bound by a release from the surface owner exempting the owners of underlying minerals from the obligation of surface support, such mine owners will be entitled to an injunction restraining a corporation from entering upon the overlying surface to construct a pipe line, until payment or security for compensation for the easement of support which is acquired as a matter of law by such entry: *Versailles Gas etc. Co. v. Versailles Fuel Co.*, 131 Pa. St. 522. On the other hand, it was held in *McMaugh v. Burke*, 12 R. I. 499, that an injunction would not be granted unless some serious injury was imminent, the court basing its opinion on the ground that "an owner of the land has a right to excavate it, and to carry the excavations so near to the adjoining owner as he can without loosening it," and that "ordinarily, even if the land of the adjacent proprietor is thrown, the injury is so slight that the remedy at law is entirely adequate." It was at the same time intimated that, if the bill had shown that the land threatened had been built upon, or



had "anything peculiar in its situation or circumstances which required the protection of a court of equity," relief might have been granted. This decision seems to be directly opposed to *Trowbridge v. True*, 52 Conn. 190, 52 Am. Rep. 579, in so far as it makes the imminence of "serious injury" a requisite prerequisite to the issue of the decree. In the cases where a building is not entitled to any special protection against the consequence of an excavation, either by prescription, or by grant from the owner of the adjacent lot upon which it is going on, and the excavator is conducting his operations with reasonable skill and care, no ground for the interference of equity is shown: *Lasala v. Holbrook*, 4 Paige, 169; 25 Am. Dec. 524; *Tunstall v. Christian*, 80 Va. 1; 56 Am. Rep. 581. Nor will the damage caused by excavating streets, unless possibly in extreme cases, call for preventive relief: *Fellows v. New Haven*, 44 Conn. 240; 26 Am. Rep. 447. An indispensable prerequisite to the granting of an injunction is that the rights of the petitioner should be clearly established, and he "must make a much stronger case to call for the interference of a court of equity where the damage is merely threatened, and no damage has actually occurred, because you have no facts to go by but only opinion, and in the other case, you have actual facts to go by. If some damage has occurred, it makes it manifest and certain that further damage will occur by reason of the prosecution of the work": *Birmingham v. Allen*, L. R. 6 Ch. Div. 284, per Jessel M. R. The injunction may be cast in any form which may be necessary for the adequate protection of the plaintiff; hence it was held in *Elliott v. Northeastern R'y Co.*, 10 H. L. Cas. 333, that an injunction restraining an adjoining mine owner from working his mines so as to endanger the bridge abutments of a railway company need not define by metes and bounds the limits within which working is to be prohibited. This, it was said, was altogether impracticable, because it was not possible to determine beforehand to what extent the workings might deprive the railway of the adjacent support, which of right they ought to have.

**ACTION FOR DAMAGES.** — Whether an action will lie, in any particular case, depends upon the absolute or qualified character of the right to support. The general rules cannot be better expressed than in the words of the court in *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771: "For any injury to his soil resulting from the removal of the natural support to which it is entitled, by means of excavation on the adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done, for the mischief thereby occasioned. This does not depend upon negligence or unskillfulness, but upon the violation of a right of property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care or skill, or positive negligence, has contributed to produce it." This statement, however, must, as will be seen from previous portions of this note, be supplemented by the rule, that the right of recovery for damages to buildings also exists where it has been acquired by statute, express agreement, or prescription. The character of the right, when thus acquired, is the same as the right which pertains to the soil itself: *Bonomi v. Backhouse*, El. B. & E. 655.

**Statute of Limitations.** — Since the right of the party whose land is interfered with by the subsidence which follows the excavation is merely a right

to the ordinary enjoyment of the land, no cause of action will accrue, until the damage actually occurs: *Bonomi v. Backhouse*, El. B. & E. 645; S. C. *sub nom.*, *Backhouse v. Bonomi*, 9 H. L. Cas. 503, reversing the judgment of the court of queen's bench, and overruling *Nicklin v. Williams*, 10 Ex. 259, on this point.

*Who May Sue.* — Generally, of course, these actions will be brought by the absolute owner of the land, but it is well settled that a reversioner may also sue: *Bonomi v. Backhouse*, El. B. & E. 622; *Bibby v. Carter*, 4 Hurl. & N. 153; *Jeffries v. Williams*, 5 Ex. 792; and in *Austin v. Hudson R. R. Co.*, 25 N. Y. 334, it was held that a lessee might recover damages for injuries to a building though such injuries were inflicted while a sublessee was occupying it.

*Who is Liable for Damages.* — The general rule is that an action may be maintained against anyone who causes the injury, whether he is the owner of the adjoining land or not. This follows from the fact that, as has been already shown, the right of a landowner to have his soil sustained by that adjacent to it is an absolute right, and that the right to have artificial structures supported is, when it has been acquired, of the same absolute character: See *Gilmore v. Driscoll*, 122 Mass. 199; 23 Am. Rep. 312. The various applications of this rule are illustrated in the cases already cited in this note. The principle that anyone who takes a servient tenement takes it *cum onere* applies to the easement of lateral and subjacent support as to other easements. Thus where a landowner conveys a tract reserving all the underlying coal, with the right of mining, excavating, and conveying away the same, and subsequently grants to another the privileges so excepted, the latter is liable for a subsidence of the surface caused by his excavations: *Carlin v. Chappel*, 101 Pa. St. 348; 47 Am. Rep. 722. In *Winn v. Abeles*, 35 Kan. 85, 57 Am. Rep. 138, a tenant sought to hold his landlord liable for permitting the soil on the adjoining lot to be so removed, pursuant to an agreement with the owner thereof, as to injure the leased building. It was held, however, that, in the absence of evidence of carelessness or unskillfulness in the work, no recovery could be had, the court saying that, "if an emergency arises during the term of the lease, which makes it necessary that something should be done to preserve the building from destruction or material damage, and which did not occur through the fault of the landlord, he would have a right to do what was reasonably necessary to preserve it from destruction or injury." Where the chairman of a street committee orders certain excavations to be made, as he might lawfully do, but the work is carried out by the street commissioner, a distinct and independent officer of the corporation, not appointed or controlled by the committee, such chairman is not liable for resulting injuries: *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49.

*Acts of Independent Contractors.* — The extent of the liability of the landowner for the acts of a contractor by whom the excavation is made, seems to depend upon whether the foundation of the liability is the violation of an absolute right or mere negligence. Thus the owner of a house who is not entitled to have it supported by the adjacent land cannot recover from the owner thereof, where a competent contractor has been employed: *Guyford v. Nichols*, 9 Ex. 702; *Myer v. Hobbs*, 57 Ala. 175; 29 Am. Rep. 719; *Aston v. Nolan*, 63 Cal. 269; *Stevenson v. Wallace*, 27 Gratt. 77; *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49. On the other hand, if the building is entitled to be so supported, the person is bound to see to the doing of that which is necessary to prevent mischief, and cannot relieve himself of his

responsibility by employing some one else to do what is necessary to prevent the act he had ordered to be done from becoming wrongful: *Boven v. Plate*, 1 L. R. Q. B. D. 321; *Stevenson v. Wallace*, 27 Gratt. 77. So, also, if a trespass of this kind is committed in carrying out plans devised by the landowner, he is liable for the injuries which may follow: *Mamer v. Lussem*, 65 Ill. 484. The principal case also establishes the further principle that interference with the contractor's work, which amounts to a control of the methods by which it is to be carried on, will render the employer liable.

*Defenses.* — The fact that the landslide would not have occurred but for the acts of persons other than the plaintiff, in erecting buildings on their own land, is no defense. "When one undertakes to make an excavation on his own land, he must consider how it will be likely, in view of the existing and actual occupation of others, to affect the soil of his neighbor": *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771. Nor is the right of recovery for injury to a building affected by the fact that the injury was caused by an act which mediately damages the building of the defendant himself, nor by the fact that the plaintiff does not interfere with the work, for he has a right to assume that the work will be conducted with reasonable skill: *Brown v. Windsor*, 1 Cramp. & J. 20. If a house is so badly constructed that its fall could not have been arrested by timely precautions on the part of the person excavating, that circumstance will not be a bar to an action against the person excavating, but may be considered in the question of damages: *Stevenson v. Wallace*, 27 Gratt. 77. Nor, in an action for injury to the plaintiff's premises, in consequence of the pulling down of the defendant's house adjoining, is the plaintiff barred from recovering damages for the injuries actually caused by the negligence of the defendant by the fact that he himself has not used those precautions which it was his duty to adopt: *Walters v. Pfeil*, *Moody & M.* 362 (per Lord Tenterden).

*Damages, generally.* — Damages to the soil itself may always be recovered where it would have fallen without the weight of the building: *Thurston v. Hancock*, 12 Mass. 220; 7 Am. Dec. 57; *Gilmore v. Driscoll*, 122 Mass. 199; 23 Am. Rep. 312; *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771. Damages for negligence in failing to give notice cannot be recovered in an action of trespass *quæ re clausum fregit*, but might be in case: *Mamer v. Lussem*, 65 Ill. 484. A railroad company which has constructed its line across a lot in such a manner as to render a retaining wall necessary cannot show, in reduction of damages, that the wall is also necessary for the protection of its own road-bed, and that it has taken measures for its construction, even though such offer of proof is accompanied by a stipulation that the company will build the wall, and in case it was not built, the plaintiff might recover in another action the expense of building it: *Thompson v. Milwaukee etc. R. R. Co.*, 27 Wis. 93.

*Consequential Damages to Buildings.* — It has already been shown that a direct recovery for injuries to artificial structures cannot be had except the right has been acquired by statute, grant, or prescription, or where the person excavating has been guilty of negligence. Sometimes, however, the question has presented itself, whether, supposing that the land would have fallen by its own weight, the damages may include those caused by injuries to the structures which may happen to have been placed thereon. The English rule undoubtedly is, that the jury, in estimating the damages under such circumstances, may take these consequential injuries into account: *Hamer v. Knowles*, 6 Hurl. & N. 459; *Hunt v. Penke*, 1 John. (Eng.) 705; *Stronach v. Knowles*, 6 Hurl. & N. 454; *Brown v. Robins*, 4 Hurl. & N. 186. The



same doctrine has been emphatically indorsed in the recent case of *Stearns v. Richmond*, 88 Va. 992, 29 Am. St. Rep. 758; but, on the whole, the American courts seem to have rejected it: *Thurston v. Hancock*, 12 Mass. 220; 7 Am. Dec. 57; *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771; *Gilmore v. Driscoll*, 122 Mass. 199; 23 Am. Rep. 312; *Panton v. Holland*, 17 Johns. 92; 8 Am. Dec. 369. The language in *Beard v. Murphy*, 37 Vt. 99, 86 Am. Dec. 693, seems, however, rather to indicate a leaning in the direction of the English doctrine, the court merely declining to pass upon the point on the ground that, so far as the bill of exceptions showed, the attention of the trial court had not been called to any such theory of claim, nor any instruction to the jury asked for on such a basis. Since, as was remarked in *Conboy v. Dickinson*, 92 Cal. 600, the only question presented under circumstances showing negligence on the defendant's part was, "Did the defendant take reasonable precautions to sustain the plaintiff's house?" and since it is also undeniable that a person is liable for the natural and probable consequences of his negligence, there is apparently no escape from the conclusion that in these cases a liability for injuries to any artificial structure on the land exists. Nor, perhaps, would it be inconsistent with principle to go a step farther, and hold, as a matter of law, that to dig so near a neighbor's land that it will fall by its own weight is negligence *per se*. Such a principle would certainly, as was suggested in a note to *Stearns v. Richmond*, 29 Am. St. Rep. 753, supply us with a simple and straightforward rule by which to test the extent of the responsibility in these cases. Another ground upon which the English rule may be sustained is, that the act of causing a neighbor's land to subside by its natural weight is wrongful in itself, and therefore renders the excavator liable for all damages, remote as well as immediate: Wood on Nuisances, sec. 201. There certainly appears to be no valid reason why the responsibility of a person who excavates his land so near to its boundary line that the operation of unvarying and well-understood physical laws will cause the neighbor's soil to slip, and the responsibility of a person who carries his excavation the least distance beyond the boundary line, should be measured by different standards. In the latter case the liability for damages to the building certainly exists: *Mamer v. Lussem*, 65 Ill. 484. Why should it not be admitted to exist in the former case also? In England there is a salutary qualification of the general rule, which prevents recovery where there would have been no appreciable subsidence but for the existence of the wall which is injured: *Smith v. Thackerah*, L. R. 1 Com. P. 564; and this indicates quite satisfactorily the place where the line should be drawn so as to prevent the rule from clashing with the more comprehensive principles which regulate the rights and liabilities of adjoining owners in regard to artificial structures. But whatever doctrine may ultimately prevail in the courts of this country, it is at least agreed that the burden of proving that the subsidence of the soil was caused by the weight of the buildings, rests upon the defendant: *Bushy v. Holthaus*, 46 Mo. 161; *Wilms v. Jess*, 94 Ill. 464; 34 Am. Rep. 242.

The Measure of Damages is the diminution in the value of the lot by reason of the defendant's acts, and not what it will cost to restore the lot to its former condition: *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49; *Moellering v. Evans*, 121 Ind. 195. So also where an ancient house has been injured, only its value is recoverable, and not the expense of erecting a new one: *Luken v. Goddall*, Peake Ad. Cas. 15; *Hide v. Thornborough*, 2 Car. & K. 250. And where the business of the owner of the house which is injured by a negligent excavation is thereby broken up, he can recover damages for the loss of profits arising from his business, but not merely conjectural profits depend-



ing on future contingencies: *Shafer v. Wilson*, 44 Md. 268. In *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312, it was held that the plaintiff could not recover the difference in market value, "because it did not appear that that difference was wholly due to the injury to her natural right"; and that "it might depend upon the present shape of the lot, upon the improvements thereon, or upon other artificial circumstances which have nothing to do with the natural condition of the soil," and the amount of the recovery was therefore limited to the damages occasioned by the loss of and injury to the soil alone. It is not, however, apparent why the "present shape" of the lot should be left out of account. A deep excavation on a city lot may very easily cause a subsidence which would put the surface of the adjoining lots into such a shape that it is virtually impossible to build upon them, or use them for any purpose, without either restoring the fallen soil to its former position, or grading them down to a practicable slope. On the whole, the rule of the New Jersey and Indiana courts seems to be the more equitable. It is also more consistent with the fact that the letting down of the soil is a trespass, and should therefore raise a liability for all the injuries which the landowner, in his character as owner of the soil itself, has suffered therefrom. In *White v. Dresser*, 135 Mass. 150, 46 Am. Rep. 454, it was held that although the defendant had been guilty of negligence in so excavating his land as to bring down a portion of the soil of an inclosure designed for a burial place, and also a portion of the wall surrounding it, the measure of damages would not include the injury to plaintiff's feelings, the defendant being ignorant of the use to which it was intended to put the land. "Neither the plaintiff's ownership of his land," said the court, "nor the use which he had made or which he intended to make of it was sufficient to identify or connect him with it, so that the injury to it would of itself be a personal injury to him."

## FLINT v. HUTCHINSON SMOKE BURNER COMPANY.

[110 MISSOURI, 492.]

**SLANDER—INJUNCTION.** — A court of equity has no power to restrain a slander or libel, and it can make no difference whether the words are uttered concerning a person or his title to property.

**SLANDER OF TITLE—POWER OF EQUITY TO RESTRAIN.** — The loss of business which results from the slander of a man's title to his property is not such a special feature in the wrong as will give a court of equity the right to interfere by injunction to restrain the publication of the slander.

**SLANDER OF TITLE—REMEDY FOR.** — Whether the words complained of are uttered in regard to the plaintiff's person or in regard to his property, it is for the jury to determine if they are slanderous or not. After a verdict in his favor, he can have an injunction so restrain the further publication of what the jury has found to be an actionable libel or slander.

**SLANDER OF TITLE OF LETTERS PATENT** renders the person uttering the slander liable for damages, and therefore a complaint which alleges that the defendant has falsely and maliciously notified persons to whom the plaintiffs were about to sell their device that it infringed the defendant's patent, states a cause of action.

*Paul Bakewell and R. A. Bakewell, for the appellants.*

*Seddon and Blair, for the respondents.*

**BLACK, J.** This case is now before us on the plaintiff's appeal from a judgment sustaining a demurrer to the petition. The petition discloses the following facts: —

The plaintiffs, Samuel E. Flint and William F. Mills, are the owners of letters patent issued by the United States in 1888, for a smoke-preventing device. The defendant corporation is the owner of three letters patent issued in 1877 and 1878 for a device for aiding combustion in steam boiler and other furnaces, and an air-feeding attachment for locomotives, all issued to William S. Hutchinson. It is alleged that the inventions described in the Hutchinson patents are restricted and most narrow in their scope.

Plaintiffs state further that that they were negotiating with the Mermod and Jaccard Jewelry Company of St. Louis for the erection of a smoke-preventing device to be constructed in accordance with their patent; that the defendant willfully and maliciously, and with the intent to injure the plaintiffs in the manufacture and sale of their smoke-preventer, served upon the jewelry company a written notice thereby notifying that company that the smoke-consuming device attached to its furnace by Flint, one of the plaintiffs, was an infringement upon the Hutchinson patents, and that the jewelry company would be held responsible for royalty, costs, and damages; that defendant served the notice, and made the statements therein set forth, knowing that they were false, with the malicious intent and purpose of injuring the plaintiffs in their business of manufacturing and selling their device; that the jewelry company, fearing suit in consequence of the notice, refused to allow plaintiffs to put up their device until they gave the jewelry company an indemnifying bond, which they were obliged to do.

It is then averred that defendant gave other like notices to plaintiffs' customers, and to other persons about to use their device; that these persons fearing lawsuits have refused to deal with the plaintiffs; that before the issuing of these notices, the plaintiffs were doing a large and lucrative business in smoke consumers, and that the loss in their trade in consequence of the notices is very great, but difficult to estimate.

The plaintiffs allege further that they are pecuniarily responsible; that their device is no infringement whatever upon

the Hutchinson patents; that they notified the defendant that they would defend any suit or suits brought by defendant for infringement; that they believe defendant does not intend to sue them or their customers, but intends maliciously to continue to serve such false notices, thereby intending to injure their business. They pray for an injunction restraining defendant from making, stating, or publishing, by notice, circular, or otherwise, that their device infringes any of the three Hutchinson patents, and for damages in the sum of ten thousand dollars.

There is no doubt but a court of equity has inherent power to restrain the wrongful use of a trade-mark, or the unauthorized use of a man's name, or the use of his letters against his will; but it is evident that this case does not fall within either of these classes. Here the complaint is that defendant falsely and maliciously notified persons to whom the plaintiffs were about to sell their device that it infringed the defendant's patents. Though these notices do not defame the reputation of plaintiffs as individuals or men of business, they do deny the right of plaintiffs to make and sell the particular smoke-preventing device. "Where the plaintiff possesses an estate, or interest in any real or personal property, an action lies against anyone who maliciously comes forward and falsely denies or impugns the plaintiff's title thereto, if thereby damage follows to the plaintiff": Odgers on Libel and Slander, 2d ed., p. 139. To the same effect is Townshend on Slander and Libel, sec. 206. Such an action is denominated slander of title, and this, too, whether the slander is published through the medium of words spoken, written, or printed. It was held by the court of appeals, and properly held, that an action at law would lie for a slander of title of letters patent: *Meyrose v. Adams*, 12 Mo. App. 330. There is no doubt but the petition in this case states a cause of action at law, but the important question is whether a court of equity has power to enjoin the slander before a trial at law. The circuit court held that it had no such power, and hence dismissed the bill, and it is this ruling which is now before us for review.

Mr. Odgers, in the first edition of his book, laid it down in clear and emphatic terms that a court of equity possessed no such power. He said: "No injunction can be obtained to prohibit the publication or republication of any libel, or to restrain its sale. The matter must go before a jury, who are to decide whether the words complained of are libelous or not.

The crown has no authority to restrain the press, and the courts, whether of law or equity, cannot, till after verdict, issue any injunction in respect of any libel, save such as are contempts of court.

Vice-Chancellor Malins asserted a contrary doctrine in *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551, and in *Dixon v. Holden*, L. R. 7 Eq. 488. In the latter case he says: "In the decision I arrive at, I beg to be understood as laying down that this court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation."

In the subsequent case of *Assurance Co. v. Knott*, L. R. 10 Ch. 142, the plaintiff was a life assurance company having a large income. The defendant published a pamphlet in which he commented on the business of several companies. The pamphlet contained statements to the effect that the affairs of the plaintiff were managed with reckless extravagance, and that it was insolvent. The bill alleged that the statements were false, that they would be injurious to the plaintiff, and diminish its profits. Vice-Chancellor Hall refused an injunction, and the plaintiff appealed. Lord Cairns considered the bill as based on a libel only, and then proceeded to say if "these comments do amount to a libel, then, as I have always understood, it is clearly settled that the court of chancery has no jurisdiction to restrain the publication merely because it is a libel." He refers to the opinions of Vice-Chancellor Malins before mentioned, and of them says: "I am unable to accede to these general propositions. They appear to me to be at variance with the settled practice and principles of this court, and I cannot accept them as an authority for the present application."

The chancery division, in subsequent cases, recognized the binding force of *Assurance Co. v. Knott*, L. R. 10 Ch. 142, but that division seems to have adhered to the former opinions of Vice-Chancellor Malins, placing, at first, stress upon certain provisions of the judicature act. It seems to be now conceded that that act in no way enlarged the principles on which a court of equity would act in granting injunctions. Mr. Odgers makes a full review of the many English cases, and says it must be taken as the present settled practice in the chan-



**cery division to restrain libels and slanders on an interlocutory application, but he gives it as his opinion that the practice is an innovation, and violative of the liberty of the press and free speech, and that the rulings will not stand the test in the House of Lords: Odgers on Libel and Slander, 2d ed., 351, 364.**

It must, we think, be conceded that the law on this subject in that country is, at this time, in a most unsatisfactory state; and it is quite clear that those prior decisions there, which we are in the habit of looking to as the foundation of our law, deny the right of a court of equity to enjoin a libel or slander. There are exceptions in star chamber times, but such exceptions serve to make firm the general rule that a court of equity possessed no such power. The great weight of American authority is to the same effect.

The plaintiff, in *Brandreth v. Lance*, 8 Paige, 24, 34 Am. Dec. 368, sought to restrain the publication of a pamphlet which purported to be a literary work, but was an intended libel on the plaintiff. As the publication could not be regarded an invasion of the literary or medical property rights of the plaintiff, an injunction was denied, though the publication was a gross libel upon the plaintiff personally. A court of equity, it was held, had no jurisdiction to restrain a libel. The remedy was an action at law.

In *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69, 19 Am. Rep. 310, Gray, C. J., speaking for the court, said: "The jurisdiction of a court of chancery does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract." The court, in that case, regarded the opinions of Vice-Chancellor Malins, before noted, as inconsistent with well-settled principles of law. *Whitehead v. Kitson*, 119 Mass. 484, was quite like the present case. There plaintiffs and defendants held letters patent for inventions. After the plaintiffs had introduced their invention and spent much time and money in doing so, the defendant falsely represented to persons likely to deal with the plaintiffs, that their patent interfered with his patent, and that persons using the patent of plaintiffs would be infringers, and become liable as such. The court held that the case made by the bill was not within the jurisdiction of a court of equity: *Clark v. Dean*, 143 Mass. 292, asserts the same principle. These Massachusetts cases were cited with ap-

proval in *Consumer's Gas etc. Co. v. Kansas City etc. Co.*, 100 Mo. 501; 18 Am. St. Rep. 563. To the same effect are the following cases: *Singer Mfg. Co. v. Domestic Mfg. Co.*, 49 Ga. 70; 15 Am. Rep. 674; *Kidd v. Horry*, 28 Fed. Rep. 773; *Baltimore Car-wheel Co. v. Bemis*, 29 Fed. Rep. 95; *Life Ass'n of America v. Boogher*, 3 Mo. App. 173.

We live under a written constitution which declares that the right of trial by jury shall remain inviolate; and the question of libel or no libel, slander or no slander, is one for a jury to determine. Such was certainly the settled law when the various constitutions of this state were adopted, and it is all-important that the right thus guarded should not be disturbed. It goes hand in hand with the liberty of the press and free speech. For unbridled use of the tongue or pen, the law furnishes a remedy. In view of these considerations, a court of equity has no power to restrain a slander or libel; and it can make no difference whether the words are spoken of a person, or his title to property.

In either case it is for a jury to first determine the question of slander or libel in an action at law. This, we conclude, is the result of the better cases in this country and in England.

But it is argued in behalf of the appellant that this is a case of libel, plus something else. If that something else is sufficient to give a court of equity jurisdiction, then the jurisdiction is not defeated because there is libel or slander added. But what is that something else in this case? It is said to be that unfair competition in business, which the courts are prompt to prevent in trade-mark cases — that unfair competition which results in loss of business, owing to the dread men have of lawsuits. The answer to all this is that slander of a person in his business or profession, or of title to his property is often, if not most generally, accompanied with loss of business. Indeed, it is generally laid down that to sustain an action for slander of title, special damage must be shown to have arisen from the defendant's words; but such incidents arising from the wrong do not give a court of equity the right to interfere by injunction. All this is clearly stated in *Assurance Ass'n v. Knott*, L. R. 10 Ch. 142.

We see nothing in this case save slander of title, and the remedy is at law. After verdict in favor of the plaintiffs, they can have an injunction to restrain any further publication of that which the jury has found to be an actionable

libel or slander: Odgers on Libel and Slander, 2d ed., p. 340. As slander of title is all we can see in this case, the judgment will be and it is affirmed. All concur.

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**SLANDER AND LIBEL — INJUNCTION TO RESTRAIN.** — An injunction will not issue to restrain the defendant from libeling the complainant, when the libels complained of are nothing more than false representations as to the character and quality of his property and as to his title thereto: *Covell v. Chadwick*, 153 Mass. 263; 25 Am. St. Rep. 625, and note.

**SLANDER OF TITLE. — LETTERS PATENT:** See *Hovey v. Rubber Tip Pencil Co.*, 57 N. Y. 119; 15 Am. Rep. 470. See also *Paull v. Halferty*, 63 Pa. St. 46, 3 Am. Rep. 518, which was an action for damages for defamation of title. Plaintiff was prevented from making a sale of an iron mine by defendant's misrepresentations to the proposed buyer, to the effect that an expert was of the opinion that the mine was but a "pocket" and would soon run out. Damages were allowed.

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## HEIZER v. KINGSLAND AND DOUGLASS MFG. CO.

[110 MISSOURI, 605.]

**NO CAUSE OF ACTION IN TORT ARISES FROM THE BREACH OF A DUTY CREATED BY CONTRACT**, unless there is some privity of contract between the defendant and the person injured.

**NEGLECT — LIABILITY OF THE MANUFACTURER OF A DEFECTIVE ARTICLE TO THIRD PERSONS.** — One who makes and sells a piece of machinery is not liable to persons other than the vendee for injuries caused by its breakage, unless such machinery is of an inherently dangerous character, and he has failed to make known its true nature, or unless he sold it knowing it to be defective without informing the vendee of the defect. The fact that the defendant must be charged with the knowledge that the machinery would be operated by such other persons is not a sufficient reason for holding the vendor liable to them for the consequences of mere negligence on his part in using poor materials or putting them together unskillfully.

*Hitchcock, Madill, and Finkelnburg*, for the appellant.

*H. S. Priest and George Robertson*, for the respondent.

**BLACK, J.** The plaintiff brought this suit against the defendant, a corporation engaged in manufacturing and selling steam threshing machines, to recover damages for the death of her husband, who received injuries from which he died while assisting Ira Ellis in operating a machine sold by defendant to Ellis.

Mr. Ellis applied to a Mr. McSwain, who was an agent for the Birdsell thresher, for a machine of that pattern. They

went to St. Louis, but being unable to get a machine of that make, they called at the defendant's shops. Ellis then gave the defendant a written order for a machine, by the terms of which defendant warranted it to be of good material and workmanship, and agreed to supply any parts which might fail during a specified time free of charge. Though McSwain was not an agent for the defendant, still defendant agreed to pay him twenty-five dollars for furnishing a purchaser, and he agreed with Ellis to start the machine. It was shipped to Ellis in due time, and he and his men used it for threshing oats on Saturday and Monday, McSwain assisting them on Saturday. On Tuesday morning the cylinder flew into pieces, one of which struck Heizer above the eye, inflicting the injuries from which he died. Heizer was assisting Ellis in operating the machine. So far there is no dispute as to the facts.

The petition states, among other things, that defendant knew, when it constructed the machine, it would be used and operated by a number of persons in the employ of the persons to whom it should be sold; that defendant, in selling the machine to Ellis, warranted the same to be free from defects and of first-class material; that the cylinder was made of poor material, was defective in construction, and was too weak to stand the ordinary strain; all of which defects were known to the defendant's agents at the time of the sale, and that the machine gave way and flew into pieces by reason of such defects, etc.

The evidence on the issue as to whether defendant made or should be deemed the maker of the machine is in substance this: The Kingsland and Ferguson Manufacturing Company, a corporation, made this machine in 1886, and went into liquidation in 1887, at which time the defendant was organized. The defendant then purchased this machine and the material of the old company then on hand, and continued to manufacture the same machines, and in August, 1888, sold this one to Ellis. Though this machine was made by the old company, still the contract of sale does not state by which company it was made, and there is evidence that the following words were printed on it: "Kingsland and Ferguson Thresher, made by Kingsland and Douglass Manufacturing Company."

From the further evidence it appears that the cylinder, located in the front part of the thresher, was composed of a shaft



which passed through "two outside and two inside heads." The outside heads were of solid cast iron. There were eight wrought iron crossbars extending from one to the other outside head, with four wrought iron bands around the bars. The teeth were set in the cylinder so as to pass between rows of teeth set in a concave which rested in grooves and could be removed when desired. The concave had been removed just before the accident, and after it had been replaced and some grain threshed, Heizer took his place at the footboard, and had commenced or was about to commence feeding, when the cylinder gave way while revolving at full speed.

The evidence of several witnesses who were working at the machine is to the effect that nothing but grain and straw got into it, while one witness for the defendant gives it as his opinion that some foreign substance must have passed into the cylinder. Other evidence is to the effect that wrenches, bolts, and the like, sometimes get into the straw, and thence into the machine; but that the ordinary effect is simply to tear out some of the teeth. These witnesses say the bands and heads of the cylinder were broken into many pieces, and that the broken pieces of the heads indicated old cracks.

The plaintiff produced two expert witnesses whose evidence is to the following effect: That the bands were irregular in thickness, varying from three-eighths to three-sixteenths of an inch; that they had been cut too short and had to be drawn out; that the iron in them was of a poor quality for such use; that in one instance, at least, the weld united on one side only. These witnesses say the cast iron in the heads was of a low grade and contained earthy matter; that the broken pieces disclosed old cracks or places where the iron did not unite when molded; that the heads were thus weakened from forty to sixty per cent; that an inspection of the heads before they broke would have disclosed the poor quality of the iron, but not the cracks or places where the iron did not unite; and that, in their opinion, the heads first gave way and the other breakage followed as a consequence.

The evidence for the defendant shows that this was one of one hundred or one hundred and twenty-five machines made in 1886; that they were all made out of like material; that with this exception they had all stood the test of practical use; that this machine was used daily during fair week at St. Louis in 1886, and again in 1887; that it had been twice tested, once when made, and again just before it was shipped to Ellis;

that the tests consisted in putting all the parts of the thrasher in motion for three quarters of an hour, with the cylinder revolving at the rate of twelve hundred and forty revolutions per minute. Mechanics, who made the cylinder, testified that the bands were purchased in large quantities, rolled and ready for use; that they were of a good quality of iron, and that none of them broke at the welds. Their evidence is to the further effect that cylinder heads for a number of machines were made at the same time; that they were cleaned when molded, and those that showed any defects were cast aside; that they were again examined when bored. These and other witnesses say the iron in the cylinder heads in question was of a good quality.

On this state of the case the trial court refused to nonsuit the plaintiff, and of this ruling error is assigned. In considering this question we must treat the defendant as both manufacturer and vendor of the machine, since there is evidence tending to show that it sold the same as one of its own manufacture. The first question is, whether the defendant is liable to the plaintiff for simple negligence. If there is any such liability it is because of a breach of duty owing by the defendant to the plaintiff's husband. If the defendant owed the deceased any duty whatever, that duty was created either: 1. By the contract by which defendant sold the machine to Ellis; or 2. Was a duty imposed by law upon defendant in addition to or independent of any mere contract duty.

There is no doubt but a cause of action in tort often arises from the breach of a duty created by contract, but in such cases there must be some privity of contract between the defendant and the person injured. There being no privity of contract the suit cannot be maintained: *Roddy v. Missouri Pac. R'y Co.*, 104 Mo. 234; 24 Am. St. Rep. 333; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Loop v. Litchfield*, 42 N. Y. 351; 1 Am. Rep. 543; *Losee v. Clute*, 51 N. Y. 494; 10 Am. Rep. 638; *Necker v. Harvey*, 49 Mich. 517; *Savings Bank v. Ward*, 100 U. S. 195; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Curtain v. Somerset*, 140 Pa. St. 70; 23 Am. St. Rep. 220; *Gordon v. Livingston*, 12 Mo. App. 267; *Kahl v. Love*, 37 N. J. L. 8; Wharton on Negligence, 2d ed., sec. 438. If this rule of law applies to the case in hand, then it is clear the plaintiff cannot recover for negligence in making and selling the machine; for Heizer was in no way a party to the contract by which defendant sold the machine to Ellis. There is no

privity of contract between the defendant and the deceased.

But in many cases the law imposes duties additional to those specified in the contract, and sometimes independent of it. Thus the relation of common carrier and passenger being created, the law casts upon the carrier the duty of using care, and in some instances the highest care known to the law, and still more to the point are those cases where the law casts a duty to use due care to third persons upon the manufacturer or vendor of dangerous goods, as in the case of poisonous drugs or explosive oils: *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455; *Norton v. Sewall*, 106 Mass. 143; 8 Am. Rep. 298; *Wellington v. Downer etc. Oil Co.*, 104 Mass. 64; *Hourigan v. Nowell*, 110 Mass. 470; *Callahan v. Warne*, 40 Mo. 131. Smith says: "The true question always is, has the defendant committed a breach of duty, apart from the contract? If he has only committed a breach of contract, he is liable to those only with whom he has contracted; but if he has committed a breach of duty he is not protected by setting up a contract in respect of the same matter with another person": Whitaker's Smith on Negligence, 10.

The difficulty in the practical administration of the law is to fix upon the dividing line between those cases where the duty begins and ends with the contract, and where the law imposes a duty to third persons notwithstanding the contract. A recital of the salient facts in some of the cases before noted will the better enable us to say to which class this case belongs.

In the leading case of *Winterbottom v. Wright*, 10 Mees. & W. 109, the defendant had contracted with the postmaster-general to provide a mail coach for carrying the mail bags, and to keep the coach in repair and fit for use. Other persons had a contract with the postmaster-general to supply horses and coachmen for conveying the coach. The coach broke down and injured the driver by reason of the negligence of defendant in failing to keep it in proper repair and fit for use. It was held the plaintiff could not recover. Says Lord Abinger: "There is no privity of contract between these parties; and, if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."

Speaking of cases not within the rule he says: "Those, however, are cases where the real ground of the liability is the public duty, or the commission of the public nuisance." For like reasons a declaration was held bad which alleged that defendant negligently hung a chandelier in a public house, knowing it would be likely to fall upon plaintiff and others unless properly hung, and that it fell upon and injured the plaintiff: *Collis v. Selden*, L. R. 3 Com. P. 495. The principle is reasserted in *Heaven v. Pender*, L. R. 11 Q. B. D. 503.

In *Necker v. Harvey*, 49 Mich. 517, the defendant manufactured and put up in the factory of a soap company an elevator, under a contract with the soap company that it would lift at least two thousand pounds. The elevator fell by reason of defective shaft in three days after it had been put in place, and injured a workman in the employ of the soap company. Judge Cooley, speaking for the court, said: "The statement of facts so far makes out no cause of action in favor of this plaintiff. It discloses a duty on the part of the defendant to construct an elevator which should lift two thousand pounds; but the duty was to the soap company, and not to anybody else. Nothing is better settled than that an action will not lie in favor of any third party upon a breach of this duty."

In *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638, it was held that the manufacturer and vendor of a steam boiler was liable only to the vendee for defective materials and want of care in its construction; and that the vendor was not liable to a third person for damages caused by an explosion on account of defective materials and construction.

The facts in *Curtain v. Somerset*, 140 Pa. St. 70, 23 Am. St. Rep. 220, were these: A contractor erected a hotel building, and turned the same over to the hotel company. Thereafter an entertainment was given at the hotel by the proprietor. A crowd of persons collected on a porch, when a girder gave way, and one of the persons attending the entertainment was injured, and he brought suit against the contractor. The contractor, it was held, was not liable to the plaintiff, because he owed the plaintiff no duty whatever. Says the court: "The consequence of holding the opposite doctrine would be far reaching. If a contractor who erects a house, who builds a bridge, or performs any other work, the manufacturer who constructs a boiler, piece of machinery, or a steamship, owes a duty to the whole world, that his work or his machine or his



steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned."

Wharton thinks the better reason for the rule is, that there is no causal connection between the negligence and the hurt; but be this as it may, the rule itself is well established in England and in the United States, and we think the case in hand comes within it. It is true the defendant must have known when it made and sold the machine to Ellis, that other persons would be engaged in operating it; but this is no reason why defendant should be held liable to such other persons for injuries arising from the negligent use of poor material or for defective workmanship. Such knowledge must have existed in the cases which have been cited as asserting the rule, and would have been as good an argument against the rule in those cases as in the case in hand.

We now turn to those cases where it is held that the vendor is liable for negligence to third persons, and *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, is the leading one in the United States. There the defendant, by his agent, put up a jar of belladonna, a deadly poison, and negligently labeled it dandelion, a harmless medicine. He sold the jar thus labeled to one druggist who sold it to another. The plaintiff's wife being ill, her physician prescribed dandelion, and the prescription was filled by the last-named druggist from the jar, and administered to her, by which she was injured. The defendant was held liable for damages. The case is made to stand chiefly on the ground that sending into the market the poison mislabeled put human life in imminent danger.

And in *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298, an apothecary, by his agent, sold a deadly poison as and for a harmless medicine to one person who purchased it for and administered it to a third person. "This finding," says the court, "includes a violation of duty on the part of the defendant, and an injury resulting therefrom to the intestate for which the defendant was responsible, without regard to the question of privity of contract between them." In these cases the articles sold were necessarily and inherently dangerous to human life, and they did not by their color or otherwise disclose their dangerous character, and, hence, the duty on the

part of the vendor to make known to the vendee their true nature. A threshing machine is not in and of itself dangerous, and there is no necessity of placing a label upon it. It speaks for itself, and discloses its uses and purposes as plainly as does a handsaw or the many other implements and machines in daily use. We think the case in hand is entirely different from those just mentioned.

The case of *Heaven v. Pender*, L. R. 11 Q. B. D. 503, before noted, and to which we are cited, was, by a majority of the judges, made to stand on the ground that the defendant, the owner of the dry dock, invited the plaintiff upon his premises. Brett, M. R., formulated a general rule to which the other judges did not agree, which he says includes the case of goods and machinery "supplied to be used immediately by a particular person or persons or one of a class of persons"; but he says, "it would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used." He approves the case of *Collis v. Selden*, L. R. 3 Com. P. 495, because there was nothing in the declaration to show that the plaintiff was more likely to be in the public house than any other member of the public; and he doubts the case of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, a case which has never been questioned in this country to the knowledge of the writer. On the whole it seems to us *Heaven v. Pender*, L. R. 11 Q. B. D. 503, is not an authority in favor of the plaintiff in the present action.

The case of *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311, is more in point. There a carpenter negligently constructed a scaffold for the use of a painter who had a contract to paint the dome of a courthouse, and a workman employed by the painter was killed by reason of the negligence of the carpenter in constructing the scaffold, and the carpenter was held liable by a divided court. The scaffold was ninety feet in height, and was built for the specific purpose and for immediate use, and the carpenter must have known that any want of ordinary care would result in the loss of life.

Thus far we have treated this action as founded on negligence. In such actions fraud or an intentional wrong is not an element. The distinction between negligence and intentional wrong is important in tracing down liability for the consequences arising therefrom. This distinction is pointed out with clearness in an article in the 16 Am. & Eng. Ency.

of Law, 392, 434. Had the defendant sold this machine to Ellis, knowing that the cylinder was defective and for that reason dangerous, without informing him of the defect, then the defendant would be liable even to third persons not themselves in fault: Shearman and Redfield on Negligence, 4th ed., sec. 117. As said in *Wellington v. Downer etc. Oil Co.*, 104 Mass. 64: "It is well settled that a man who delivers an article which he knows to be dangerous or noxious to another person without notice of its nature and qualities is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom to that person or any other who is not himself in fault."

But it seems out of place to pursue this inquiry further on this occasion; for there is no evidence showing or from which it can be fairly inferred that defendant knew the cylinder was in a dangerous condition. The plaintiff's evidence tends to show that the iron in the heads and bands of the cylinder was of a poor quality; that there was want of care in testing the pieces of iron before joined into the cylinder, and perhaps want of care in testing the machine when completed; but all this does not show that defendant knew this cylinder was defective or unfit for use. The case discloses no motive whatever on the part of defendant for sending out a defective machine. The plaintiff's case tends to show no more than negligence, and an action based on that ground must be confined to the immediate parties to the contract by which the machine was sold. To hold otherwise is to throw upon the manufacturers of machinery, not necessarily dangerous, a liability which, in our opinion, the law will not justify.

The judgment in this case is therefore simply reversed. All concur.

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CONTRACTS — ACTIONS BY THIRD PERSONS FOR BREACH OF — PRIVACY. — There is no privity of contract between a water company and the residents of a city under a contract by which the company is to furnish water to extinguish fires; therefore they cannot recover of the company for damages resulting from a breach of the contract by the company: *Mott v. Cherryvale, Water etc. Co.*, 48 Kan. 12; 30 Am. St. Rep. 267. A third person cannot maintain an action for injuries resulting from a breach of contract between two other contracting parties: *Roddy v. Missouri Pac. R'y Co.*, 104 Mo. 234; 24 Am. St. Rep. 333, and note; note to *Bickford v. Richards*, 26 Am. St. Rep. 225; note to *Schubert v. J. R. Clark Co.*, 32 Am. St. Rep. 565, discussing the privity of contract required to authorize a recovery for negligence. A party for whose benefit, however, a contract is evidently made may sue thereon in his own name, though the engagement is not directly to or with him: *Paducah Lumber Co. v. Paducah Water etc. Co.*, 89 Ky. 340; 25 Am. St. Rep. 536.

**MANUFACTURER OF DEFECTIVE ARTICLE — LIABILITY TO THIRD PERSONS.** One who manufactures and puts a faulty article in his stock for sale, is deemed to have anticipated that in the ordinary course of events it would come into the hands of a purchaser for use either directly or through an intermediate dealer and is therefore liable for such damages as result from its faulty construction: *Schubert v. J. R. Clark Co.*, 49 Minn. 331; 32 Am. St. Rep. 559, and note; *Blood Balm Co. v. Cooper*, 83 Ga. 457; 20 Am. St. Rep. 324, and note.

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## BOWERS v. SMITH.

[111 MISSOURI, 45.]

**ELECTIONS — STATUTE ADOPTED FROM ANOTHER STATE — CONSTRUCTION OF.** — When an election statute is adopted from another state the decisions in that state construing it are not also adopted, if inconsistent with the fundamental law of the state adopting it.

**ELECTIONS — AUSTRALIAN BALLOT LAW — ADDING NAME TO TICKET.** — Under the Australian ballot system as adopted in Missouri, electors may vote for candidates whose names do not appear on the official ballots by adding such names in writing on the blanks provided on the ballot for that purpose.

**ELECTIONS — BALLOTS — EFFECT OF IRREGULARITY.** — Ballots printed by county clerks as directed by law and cast by voters in conformity therewith, but incorrectly prepared by the secretary of state or county clerk by erroneously admitting a candidate's name to a place on the ballot, are not void but should be counted.

**ELECTION LAW — CONSTRUCTION — ERROR OF OFFICIAL.** — Such a construction of an election law as will permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted where the language of the statute is fairly susceptible of any other meaning.

**ELECTION LAWS — HOW CONSTRUED.** — All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor.

**ELECTIONS — BALLOTS — ERRONEOUS ADDITION OF NAME** to the official list of nominees, though not corrected before the election as provided by law, is, under the Australian ballot system, harmless in its effect upon the voter's right to use the official ballot without fear of possible disfranchisement.

**ELECTIONS — BALLOTS — WAIVER OF ERRONEOUS ADDITION OF NAME.** — When, under the Australian ballot system, a candidate causes no timely objection to be made before the election, as provided by law, to the presence on the official ballot of any names of nominees not proper to be there, he must be regarded as having waived such objection.

**ELECTIONS — POLLING PLACES.** — When the ballots voted in a certain election district are received at two polling places instead of one, thus necessitating the appointment of an additional set of election judges not authorized by law, such irregularity will not affect the validity of the ballots cast at either or both of such polling places, when it does not appear to have had any bearing upon the result of the election to the prejudice or disadvantage of the defeated candidate.



**ELECTION LAWS — CONSTRUCTION OF MANDATORY PROVISIONS.** — When an election law itself declares a specified irregularity in an election to be fatal, courts will follow that command irrespective of their views of the importance of the requirement, but in the absence of such mandatory provision, an irregularity not so vital as to prevent a free and full expression of the popular will, will be considered as immaterial, and will not vitiate the whole return.

**ELECTION LAWS — CONSTRUCTION — IRREGULARITIES.** — Courts will consider the chief purpose of election laws, so as to obtain a fair election and an honest return, as paramount in importance to minor requirements which prescribe the formal steps to reach that end; and in order not to defeat the main design, are frequently led to ignore such innocent irregularities of election officers as are free from fraud, and have not interfered with a full and fair expression of the voter's will.

**ELECTION CONTEST.** The official ballot over which the contest arose was as follows:—

**“STATE, COUNTY, AND TOWNSHIP TICKET, PETTIS COUNTY,  
MISSOURI.**

DEMOCRATIC.	REPUBLICAN.	UNION LABOR.
* * * *	* * * *	* * * *
* * * *	* * * *	* * * *
* * * *	* * * *	* * * *
For Sheriff.	For Sheriff.	For Sheriff.
J. A. Bowers.	Ellis R. Smith.	G. D. Sappington.
* * * *	* * * *	* * * *
* * * *	* * * *	* * * *
* * * *	* * * *	* * * *

The blanks in the ballot indicated by the stars were filled in the original with the names of the several party nominees from the various state, county, and township offices. The abstract of returns for the whole county showed the vote as follows:—

For Bowers .....	3,289
For Smith .....	3,332
For Sappington .....	65
For No Vote .....	197

Total ..... 6,873

And for the city of Sedalia:—

Sedalia City, A to K,—

Bowers.	Smith.	Sappington.	No Vote.
618	852	19	93

Sedalia City, L to Z,—

Bowers.	Smith.	Sappington.	No Vote.
654	840	13	71

Total ..... 8,160

*Jackson and Montgomery, and Charles E. Yeater, for the appellant.*

*W. S. Shirk, Bothwell, and Jaynes, and Sangree and Lamm, for the respondent.*

BARCLAY, J. This appeal was first heard in division 1, and a conclusion announced November 9, 1891.

After a motion for rehearing was denied, plaintiff moved to transfer the cause to the court *in banc*. The motion was ultimately sustained, upon the entry of a dissent by one of the judges to the decision of the first division.

The case was then fully reargued before the whole court.

It is a statutory contest to determine the respective rights of the parties to the office of sheriff of Pettis County.

The election in question took place November 4, 1890. Mr. Bowers is the contestant. For convenience he will be called the plaintiff, and his opponent, Mr. Smith, who is the contestee, the defendant.

Plaintiff's notice of contest assigned several distinct grounds, in as many paragraphs, in the nature of counts, or causes of action. After it was served, defendant gave plaintiff a counter-notice, which (besides denying the plaintiff's charges) alleged a number of objections to the original count of the ballots, and claimed that corrections, to defendant's advantage, should be made therein in a number of particulars.

The circuit court of Pettis County sustained motions to strike out some parts of plaintiff's notice. Exceptions were saved to that ruling.

The case then came to trial. As will appear, the real issues were finally resolved into questions of law, and upon them the trial court found for the defendant.

Plaintiff then appealed, after the usual motions.

After the formal contest began, plaintiff applied for, and obtained, a recount, by the county clerk of the original ballots cast at all the precincts in the county. The recount was conducted as provided by the statute on that subject: Rev. Stats., 1889, secs. 4721, 4726. It resulted in an exhibit that defendant had a plurality over the plaintiff of thirty three votes in the county, and that no less than three thousand voters had cast their ballots in the city of Sedalia at that election.

Both parties rely on the recent statute concerning elections (Rev. Stats., 1889, secs. 4756, 4791), commonly known as the "Australian Ballot Law," as first enacted in this state. It is

thus conceded to apply to Sedalia as a city of over five thousand population. The points of difference to be determined relate to features of the election in that city, held under that law.

We need not pause to state the particulars of the rulings of the trial court, raising the material questions involved, but shall proceed at once to the merits of the dispute.

Plaintiff's contention is, that the entire returns from Sedalia should be thrown out of the final count, for several reasons.

1. He claims that the official ballots, printed by the county clerk for use at the voting places in that city, contained (among others) the names of the nominees of the Union-Labor party, and that that political party had not polled three per cent of the entire vote at the last previous general election, as required by section 4760, Revised Statutes, 1889.

Conceding, without investigating, the fact on which that claim rests, does it follow that the vote of the precinct should be discarded ?

In interpreting the statute in question, it must be remembered that its adoption here brings it into subordination to the fundamental law of Missouri, and that prior decisions elsewhere, construing enactments on the same general topic, cannot properly be followed if inconsistent with that fundamental law.

By our constitution, general elections are held at certain fixed dates, and the right of suffrage is expressly secured to every citizen possessing the requisite qualifications. The new ballot law cannot properly be construed to abridge the right of voters to name their public servants at such elections, or to limit the range of choice (for constitutional offices) to persons nominated in the modes prescribed by it. Nominations under it entitle the nominees to places upon the official ballots, printed at public expense; but the Missouri voter is still at liberty to write on his ballot other names than those which may be printed there.

The statute recognizes this right by requiring sufficient blank space for such writing, next to the printed names of candidates for each office: Rev. Stats. 1889, sec. 4773.

In this respect our law differs from the English act of 1872, under which no actual poll of voters is held unless more candidates are formally nominated than there are vacancies to be filled.

These observations seem necessary to guard against the supposed effect of adjudications in other states or countries, construing features of such laws differing from those in force in this state.

The living question which this case presents is, what construction shall be given to the Missouri statute on this subject, and to what extent the constitutional rights of voters depend upon the correctness of action of the county clerk in preparing and printing the official ballots?

The act of the clerk which is called in question consisted of admitting names to the ballot, not of excluding any.

There is a substantial difference, in principle and in effect, between admitting and excluding such names.

The practical consequence of erroneously adding a name to the ticket is merely to enlarge the voter's range of choice among candidates on the official list. In Missouri any voter may add such a name for himself in the blank provided on the ballot for that purpose.

How then are errors of this sort to be treated?

Plaintiff insists that they vitiate the whole return; that every such error of judgment is a sufficient ground to disfranchise the voters of the locality where such ballots are used.

The law in question presents a number of points at which errors may be expected of the most faithful and conscientious officers. It will often require nice judgment to determine, among other things, whether party candidates have been regularly nominated; how declinations should be treated; whether certificates of independent nominations have the necessary signatures; whether the signers are "resident electors"; whether nomination certificates are formally sufficient under the law; or whether acknowledgments thereof have been "executed with the formalities prescribed for the execution of an instrument affecting real estate": Rev. Stats., 1889, secs. 4756-4763.

It is declared to be the duty of the county clerk to provide the ballots, and that all others than those printed by him according to the provisions of this law "shall not be cast or counted in any election." The plain meaning and purpose of this expression can be seen from the context in the section in which it occurs and that which next follows: Rev. Stats., 1889, secs. 4772, 4773. The design is to preclude the voter and his party friends from supplying his own ballot, as was the former practice, and to compel him to use only that



furnished by the state through the county clerk. The latter is directed to print no other names on the voting papers than those of the candidates nominated according to the provisions of that law. The title of the original act (Session Acts 1889, p. 105) and its opening lines show that uniformity in the printing and appearance of the ballots is one of the main objects aimed at. The prohibitions above noted are inserted to further that object; but they give no countenance to the notion advanced by the plaintiff that their purpose or effect is to nullify the result of every election at which the county clerk may make some error in publishing or printing the names on the only ballots that can be used.

Legislative language should be clear and unequivocal to justify an inference that such consequences were intended to flow from it: Rutherford on Institutes, 2d Am. ed., p. 413.

The printing of the ballots "according to the provisions of this" law, and the antecedent making up of a ticket to be printed (by acting on the nominations submitted) are two distinct official duties. The county clerk prints all the ballots, but he does not act originally on all the nomination papers.

Some of the latter are submitted to the secretary of state, and he certifies certain nominees to the county clerk: Rev. Stats. 1889, sec. 4767.

Errors in omitting or adding names to the list of candidates by rulings on the nominating documents are distinguished from errors made in the mere printing of ballots by the terms of the law itself. Section 4778 provides a summary remedy to correct any "error or omission in the publication of the names or description of candidates nominated for office, or in the printing of the ballots"; so that the language of section 4772, forbidding other ballots than "those printed by the respective clerks of the county courts according to the provisions of this article" to be cast or counted, obviously carries no such meaning as to nullify ballots printed by county clerks as directed by the law, and cast by voters in conformity thereto, but incorrectly made up beforehand by the secretary of state or the county clerk by erroneously admitting some candidate's name to a place on the ballot.

The suffrage is regarded with jealous solicitude by a free people, and should be so viewed by those intrusted with the mighty power of guarding and vindicating their sovereign rights. Such a construction of a law as would permit the

disfranchisement of large bodies of voters because of an error of a single official should never be adopted where the language in question is fairly susceptible of any other: *Wells v. Stanforth*, 16 Q. B. Div. 245.

Or, as a very able judge once tersely said: "All statutes tending to limit the citizen in his exercise of this right [of suffrage] should be liberally construed in his favor": *Owens v. State*, 64 Tex. 509.

It is proper, and often necessary, to consider the effect and consequences of a proposed interpretation of a law to ascertain what is probably its true intent: *State v. Hope*, 100 Mo. 361. The consequences which would inevitably follow the acceptance of the reading proposed by the plaintiff are so far reaching and disastrous that they constitute a vigorous argument against adopting it.

More than that, section 4778 clearly discloses a legislative design to provide for the correction of just such errors as we are considering, at the instance of any elector (including every one interested) before the election. The process is so summary that the inference is irresistible that the errors it is designed to reach should be rectified by prompt action then, so as not to subject voters to the risk of losing their votes by reason of those errors.

"Sec. 4778. Whenever it shall appear by affidavit that an error or omission has occurred in the publication of the names or description of candidates nominated for office, or in the printing of the ballots, the circuit court of any county, or the judge thereof in vacation, or if the circuit judge is then absent from the county, a judge of the county court may, upon application by any elector, by order, require the clerk of the county court to correct such error, or to show cause why such error should not be corrected."

In connection with this section it should be remembered that "at least seven days before an election" the county clerk is required to cause the list of nominations, "arranged in the order and form in which they will be printed upon the ballot," to be published in the newspapers as provided in section 4768, 4769. Thus every one in interest is apprised of the names of all candidates, as determined by the clerk, at least one week before election day, to the end that steps may be taken, if desired (as indicated by the language quoted), to supply any omissions, or to correct other errors in that list as published. If full effect be given to that section, the injustice

and unfairness which otherwise would result in the practical working of the statute will be avoided.

This "ballot reform law" was intended to improve the methods for giving expression to the popular will in the choice of public officers. It should be construed so as to promote, not destroy, the great objects in view in its passage. It resembles and in the main follows statutes elsewhere on the same subject; but is not identical with its models at all points. A glance at these models, however, will show how foreign to the reason and spirit of such legislation is the idea that the unwary voter is to be subjected, in the name of "reform," to the risk of losing the right of suffrage every time an error in admitting a name to the official ballot is made by an officer passing upon the regularity of nominating papers, when no objection to his ruling is made before the election. Section 4778 was evidently framed with the view to avert such risk. It coincides with part of section 19 of the New York law of 1890. It is not found in the English statute, but there we read that "the returning officer shall decide on the validity of every objection made to a nomination paper, and his decision, if disallowing the objection, shall be final; but if allowing the same shall be subject to reversal on petition questioning the election or return": 35 & 36 Vict., c. 33, sched. 1, sec. 13, p. 214. This provision applied at first to parliamentary elections only; but after the decision in *Northcote v. Pulsford*, L. R. 10 Com. P. 476, it was extended to municipal elections (the kind considered in that case) by the amendment of July 19, 1875: 38 & 39 Vict., c. 40, sec. 1, p. 283.

So that in England and New York to-day the erroneous addition of a name to the official list of nominees, though not corrected before the election, is harmless in its effect upon the voter's right to use the official ballot without fear of possible disfranchisement. This we consider is also the proper meaning to be placed upon the law of Missouri. Any other would metamorphose the supposed "reform" into a gigantic trap where the inoffensive citizen might readily be deprived of his most valuable right as a freeman by political manœuvres in the form of "errors," the force of which he could not foresee until too late to avoid their consequences.

A single case appears to antagonize the conclusion we have reached on this point, namely: *Price v. Lush*, 10 Mont. 61. With all respect due to the court that decided it, we think it embodies a misapplication of the English precedents which

it cites. It entirely omits to mention or consider the effect of section 19 of the Montana statute (Gen. Laws Mont., 1889, p. 140, substantially the same as our section 4778), which should be given some significance to prevent such unjust consequences to voters as have been explained, and which are impossible under the English ballot act, which that case purports to follow and expound.

Some other decisions, however, are supposed to cast light on the present discussion, and will therefore be touched upon. In *Talcott v. Philbrick*, 59 Conn. 472, the supreme court of Connecticut had to deal with a statute so unlike the Missouri law that it does not even provide for printing the list of candidates at public expense; but it requires the secretary of state to furnish at cost (to all persons applying for them) blank slips of paper, of uniform size, color, etc., indorsed (in print) "official ballot," and upon these papers the respective political parties may cause the names of their own nominees to be printed, under provisions declaring that "in addition to the official indorsement the ballots shall contain only the names of the candidates, the office voted for, and the name of the political party issuing the same": Pub. Laws, Conn. 1889, sec. 1, p. 155; and further that "all ballots cast in violation of the foregoing provisions, or which do not conform to the foregoing requirements, shall be void and not counted": Pub. Laws, Conn. 1889, sec. 12.

The case showed that some ballots, in a local election, had been issued by the Republican party, but were headed "Citizens"; yet so loth was the court to disfranchise a few persons, who had voted for an alderman in Hartford, that the ruling, pronouncing the "citizens" ballots illegal, was made by three judges only, the other two dissenting.

The exact value of such a decision in enlightening the case at bar we need not pause to measure. The reader can probably as well determine that for himself.

In *People v. Board of Canvassers*, 129 N. Y. 395, the statute required a certain uniform official indorsement on all ballots, cast at any one polling place, to preclude identification of any particular vote or class of votes, and declared that "no ballot that has not the printed official indorsement shall be counted." The facts were that certain ballots, having an indorsement different from others properly used at the precinct in question, were voted by twelve hundred and fifty-two electors; and



the court rejected the ballots mentioned, but only by the concurrence of four judges, three others dissenting.

We mention these cases neither to approve nor to disapprove them; but to indicate how inapplicable they are to the case in hand, and to show that even with language as positive as that they construe, how reluctant are the courts to adopt an interpretation, the effect of which is to deprive a large number of their fellow-citizens of the electoral franchise.

Having regard to the spirit and purpose of the Missouri statute, and to the general principles governing the treatment of popular elections by the courts in this country, we think it should be held that where a candidate for public office causes no timely objection to be made before the election (as permitted by section 4778), he should be regarded as having waived all objections that may exist to the presence on the official ballot of any names of nominees not properly entitled to be there. Compare *Regina v. Blackburne*, 6 Ont. Pr. 308, and *Allen v. Glynn*, 17 Col. 338, 31 Am. St. Rep. 304.

2. It is next charged that the "Union Labor" list of names of candidates was not legally certified to the county clerk. How it was certified is not stated. That it was not certified at all is not alleged. From what appears it is evident that the pleader is giving merely his views of the certificate, of which neither the language, substance, nor legal import is mentioned, so that the court cannot judge whether it was "legally certified" or not.

In addition, therefore, to the reasons already assigned for declining to review in this proceeding the alleged errors of the county clerk in preparing and printing the ballot, the application of a familiar rule of code pleading makes it unnecessary to discuss as a fact such a legal conclusion as alludes to the certification of the "Union-Labor" ticket.

3. It is next asserted that the votes from Sedalia should be excluded because they were received at two polling places instead of at one.

It appears that the county court had designated Sedalia city as one election district, but had further provided two voting places therein for holding this election, with one set of judges at each, as hereafter more particularly described. This was done by orders to that effect before the election. Both of the voting precincts were at the courthouse in that city.

At one, the voters whose surnames began with the letters

"A" to "K" voted; at the other, those with the letters "L" to "Z." Each poll was reached by way of a window, and the two were only seventy-five feet apart. The windows fronted on one portico of the court building. Through them pass-ways led to the polling booths in the rooms within, where the election judges were stationed and received the ballots.

Assuming that these arrangements involved the irregularity of receiving the vote at two places instead of at one, does it nullify the will of the people so expressed, the election having been regular in other respects?

Undoubtedly some irregularities are of so grave a nature as to invalidate the whole return of the precinct at which they occur; as, for example, the omission of registration: *Zeiler v. Chapman*, 54 Mo. 502. In determining which are of that kind, the courts aim merely to give effect to the intent of the lawmakers in that regard, aided by established rules of interpretation.

If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement: *Ledbetter v. Hall*, 62 Mo. 422. In the absence of such declaration, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial.

It has been sometimes said in this connection that certain provisions of election laws are mandatory, and others directory. These terms may, perhaps, be convenient to distinguish one class of irregularities from the other; but strictly speaking, all provisions of such laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview; but it does not therefore follow that every slight departure therefrom should taint the whole proceedings with a fatal blemish.

Courts justly consider the chief purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end, and, in order not to defeat the main design, are frequently led to ignore such innocent irregularities of election officers as are free of

fraud, and have not interfered with a full and fair expression of the voters' choice.

Thus, in *Davis v. State*, 75 Tex. 420, the law required that each ward in a town should "constitute an election precinct"; yet, in San Marcos, a town incorporated with four wards, the county commissioners established two precincts only (without reference to ward lines), and each included parts of the adjacent country; but the court, after full discussion of the general subject, held that the election in those precincts was not avoided by the irregularity.

In *Stemper v. Higgins*, 38 Minn. 222, a general election was conducted in the village of Medelia by its officers, as though it constituted a district separate from the township in which it was situated, where also a precinct was open; whereas the law declared that "every organized township, and every ward of an incorporated city is an election district"; yet the court held the returns from the village valid, despite the irregularity indicated.

These cases find support in others, illustrating the same principle: *Gass v. State*, 34 Ind. 425; *Dale v. Irwin*, 78 Ill. 180; *Wheelock's Case*, 82 Pa. St. 297; *Preston v. Culbertson*, 58 Cal. 209; *Farrington v. Turner*, 53 Mich. 27; 51 Am. Rep. 88; and *Peard v. State*, 34 Neb. 372, a case under a ballot reform statute.

Such rulings are not peculiar to election proceedings, but result, logically, from the application to them of a time-tested rule of interpretation which requires that the general design and object of a law be kept in view and effectuated, even if it be necessary, in so doing, to restrict somewhat the force of subsidiary provisions that otherwise would conflict with the paramount intent: *Cortis v. Kent Waterworks Co.*, 7 Barn. & C. 330. Elections under the "Australian ballot" statutes, fall within reach of the principle above stated.

In the English law of 1872 it is enacted that "no election shall be declared invalid by reason of a noncompliance with the rules contained in the first schedule to this act, or any mistake in the use of the forms in the second schedule to this act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this act, and that such noncompliance or mistake did not affect the result of the election": Ballot Act, 1872, 35 & 36 Vict. c. 33, sec. 13, p. 200.

The rules and schedules prescribe the forms of nomination papers, and the procedure for conducting the election.

It has been judicially determined in that country that the language just quoted is merely declaratory of the common law of England: *Woodward v. Sarsons*, L. R. 10 Com. P. 751.

It certainly goes no further as a curative power than the accepted general principles of the law of elections in this country, as expounded by the courts.

We consider that they have a just and proper application to the facts now in judgment. It is not asserted on this appeal that the supposed irregularity of having two voting booths instead of one had any bearing upon the result of the election to the prejudice of plaintiff, and we are unable to conjecture how it could, in anywise, have redounded to his disadvantage. We believe it furnishes no sufficient reason for excluding the vote of the two precincts in the circumstances.

4. We conclude that a reasonable and natural construction of the law forbids us to repudiate, for any such reasons as have been presented, the three thousand votes cast in Sedalia in 1890.

If for every error of a county clerk or harmless irregularity in election procedure, citizens, having no control over either, are to lose their right of choosing public officers, the "reform ballot act," instead of being found an improvement of the machinery of popular government, will justly be denounced as a "snare to entrap the unsuspecting voter": *Gumm v. Hubbard*, 97 Mo. 319; 10 Am. St. Rep. 312. Such a result, however, was never contemplated in its enactment, and should not be brought about by a narrow and technical reading of it.

"Where any particular construction which is given to an act leads to gross injustice or absurdity, it may generally be said that there is fault in the construction, and that such an end was never intended or suspected by the framers of the act": *Peckham, J., in People v. Board of Canvassers*, 129 N. Y. 395.

While it is well enough to insist on a proper and strict performance of duty by officers conducting elections, we are not of the number of those who imagine that such performance will be promoted by disfranchising the whole body of electors in any locality where errors, such as are here charged, occur. The legislature has not plainly declared such a purpose, and we think it should never be imported into a statute by construction.



It seems to us, after full reconsideration of the case, that the decision of Judge Field on the circuit, in favor of defendant, was right, and should be affirmed.

BLACK, BRACE, and MACFARLANE, JJ., concur; SHERWOOD, C. J., and GANTT, J., dissent. THOMAS, J., will express his views in a separate opinion.

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MR. JUSTICE GANTT dissented from the conclusion announced by the majority of the court, and in expressing his reasons therefor and the view entertained by himself in regard to the law under consideration, said that "the contestor insists that the vote of the city of Sedalia should be rejected altogether, because the official ballot prepared by the county clerk and used at that precinct contained, in addition to the names of the Democratic and Republican nominees, duly certified to the county clerk, the names of certain parties as candidates of the Union-Labor party, among others, that of George D. Sappington, for sheriff, when, in fact, no such party at the last previous general election had cast three per cent of all the votes of Pettis County, and no nominations of such a party had been certified to, or filed with the county clerk as required by said article 3 of chapter 60.

"This, it will be readily seen, presents a question of great moment. The right of suffrage is justly esteemed the corner stone of our free institutions. Our election laws are framed with the special purpose of preserving this right, and of enabling every citizen, whatever his position in society, to express his choice, untrammelled and unintimidated. It is earnestly contended by counsel that, if the statute is to be construed so that ballots cannot be counted which contain names of candidates prohibited by the statutes, then it is unconstitutional. The argument of counsel for contestee is based upon the wrong that would be done the voter to deprive him of his franchise on account of the illegal act of a public officer, and that the statute is merely directory and not mandatory.

"Now, section 4772 provides, 'except as in this article otherwise provided, it shall be the duty of the clerk of the county court of each county to provide printed ballots for every election for public officers in which the electors or any of the electors within his county participate, and to cause to be printed in the appropriate ballot the name of every candidate whose name has been certified to or filed with him in the manner provided for in this article. Ballots other than those printed by the respective clerks of the county courts, according to the provisions of this article, shall not be cast or counted in any election.'

"Section 4773 provides that 'every ballot printed under the provisions of this article shall contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this article, and no other names.'

"For the purposes of this discussion it must be taken that the motion to strike out the allegations in the notice as to the names of the Union-Labor candidates confesses the truth of that averment, which I hold is a clear and concise statement, and its sufficiency as a pleading was not questioned by opposing counsel in the circuit or this court. It was reserved for this court to make the point; and it stands admitted that the ballot contained names not certified or filed in accordance with said article 3 of chapter 60. The statute provided said ballot should contain 'no other names' than those

certified. Here then is a positive violation of a plain law. What penalty follows in such a case? The statute answers: 'Ballots other than those printed . . . according to the provisions of this article (3) shall not be cast or counted in any election.' These words, 'shall not be counted,' were construed as mandatory in *West v. Ross*, 53 Mo. 350, and the whole vote of a township excluded. Again in *Leibetter v. Hall*, 62 Mo. 422, the whole vote of a township was excluded under the same provision.

"In *Gumm v. Hubbard*, 97 Mo. 311, 10 Am. St. Rep. 312, it is true, the words 'shall be considered fraudulent' were in the statute, but the words 'and shall not be counted' affixed the punishment that should be visited upon the ballot declared by the statute to be fraudulent.

"The alternative is plain, we must either follow a statute which the legislature has enacted, and had a perfect right to enact, or hold that it is optional with the county clerks to obey the election law or not, as their judgment may dictate. By holding that a violation of this provision does not affect an election, we in effect nullify the statute, and say to election officers, it is not necessary to follow its commands"; citing also in support of this view, *State v. Cook*, 41 Mo. 593, *State v. Frazier*, 98 Mo. 426, and stating that from all the cases mentioned it seems evident that neither averment or evidence of fraud is necessary in such cases, but proof of a failure to comply with such mandatory provisions of the statute will avoid an election. "In many of the states there are statutes prescribing the form of the ballots, the kind of paper, etc., and prohibiting any marks, figures, or devices by which one can be distinguished from another. These statutes being designed to preserve the secrecy of the ballot, and to prevent fraud, intimidation, and bribery, will generally be considered mandatory, and this will be so in all cases where the statute provides that a ballot varying from the requirements of the law shall not be counted": 6 Am. & Eng. Ency. of Law, 348, sec. 8; and at page 325, same volume, it is said: "A violation of mandatory provisions will avoid the election, without regard to the motives of the persons guilty of the violation, and without any inquiry into the effect of the result of the election."

In relation to the contention by the majority of the court that no harm was shown to have resulted to the contestor from the canvass of the votes as returned, Judge Gantt said: "It appeared from the evidence in the trial court that upon the recount, contestee Smith had a majority of thirty-three votes only. It further appeared that there were one hundred and sixty-four votes cast in Sedalia that were returned 'no vote.' In about three-fourths of said ballots the state of the case was that the same were not counted because one of the three candidates for sheriff was scratched, leaving the other two upon the ballot, and in a very large majority of such three-fourths of said ballots the aforesaid result arose from the fact that the voter struck out one column of candidates, or the candidates of one political party, and left the candidates of the other two parties or columns intact. Now, according to the statutes of this state, as only the nominees of two political parties had been certified to the county clerk, no other names could lawfully be placed on the ballots at said election, and had there been only the two names of the contestor and contestee on the official ballot the striking off of either of their names would have left the other a vote, but when a third name illegally appeared on this ballot, the striking off of the name left a vote for two candidates, which rendered it void, or 'no vote.' There were one hundred and sixty-four votes of this character in Sedalia alone, and the majority is only thirty-three. Who will say that the placing of the third

name illegally on these ballots did not render this election uncertain? It has often been said that, if the irregularities in an election are so great as to render the choice doubtful, they will avoid the election: *Scranton Borough Case*, *Brightly's Election Cases*, 455; 6 Am. & Eng. Ency. of Law, 328, note, 3."

Judge Gantt also said that a careful scrutiny of the statute did not reveal anything requiring the county clerk to print the ballots and prescribe what names should be printed thereon, so as to make it unconstitutional as conflicting with a free and open ballot. "We agree that if this new election law of May 16, 1889, should restrict the election to the names printed on the official ballot, and made no provision for his substituting any name he chose for any office to be chosen, it would be unconstitutional. On the contrary, it has expressly guarded against that in section 4773 by leaving space for him to write the names of as many candidates as there are offices to be filled."

"If an aspirant for office does not belong to any of the great parties in this country, and is not fortunate enough to have the nomination of a party that cast three per cent of the votes at the last election, he is still not debarred; he can procure the certificate of electors within his district or political division to the number equal to one per cent of the vote cast at the last general election. This system contains many features that are new, and they have not yet received construction by the courts of the several states. In *Price v. Lush*, 10 Mont. 61, the supreme court of Montana held that as this was an English statute, and had been often construed by the courts of that country, the territory of Montana must be presumed in adopting it to take it with the construction it had received in England, and consequently held an election void where the successful candidate at the polls had not been nominated as required by law, but had succeeded in getting his name on the official ballot. That court reached that conclusion after a thorough examination of the English and Australian cases. In adopting that construction, it followed eminent authority: *Pennock v. Dialogue*, 2 Pet. 1; *McDonald v. Hovey*, 110 U. S. 628; *Allen v. St. Louis Bank*, 120 U. S. 34; *Pratt v. American Bell Tel. Co.*, 141 Mass. 225; 55 Am. Rep. 465; *Skouten v. Wood*, 57 Mo. 380."

In *People v. Board of Canvassers*, 129 N. Y. 395, Ruger, C. J., in construing the Australian ballot adopted in New York in 1891, said: "But it is urged that a strict construction of the law must result in disfranchisement. This is true, but the law plainly contemplates such a result, and who can complain except those who are opposed to any restrictions whatsoever upon the action of an elector? No advocate of the reform ballot law can justly criticise a result which was in the minds of its authors when the law was drafted and enacted. They clearly contemplated this effect, and determined that the injustice which a few might suffer through ignorance, willful blindness, or inattention to the requirements of law should not be permitted to defeat the great good to be secured to the whole people by the adoption of an effectual scheme for the purification of elections."

"Let it be conceded that the arguments of the judges in sustaining the law proceed principally upon the necessity of a secret ballot, and to permit the irregularity to go unpunished would destroy that secrecy; still the great underlying consideration was that 'elections are a contrivance of government, which prescribes who are electors, and how they may express their will, and it is a legitimate exercise of power to prescribe the description of ballots which shall be used.'"



And Mr. Justice Gantt further said: "This case fully meets the argument of respondent that the ballots in the case at bar were official ballots prepared by the county clerk, and his illegal act cannot disfranchise a voter. In the New York case the ballot was indorsed 'official ballot,' but by the willful or negligent act of the clerk the wrong precinct was indorsed, and they were rejected. The point is identical in principle. It was the act of an official, and that court, as we have already said, but followed our own decisions, wherein the act of the election judges disfranchised a whole township." This view is fully supported by *Tulcott v. Philbrick*, 59 Conn. 472; *Fields v. Osborne*, 60 Conn. 544; *In re Marks*, 17 R. I. 812.

"It is also objected that notwithstanding the county clerk placed upon the ballots at this election the names of candidates in positive violation of the statute, the contestor cannot complain, because section 4778 provides, 'whenever it shall appear by affidavit that an error or omission has occurred in the publication of the names or description of candidates nominated for office, or in the printing of the ballots, the circuit court of any county, or the judge thereof in vacation, or if the circuit judge is then absent from the county, a judge of the county court, may, upon application by any elector, by order, require the clerk of the county court to correct such error, or to show cause why such error should not be corrected.' This section was intended to correct mistakes in the names of the candidates nominated, or the designation of the offices for which they were candidates, upon the application of any elector. It does not purport, nor do we think it was intended, as furnishing a mode of procedure to a candidate who was wrongfully denied a place on the ticket, nor a remedy for those lawfully on the ticket, to purge it of names which had illegally been placed thereon; but in any event, this case is here on the pleadings alone. There is nothing in the record that tends to show that contestor had any knowledge of the facts which would now estop him of complaining. In the absence of proof or allegation to the contrary, it will be presumed that he acted on the presumption that the county clerk, a public officer, would not put on the official ballot the name of any candidate whose nomination had not been certified or filed as required by law. In the absence of knowledge, no one will contend he is estopped."

Judge Gantt also contended that the vote of Sedalia should be excluded, for the reason that the county court ignored section 4673 of the statute in the appointment of judges for that precinct. In this connection he said: "The statute, section 4777 in connection with 4673, provides that the court shall appoint six judges for each precinct, and in this instance the court appointed twelve judges. Instead of one polling place in the precinct there were two, seventy-five feet apart. Different judges received and numbered the ballots. At one of these voting places 1582 votes were cast, and at the other 1578. By the statute, section 4777 in connection with 4673, the county courts are empowered to appoint six judges only for each election precinct; three of the judges shall be selected from the party having the largest vote at the last election, and three from the party having the next largest. These judges shall select the two judges, one from each party, to have charge of the ballots and furnish them to the voters; and minute direction is given in the statute for the conduct of the election. There is no warrant for the appointment of double this number and opening a new poll. After the court had appointed six, the power of attorney was exhausted, and those appointed after that derived no authority.

"If the county court of Pettis County may disregard the election law by



appointing six additional judges and a second polling place, they may establish a dozen in the same precinct, and if that court may do this, all other county courts may do likewise. The precedent would be dangerous and pernicious. It would open wide the door for fraudulent practices, and practically nullify the statute. The statute has made ample provision for conducting an election by giving 'authority to the county court to make the election precinct or district small enough that six judges only will be required to receive and count the vote. The county court of Pettis County, when it appointed twelve judges for one precinct, by its very record disclosed the absolute necessity for dividing this precinct. It is a virtual finding that six judges could not receive and count the votes. Instead, in that city, of following the plain provision of the statute, and dividing the precinct, they made this unauthorized appointment of six additional judges, and in this way preserved all the objectionable features of a popular election, and secured to the people of that city none of the benefits that the statute was designed to secure. The statute wisely provides that each voter shall vote only in the township in which he resides, or, if in a town or city, then in the election district therein in which he resides. This provision was made so that the judges and voters could more readily know who is entitled to vote, and the more easily detect any attempt to vote illegally, either for want of residence, or nonage, or other disability. Moreover, as having precincts small enough for two judges to receive and two to count, the judges may more deliberately hear challenges, and decide them without denying others the right to vote.

"And there are other considerations that doubtless controlled the legislature. It was intended that the boundaries of each precinct should be defined, and every elector therein should know the voting place. It was never intended, as was done here, that the initial letter of a voter's name should subject him to the annoyance of going from one voting place to another according to the initial letter of his name. It was the clear intention of the law that every voter in each precinct should vote at one and the same place, and that these precincts should be small enough to permit each voter to cast his ballot on the day of election without annoyance. The suggestion that this had been previously done is not in the case, and if it was is no justification. There was no evidence heard on this branch of the case that would tend to estop the contestor.

"As the judges in excess of six were not even *de facto* judges, it resulted that at least six persons unauthorized by statute were permitted to pry into the ballots of the voters, and thus destroy that secrecy which the constitution secures against every one but a sworn and lawful election officer. The position taken by my learned brother, that the two polling places within one precinct is not an abuse of the statute, is not sustained by these judges of this court who hold that this violation of a positive enactment does not vitiate the election."

In such case where the conduct of the election is so grossly irregular that the courts cannot determine which of the ballots are legal and which illegal, the whole should be disregarded. "In no other way can the law be upheld, and the purity of the ballot preserved. It follows from these views that I hold the ballots containing the names of the Union-Labor candidates void, and that the dividing of the city into two polling places was illegal and unauthorized, and resulted in placing the ballots in the hands of parties who had no authority to see them, and was a clear violation of the statute. In

so doing I follow the command of the law in a matter of the highest public concern."

Chief Justice Sherwood fully concurred with Mr. Justice Gantt in the conclusions reached by him in his dissenting opinion. Mr. Justice Thomas concurred with the majority opinion written by Mr. Justice Barclay, so far as the division of election precincts in Sedalia was involved, but dissented from that opinion, and concurred with Mr. Justice Gantt in holding that the ballots containing the names of non-Union candidates were unauthorized and void. In this connection he said: "I concur in the result reached by my brother Gantt on the second point discussed in his opinion, but I fear he has stated the principles upon which he bases that result too broadly. I am not prepared to say that a county clerk's action in preparing a ticket under our election laws can be reviewed by the courts after the election in all cases, nor am I willing to say that it cannot be reviewed in any case. That would in my judgment depend on circumstances.

"Under the specifications in the notice of contest in this case, which were stricken out on motion of the contestee, the contestor would have had the right to introduce evidence to show that the Union-Labor party had no existence in Pettis County; that Sappington had not been nominated by any party, or by any number of electors; that his nomination had not been certified to the clerk at all, and that the clerk arbitrarily put his name on the official ballot without deciding or attempting to decide anything, simply because he was requested to put it there, and in that case the ballot would have been void. . . . I do not believe that the power of the secretary of state or clerk in preparing the official ballot is unlimited. It would be a pernicious doctrine for the courts to assert that the county clerk can arbitrarily and *ad libitum* put names on the official ballot that ought not to be put on it, and that the candidates who have a legal right to have their names on it must resort to the courts before the election or lose their remedy; on the other hand, if the clerk should receive the certificate of nomination, should examine into the facts in regard to it, should decide that the names of the parties mentioned therein ought to go on the official ballot, and should print and publish it as required by law, and no objection to it should be made prior to the election, the courts, in a contest arising in regard to it after the election, might very well refuse to interfere with the clerk's decision and hold the ballot good, though it should turn out that certain names were improperly printed on it; but the courts should hold the ballot void if it appears that names were illegally printed on it, unless it should be proved that the clerk did consider before acting, and that he did search and inquire before reaching a conclusion; that he did exercise his judgment and discretion, and that he did not arbitrarily, and without a pretense of authority or right, print the unauthorized names on the ballot.

"I take the position that the clerk has not a *carte blanche* to put the name of every eager applicant, who may so request, on the official ballot; nor should a ballot be declared void in every case in which a name is on it which ought not to be on it, where the clerk exercised a sound discretion in preparing it. This leaves the courts to review the action of the clerk, and to adjudicate the issue as the very right of each case may demand.

"The court below ought to have refused to strike out the portions of the notice of contest it did strike out; ought to have heard the evidence in regard to how and why the names of the Union-Labor candidates were printed on the ballot, and to have disposed of the issue on the evidence.

"I fully agree with my brother Barclay in what he has said in his opinion

in regard to the election precincts in Sedalia. For the reasons given above I think the judgment of the lower court ought to be reversed, and the cause remanded for new trial on the merits."

**ELECTIONS — AUSTRALIAN BALLOT LAW — ADDING NAME TO TICKET.** — The act providing for the printing of an official ballot at the public expense, does not prevent a voter from voting for whom he chooses. He may "write or paste upon his ballot the name of any person for whom he desires to vote for any office": *People v. Shaw*, 133 N. Y. 493; but a failure to comply with the section of the act concerning nomination is not aided by the section which permits every voter to write or paste on his ballot "the name of any person whom he desires to vote for": *Price v. Lush*, 10 Mont. 61.

**ELECTIONS — IRREGULARITY IN BALLOTS — EFFECT OF.** — Errors of public officers in the preparation or printing of ballots will not invalidate the ballots: *Allen v. Glynn*, 17 Col. 338; 31 Am. St. Rep. 304, and note.

**ELECTIONS — EFFECT OF IRREGULARITY OF OFFICERS.** — Mere irregularities on the part of election officers do not vitiate the election: *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254, and note.

**ELECTION — CONSTRUCTION OF LAWS.** — Courts should restrict the exceptions which exclude ballots where the spirit and intent of the law is not thereby violated: *Kellogg v. Hickman*, 12 Col. 256. The tendency of a court is to effectuate the intent of the voter, and a statute should be so construed as not to place an arbitrary or unreasonable obstruction in his way: *People v. Board of County Canvassers*, 129 N. Y. 395. The rules prescribed by statute for conducting elections are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise and to ascertain with certainty the result: *DeBerry v. Nicholson*, 102 N. C. 465; 11 Am. St. Rep. 767, and note.

**ELECTIONS — STATUTE WHEN MANDATORY.** — If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission will render the election void, the courts must hold the statute to be mandatory, whether the particular act goes to the merits or affects the result of the election or not: *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254, and note; *State v. Saxon*, 30 Fla. 688; 32 Am. St. Rep. 46.

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## ROBINSON v. SMITH.

[111 MISSOURI, 205.]

**EVIDENCE — ACCOUNT BOOKS.** — Bank books of accounts and original entries shown to have been accurately kept and written up each day are admissible in evidence in favor of the bank.

*Alexander and Richardson, and Gillihan and Brosius, for the appellants.*

*G. A. Chapman, for the respondent.*

**MACFARLANE, J.** Plaintiffs are bankers and sued the defendants before a justice of the peace for an alleged overdraft of fifty dollars.

The case was taken by appeal to the circuit court, when upon a trial the defendant recovered judgment, and plaintiffs appealed to the Kansas City court of appeals.

Upon a hearing in that court, Smith, P. J., wrote an opinion, reversing the judgment of the circuit court, and the appeal was certified to this court, the opinion being deemed in conflict with decisions of the St. Louis court of appeals.

At the trial of the case plaintiffs offered to introduce in evidence their "ledger, cash book, and balance book kept in the transaction of their business as bankers, and showing the transaction with the defendant, and offered to prove that they were accurately kept, and that entries were made and the books written up each day from the checks of the customers and tickets of the teller, and that the books were balanced each day to verify their accuracy." These offers were refused and the books excluded. This ruling of the court is the only error assigned here.

Judge Smith in his opinion says: "Upon the long and well-recognized principle that the book entries, made by a party himself, or by his clerk, in the usual course of his business, being contemporaneous with the fact, and part of the *res gestæ*, are admissible in evidence, I think the offer of evidence made by plaintiffs should not have been rejected." Since this opinion the whole question has been carefully considered by this court, the decisions in this state reviewed, and in an elaborate opinion by Black, J., the same conclusion was reached as that arrived at by the court of appeals: *Anchor Milling Co. v. Walsh*, 108 Mo. 277; 32 Am. St. Rep. 600.

The court committed error in refusing to admit in evidence the books offered. Judgment of Kansas City court of appeals affirmed. All concur.

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**EVIDENCE — ACCOUNT BOOKS.** — An account book of original entries, fair on its face, and shown to have been kept in the usual course of business, is admissible in evidence even in favor of the person keeping it: *Anchor Milling Co. v. Walsh*, 108 Mo. 277; 32 Am. St. Rep. 600, and note with cases discussing the subjected collected.



## FERGUSON v. SODEN.

[111 MISSOURI, 208.]

**TRUST DEED BY MARRIED WOMAN.** — A married woman may, by joining with her husband, execute a valid mortgage or deed of trust upon her real estate to secure a debt of her husband, and may therein appoint a trustee to make sale in default of payment of the debt secured.

**USURY — EFFECT OF CONTRACT FOR.** — While a contract calling for usurious interest is not void, still the creditor forfeits the whole interest, and the legal interest is collectible from the debtor and goes into the school fund.

**USURY — RIGHT TO RECOVER.** — One who voluntarily pays unlawful interest upon a usurious contract cannot recover it by suit.

**USURY — EFFECT ON MORTGAGE — RESTRAINING SALE.** — When usury does not invalidate a mortgage, a sale under the power contained therein will not be enjoined by reason of it, unless the debtor brings into court the principal and legal interest due.

**USURY — DEFENSE OF TO MORTGAGE WHEN LOST.** — So long as a mortgage providing for usurious interest remains executory, the mortgagor may avail himself of the usury as a defense; but when the mortgage contract is executed by foreclosure or otherwise, and when others have in good faith acquired an interest in the property, the defense of usury is no longer available to the mortgagor, and this is especially the case when he has been guilty of laches.

**FOREIGN CORPORATION — RIGHT TO TAKE MORTGAGE.** — A foreign corporation is entitled to make a mortgage loan in Missouri.

*W. C. Wells and Junius W. Jenkins*, for the Appellant.

*O. H. Dean and C. O. Tichenor*, for the Respondent.

**THOMAS, J.** Action to redeem from sale under a deed of trust. Judgment in the court below for defendants, and plaintiff appeals.

The facts for a proper understanding of the questions decided will sufficiently appear in the opinion.

1. The trial court was correct in ruling that a *feme covert* in Missouri may, by joining with her husband as prescribed by our statute of conveyances, execute a valid mortgage or deed of trust upon her legal real estate to secure a debt of her husband, and may appoint therein a trustee to make sale of the property in default of payment of the debt secured: *Schneider v. Staihr*, 20 Mo. 269; *Hagerman v. Sutton*, 91 Mo. 519; *Rines v. Mansfield*, 96 Mo. 394; *Wilcox v. Todd*, 64 Mo. 390.

2. It is contended that the debt secured by the deed of trust in question bore interest at a usurious rate, and the sale for that reason was void. The principal sum secured was six thousand dollars, and payable five years after date. The interest thereon for the five years at the rate of ten per cent was

secured by ten notes for three hundred dollars each, payable six, twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, and sixty months after date, with interest at the rate of ten per cent per annum after maturity, and the contention is that this transaction is usurious.

Conceding the correctness of this proposition, without deciding the question, the plaintiff has no right to redeem from the sale under the deed of trust in question. The interest notes falling due six, twelve, eighteen, twenty-four, and thirty months after date were paid, and the sale was made for default of payment of those falling due thirty-six and forty-two months after date, and when the trustee credited the net proceeds of the sale on the note, he allowed \$23.08 interest on the notes falling due thirty-six months after date, and \$8.08 on the note falling due forty-two months after date. There can be no question that the \$23.08 was legally allowable as compound interest, it having been calculated from the expiration of the year. This leaves \$8.08 only which could be regarded as usurious interest under any rule that could be adopted. The land brought two thousand five hundred dollars at the sale, and there is a large balance of the debt that has not been paid. The plaintiff has a right to have this sum of \$8.08 credited properly on the debt, if it was usurious, but she has no right to come into a court of equity and ask to have the sale set aside. If she had desired to take advantage of the defense of usury, she should have tendered the proper amount before sale: *Perrine v. Poulson*, 53 Mo. 309; *McGlothlin, Adm'r, v. Hemery*, 44 Mo. 350; *Corby v. Bean*, 44 Mo. 379.

A contract calling for usurious interest is not void in Missouri: *Montany v. Rock*, 10 Mo. 506. In such case the creditor forfeits the whole interest, but the interest at the legal rate is collectible from the debtor, and goes into the school fund: Rev. Stats., 1889, sec. 5976. One who voluntarily pays unlawful interest upon a usurious contract cannot recover it by suit: *Kirkpatrick v. Smith*, 55 Mo. 389; *Ransom v. Hays*, 39 Mo. 445.

It is no ground for enjoining a sale under a deed of trust that the notes secured reserve usurious interest or include it, except in those states where usury renders the contract void. The trustee's duty to sell and apply the proceeds in discharge of the debt legally due remains the same. If he should attempt to misapply the proceeds, and pay on account of usury what was not legally due, the court would interfere.

Where usury does not invalidate the mortgage, a sale under the power will not be enjoined by reason of it, unless the debtor brings into court the principal and the legal interest due: *Tooke v. Newman*, 75 Ill. 215; *Powell v. Hopkins*, 38 Md. 1; *Walker v. Cockey*, 38 Md. 75; *Eslava v. Crampton*, 61 Ala. 507.

“After a foreclosure, a mortgage contract is regarded as executed. So long as the contract remains executory, the mortgagor can avail himself of the usury; but when it is executed, and others have in good faith acquired interests in the property, the objection can no longer be raised”: 1 Jones on Mortgages, 4th ed., sec. 646.

3. The Connecticut Mutual Life Insurance Company at Hartford, Connecticut, though a foreign corporation, was authorized to make this loan: *Connecticut Ins. Co. v. Albert*, 39 Mo. 181; *Long v. Long*, 79 Mo. 652.

4. Plaintiff's laches is fatal to her claim of relief in this case. She and her husband executed the deed of trust in 1872. The property was sold under it by the trustee in 1876 to the Connecticut Mutual Life Insurance Company, and the possession of the property was then surrendered to it. Plaintiff's husband died in 1879, and the insurance company sold the property to Patrick Soden in 1880, for twelve thousand dollars, and the latter took immediate possession, and has continued in possession ever since; and this suit was not instituted until 1887. The property having gone into the hands of an innocent purchaser, and plaintiff having delayed action for over eight years after she became discoverer, and no defect in the proceeding being apparent on the face of the deed of trust, or the trustee's deed, it was too late for plaintiff to seek redress at the time she did: *Burgess v. St. Louis Co. R. R. Co.*, 99 Mo. 508; *Schradski v. Albright*, 93 Mo. 48; *Stamper v. Roberts*, 90 Mo. 688; *Kline v. Vogel*, 90 Mo. 248; *Reel v. Ewing*, 71 Mo. 29.

What is said above in regard to usury is based on the law as it existed in this state prior to 1891. In the latter year two statutes were passed making some radical changes on this subject, which it is not necessary for us to consider at this time as they do not affect the transactions involved in this controversy.

Other questions are presented by the briefs of counsel, but we do not deem them of sufficient importance to give them special notice. The learned trial judge in the court below

gave this case a very careful consideration, as is evident from an elaborate, exhaustive, and able opinion, which he prepared and filed, and which was printed for our reference, and the conclusions he reached were not only sound, but they were the only conclusions he could have justly reached under the law applicable to the facts disclosed by this record, and the judgment is accordingly affirmed. All concur.

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**MORTGAGE BY WIFE OF HER SEPARATE PROPERTY TO SECURE HUSBAND'S DEBT**, and in consideration of an extension of time for the payment thereof, is valid if fairly obtained: *Green v. Scrannage*, 19 Iowa, 461; 87 Am. Dec. 447, and note. See *Kansas Mfg. Co. v. Gandy*, 11 Neb. 448; 38 Am. Rep. 370. A wife can, by complying with the formalities prescribed by statute, pass her whole estate for the payment of her husband's debts: *Hollis v. Francois*, 5 Tex. 195; 51 Am. Dec. 760, and note with many cases collected; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; 8 Am. Dec. 467. A married woman who mortgages her separate property to secure a loan to her husband is a surety and not the principal debtor: *Bull v. Cole*, 77 Cal. 54; 11 Am. St. Rep. 235. A married woman cannot encumber her separate property for the debt of another: *Hartman v. Ogborn*, 54 Pa. St. 120; 93 Am. Dec. 679, and note. In Indiana a note and mortgage executed by a man and wife to secure a loan to him cannot be enforced against her where the property included in the mortgage is held by them as tenants by the entireties: *Wilson v. Logue*, 131 Ind. 191; 31 Am. St. Rep. 426.

**USURY — EFFECT OF CONTRACT FOR.** — A reservation of an illegal rate of interest does not prevent a recovery of the principal and legal interest thereon: *Philadelphia etc. R. R. Co. v. Lewis*, 33 Pa. St. 33; 75 Am. Dec. 574, and note; *President etc. v. Swayne*, 8 Ohio, 257; 32 Am. Dec. 707, and note. Interest on a usurious contract may be recovered, unless the party affected by the usury sets up the usury in his answer, and tenders the principal sum: *Rock River Bank v. Sherwood*, 10 Wis. 230; 78 Am. Dec. 669, and note. The statute of Arkansas denounces the taking of usury, and upon all contracts for its payment impresses the stamp of absolute nullity; and this blight covers the entire transaction. It extends to the principal as well as the illegal interest: *Vahlberg v. Keaton*, 51 Ark. 534; 14 Am. St. Rep. 73, and note.

**FOREIGN CORPORATIONS. — POWER TO CONTRACT:** See *Toledo Tie etc. Co. v. Thomas*, 33 W. Va. 566; 25 Am. St. Rep. 925, and note with cases collected.



## BECK v. HAAS.

[111 MISSOURI, 264.]

**STATUTE OF LIMITATIONS. — PART PAYMENT of a demand will take it out of the statute of limitations.**

**PAYMENTS — APPLICATION OF. —** When a creditor holds several claims against his debtor, the latter on making a payment, may direct upon which debt it shall be credited, but failing to do this the creditor may make the application in the manner most to his interest. If neither the debtor directs, nor the creditor applies the payment, the law will apply it to the debt which first matures, unless justice and equity demand a different appropriation.

**PAYMENTS — APPLICATION OF. —** When a creditor holds two claims against his debtor, and the latter makes a payment without directing to which debt it shall be applied, the creditor may apply it equally to the payment of each debt, neither being barred by limitation.

**PARTIES — RIGHT OF TRUSTEE TO SUE. —** When a note is made payable to a party as trustee he may sue thereon in his own name after the death of the beneficiary and when no administrator has been appointed.

*Wislizenus and Kleinschmidt*, for the appellant.

*Benjamin J. Klene*, for the respondent.

MACFARLANE, J. Suit was commenced August 15, 1889, upon a note for three thousand dollars, dated April 1, 1866, made by defendant and one John Schreiber, and payable to Christian Beck, trustee of Anna Eliza Beck, one year after date. Upon the note credits were indorsed as follows: April 1, 1867, interest \$300; April 1, 1868, interest \$300; March 6, 1873, \$50; June 28, 1877, \$50; November 11, 1885, \$5.

The answer admitted the execution of the note, denied the payments of March 6, 1873, June 28, 1877, and November 11, 1885; and set up the statute of limitations in bar. The answer further charged that Anna Eliza Beck was dead, and the note being payable to plaintiff as her trustee belonged solely to her estate, and suit thereon could not be maintained in the name of the trustee. The reply was a general denial.

The evidence upon the trial showed that Anna Eliza Beck was the wife of Christian Beck; that she died in 1881, and no administration was ever taken out on her estate. The evidence further showed that \$300 interest was paid on the note April 1, 1867, and April 1, 1868, and the payments indorsed as such credits thereon. In 1872 defendant and Schreiber gave plaintiff their note for \$900, being interest for the years 1869, 1870, and 1871, on the \$3,000 note in suit. At the same time Haas gave a second deed of trust to secure this \$3,000 note upon certain real estate in Carondelet, subject to

a prior deed of trust for \$3,000, the property having cost Mr. Haas, as he testifies, over \$6,000. In 1872 Haas and Schreiber failed. In 1873 Beck foreclosed the deed of trust above mentioned, buying the property subject to the first deed of trust for \$50, which he credited on the \$3,000 note.

The evidence tended to prove that in 1877 defendant gave plaintiff a note on a third person for \$1,000, instructing him not to take less than \$100 for it. He received that sum and credited \$50 on the note in suit, June 28, 1877, and \$50 on the \$900 note. Plaintiff testified that these credits were made by defendant himself; this, defendant denied. Defendant also owed plaintiff \$100 or more on account. Defendant remitted to plaintiff from November 10, 1885, to July, 1887, on several occasions, sums of from \$3 to \$10 each. Plaintiff testified that these were sent in response to demands on account of these debts. Defendant testified that they were intended as mere donations. The letters accompanying the remittances gave no directions as to the application of the amount sent. Ten dollars were sent by letter, dated November 10, 1885. Five dollars of this were credited on the note in suit under date of November 11, 1885.

The verdict on the facts was for the plaintiff, and from a judgment therein defendant appealed. The question is, whether the payments made and placed as credits upon the note in suit were sufficient to take it out of the statute of limitation. The circuit court held that they were so, if made as payments.

1. It is not disputed by the defendant that part payment of a demand will take it out of the statute of limitation, and if \$50 were paid on the note June 28, 1877, and \$5 November 11, 1885, the action was not barred when it was commenced: Wood's Limitation of Actions, sec. 97, p. 221; Rev. Stats., sec. 6795; *Shannon v. Austin*, 67 Mo. 485; *Beck v. Haas*, 31 Mo. App. 183.

2. It is admitted that the money to the amount indicated by the credits on the note was paid by defendant to plaintiff, but defendant denies that he intended that it should be applied as payments on the notes.

The rule in reference to the appropriation of payments is well settled in this state. When a creditor holds several claims against his debtor, the latter, on making a payment, has the right to direct upon which debt it shall be credited; if he gives no direction, then the creditor, on receiving the pay-

ment, can make the application; if neither the debtor directs, nor the creditor applies, the payment, then the law will apply it to the debt which first matures, unless justice and equity demand a different appropriation: *Gantner v. Kemper*, 58 Mo. 570; *Waterman v. Younger*, 49 Mo. 415; *McCune v. Belt*, 45 Mo. 181; Wood's Limitation of Actions, sec. 110, p. 238.

There is no dispute about the payments made April 1, 1867, and April 1, 1868, of \$300 each. These payments were properly credited on the note. As to the application of the credit of \$50, dated June 28, 1877, the evidence is conflicting. Defendant testified that he directed the \$100 collected to be paid on the \$900 note, while plaintiff testified that defendant directed him to "credit it on both notes." His recollection was that defendant himself indorsed the credit on the note.

As to the credit of \$5 November 11, 1885, the evidence shows that defendant transmitted to plaintiff \$10 in a letter, in which he says: "Inclosed I send you the promised \$10, I am sorry I cannot make it more." Plaintiff testified that this and other small remittances were made in answer to requests of payment on these notes. Defendant testified that these payments were not intended to apply on any indebtedness — "did not expect a credit on the note; just wanted to help him out." This evidence was ample to support the verdict of the jury that the \$50 credit was placed upon the note by the direction of defendant, and that the \$10 remittance was intended as a payment on existing indebtedness.

The court instructed the jury that they should find those facts or the note was barred by the statute of limitation. The instruction of the court on this question was full, and fairly presented the theories of both the parties.

3. It is insisted that though plaintiff had the right to appropriate the ten dollars payment as a credit upon either note, in the absence of instructions from the defendant to the contrary, he had no right to divide the payment and credit, a part on one note and a part on the other as was done.

In support of this contention two cases from the supreme court of Vermont are cited: *Ayer v. Hawkins*, 19 Vt. 30, and *Wheeler v. House*, 27 Vt. 735. In these cases the court argues "that the right of designation among the creditors' demands is essentially the right of the debtor; and hence if he silently waives it in favor of the creditor, it should be intended that he does so relying upon a mode of application to which he

could not justly or reasonably object." That the debtor could reasonably object to any appropriation of the payment which would revive his legal liability upon more than one debt, and such appropriation could not be made.

The rule, as generally understood in this state, allows the creditor to appropriate the payment in the manner most to his own interest when the debtor himself waives the right, provided that the application he makes does not operate inequitably to the debtor. He is not required to consult the interest of the debtor: See authorities cited *supra*; *Shortridge v. Pardee*, 2 Mo. App. 363; 18 Am. & Eng. Ency. of Law, 239, note 2.

We are able to see nothing more inequitable in stopping the running of the statute of limitation upon two debts than upon one only, neither being barred at the time the payment is made. If these payments had resulted in reviving debts already barred, the effect might have been different, though it is difficult to see that any equities of the debtor are affected in either case: *Johnson v. Johnson*, 81 Mo. 335.

But whatever the correct rule in such case may be, the note in suit was the older of the two held by plaintiff, and if no designation had been made by either the debtor or creditor, the law would have applied the whole payment as a credit upon this note under the rule before stated. The legal effect on the running of the statute would have been the same, and defendant can have no just ground of complaint.

4. Complaint is made of the refusal by the court of the entire series of instructions prayed by defendant. Most of these instructions were inconsistent with the law as herein declared, and were properly refused. The court gave to the jury one plain, consistent, and intelligible instruction, covering every phase of law and fact in the case, and including every proper request made by defendant. Indeed, the instruction is more favorable to defendant than he had the right to demand. In such case there was no error in refusing those asked.

5. Objection is made that the note being payable to plaintiff as trustee for his wife, and the wife being dead, the suit could only be prosecuted in the name of her executor or administrator. This contention cannot be maintained. Our statute authorizes the trustee of an express trust to sue in his own name: Rev. Stats., 1889, sec. 1991. "A trustee of an



express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

Such is the definition of the statute, and plaintiff clearly comes within its terms. No administrator of the deceased wife has been appointed, and defendant has nothing to do with the application of the trust fund after the trustee has collected it: *Beck v. Haas*, 31 Mo. App. 183.

Judgment affirmed. All concur.

**LIMITATION OF ACTIONS — EFFECT OF PART PAYMENT ON.** — The payment of part of a debt is evidence of a promise to pay the remainder, so as to prevent the operation of the statute of limitations as a bar: *Newlin v. Duncan*, 1 Harr. (Del.) 204; 25 Am. Dec. 66, and note; *State v. Finn*, 98 Mo. 532; 14 Am. St. Rep. 654, and note; *Clement v. Clement*, 69 Wis. 599; 2 Am. St. Rep. 760, and note. See also notes to *Landis v. Roth*, 58 Am. Rep. 749; *Walters v. Kraft*, 55 Am. Rep. 52; and *Burgoon v. Bixler*, 39 Am. Rep. 418.

**PAYMENTS — APPLICATION OF BY DEBTOR.** — When a debtor owes the same creditor more than one debt, he may generally direct to what debt a payment shall be applied: *Phillips v. Herndon*, 78 Tex. 378; 22 Am. St. Rep. 59, and note; note to *Frazier v. Lanahan*, 17 Am. St. Rep. 518; *Washington etc. Gas Co. v. Johnson*, 123 Pa. St. 576; 10 Am. St. Rep. 553; *Putnam v. Russell*, 17 Vt. 54; 42 Am. Dec. 478, and note; *Vicary v. Moore*, 2 Watts, 451; 27 Am. Dec. 323; *Baker v. Stackpoole*, 9 Cow. 420; 18 Am. Dec. 508, and note; note to *Brady v. Hill*, 13 Am. Dec. 505; *Pickering v. Day*, 3 Houst. 474; 95 Am. Dec. 291.

**PAYMENTS — APPLICATION OF BY CREDITOR.** — A creditor may direct a payment to any debt which he may choose when the debtor has not directed such application: *Blake v. Sawyer*, 83 Me. 129; 23 Am. St. Rep. 762, and note with cases collected; *Wood v. Callaghan*, 61 Mich. 402; 1 Am. St. Rep. 597, and note.

## FIRST NATIONAL BANK v. PAYNE.

[111 MISSOURI, 291.]

**WITNESSES — COMPETENCY — DEATH OF CONTRACTING AGENT.** — The rule that the death of the contracting agent of a surviving party to a contract in suit excludes the evidence of the other contracting party does not extend further than to transactions had by such party with the deceased agent of the other party acting in behalf of his principal.

**WITNESSES — COMPETENCY — DEATH OF CONTRACTING PARTY.** — In an action by a bank seeking to charge certain indorsers as makers of a note executed by a maker since deceased and payable to his own order, the cashier of the bank who acted as its contracting agent in the matter being also dead, the bookkeeper of the bank is competent to testify that the note had not been indorsed by such maker at the time it was in-

dorsed by the parties sought to be charged as makers, and they are competent to testify in rebuttal that it had been so indorsed.

**NEGOTIABLE INSTRUMENTS — EFFECT OF INDORSEMENT BY ONE NOT A PAYEE.**

The rule that when a person indorses a negotiable note in blank, not being a payee or indorsee thereof, he is to be treated *prima facie* as a maker, does not apply to the indorsement of a note made payable to the order of the drawer.

**NEGOTIABLE INSTRUMENTS — EFFECT OF INDORSEMENT BY ONE NOT A PAYEE.**

One who indorses a note made payable to the order of the drawer, cannot be charged as a maker, and can only be charged as an indorser when the contract is perfected by the indorsement of the drawer's name as payee.

*T. F. McDearmon*, for the appellant.

*Silas B. Jones*, for the respondents.

BRACE, J. This action is based upon the indorsements of defendants upon the following promissory note filed with the petition:—

“\$6,000. St. Louis, Mo., March 28, 1889.

“Sixty days after date I promise to pay to Robert H. Payne or order \$6,000. Value received, with interest at the rate of — per centum per annum. Negotiable and payable without defalcation or discount.

“ROBERT H. PAYNE.”

Upon which were the following indorsements:—

“May 30, 1889. Protest is hereby waived by the undersigned indorsers:—

“ROBERT H. PAYNE,

“FANNIE F. PAYNE,

“ROCHESTER FORD.”

The petition was in two counts. The first charged the defendants as makers, the second as indorsers, waiving protest; issue was joined by answer, and the case tried before the court without a jury. The signatures of the parties on the note were admitted.

The evidence tended to prove that the waiver of protest of May 30, 1889, indorsed on the back of the note was written on that day by Robert H. Payne, and no authority from defendants to him, so to do, being shown, the only possible ground of recovery in the case was to charge the defendants as makers.

The court, at the request of the plaintiff, declared the law of the case, by way of instruction, to be that, “if the evidence shows that the defendants indorsed their names on the back of the note in suit, while in the hands of the payee, and that the payee negotiated and delivered the same to the plaintiff

without indorsing his name on the back thereof, the plaintiff is entitled to recover of the defendants as makers," found the issue for the defendants, and from the judgment in their favor the plaintiff appeals.

On the trial the plaintiff introduced the oral evidence of its clerk or bookkeeper, tending to prove that the note in question, with other securities, was on the day of its date delivered to plaintiff's cashier by Robert H. Payne, the maker, as collateral security for two other notes of the same date executed by him aggregating the same amount, payable to his own order sixty days after date, and by him indorsed in blank, delivered to, and discounted by the bank for him on that day. And that, at that time, the name of Robert H. Payne was not indorsed on the note in suit, but was afterwards written on the back thereof on the 30th of May, 1889.

To meet this testimony, the defendants were introduced as witnesses in their own behalf, and were permitted to testify over the objection of the plaintiff, and after it had first been shown that the cashier and Robert H. Payne were dead at the time of the trial: the said Fannie F. Payne, that at the time she indorsed said note the name of said Robert H. Payne was already indorsed thereon, and the said Ford that at the time he indorsed said note the names of the said Robert H. Payne and the said Fannie F. were already indorsed thereon.

The admission of this evidence, the plaintiff complains of as error, for which the judgment should be reversed; and for support of its contention relies upon a line of decisions of this court, maintaining the doctrine that the death of the contracting agent of a surviving party to a contract excludes the evidence of the other contracting party: *Stanton v. Ryan*, 41 Mo. 510; *Butts v. Phelps*, 79 Mo. 302; *Williams v. Edwards*, 94 Mo. 447, to which may be added *Leach v. McFadden*, 110 Mo. 584. We do not understand the rule in these cases, however, to extend further than to transactions had by a party to the action with the deceased agent of the other party acting in behalf of his antagonist.

The defendants in this case did not undertake, nor were they permitted, to testify in regard to any contract or transaction they had either with Robert H. Payne, the maker of the note, or with the cashier of the bank, or any other of its officers, dead or alive. They were permitted to testify merely to a physical fact, the existence of which was independent of

any and all contracts between the parties, a fact not peculiarly within the knowledge of the defendants and any agent of the bank, arising from a transaction between them and such agent, but of which they obtained cognizance by their sense of sight, and which was open to the cognizance of any other witness to whom an opportunity was afforded at the time, of inspecting the note in suit, and concerning which one of the plaintiff's officers, who had such opportunity, testified, and but for whose evidence as to such fact the plaintiff would have made out no case against the defendants.

How can the plaintiff then claim that the defendants should be excluded from testifying in rebuttal of a case made out alone by the evidence of its living agent, on the ground that it had another agent dead, by whom it could have made out the same case, and nothing more. Upon the face of the indorsements upon this note the defendants were indorsers, and chargeable only as such. As we have seen, the plaintiff failed to make out a case against them as indorsers; it then sought to charge them as makers. In order to do so, it had to resort to the extrinsic parol evidence of its clerk, whose evidence alone made for it all the case it had. To exclude the evidence of the defendants in rebuttal of the evidence of this living and testifying agent of the plaintiff, as to a fact coming to their knowledge in exactly the same way as it did to them — by their sense of sight — is not within the letter or spirit of the statute; nor within any of the rulings of this court on the subject.

While we think the court committed no error in admitting this evidence, yet, conceding that it did, and that the court ought to have decided the issue upon the uncontradicted evidence of the plaintiff, tending to prove that it was indorsed by Robert H. Payne after it was indorsed by the defendants, and after it was delivered to the bank, it does not follow that this judgment ought to be reversed.

2. He was both the drawer and payee of the note. Now, while in a long line of decisions in this state following *Powell v. Thomas*, 7 Mo. 440, 38 Am. Dec. 465, it has been consistently and persistently held that where a person indorses a negotiable promissory note in blank, not being a payee or indorsee thereof, he is to be treated *prima facie* as a maker of the note: *Lewis v. Harvey*, 18 Mo. 74; 59 Am. Dec. 286; *Schneider v. Schiffman*, 20 Mo. 571; *Baker v. Block*, 30 Mo. 225; *Western*



*etc. Ass'n v. Wolff*, 45 Mo. 105; *Kuntz v. Tempel*, 48 Mo. 71; *Seymour v. Farrell*, 51 Mo. 95; *Mammon v. Hartman*, 51 Mo. 168; *Stagg v. Linnenfelser*, 59 Mo. 336; *Cahn v. Dutton*, 60 Mo. 297; *Chaffe v. Memphis etc. R. R. Co.*, 64 Mo. 196; *Semple v. Turner*, 65 Mo. 696; *Mastin Bank v. Hammerslough*, 72 Mo. 274; yet it will be found on examination that in every one of these cases the payee of the note indorsed was a third person. We have not found a case in our reports or where it has ever been applied to an indorsement of a note made payable to the order of the drawer.

Such a note was an incomplete and void contract at common law, but by the custom of merchants after it had been negotiated, that is, after the drawer, as payee, had indorsed his name upon the note and delivered it to a third person, it was treated as a valid, negotiable, promissory note, payable to bearer, and has been so held in England since the statute of 3 & 4 Anne, cap. 9 (*temp.* 1704). Our statute, Revised Statutes, 1889, section 735, is declaratory of the law merchant upon the subject.

The character of such an instrument before it is indorsed by the maker is clearly stated by Parke, B., in *Hooper v. Williams*, 2 Ex. 20, in the following language: "No right to sue could exist in anyone, in the case of a note payable to the maker's order, until the order was made in the shape of an indorsement; until that indorsement was made, it was an imperfect instrument, and, in truth, not a promissory note at all, and consequently not transferable under the statute. What, then, is the effect of the indorsement to another person? We think it was to perfect the incomplete instrument, so that the original writing and indorsement taken together became a binding contract, though an informal one, between the maker and the indorsee, and then, and not till then, it became an assignable note." See also *Smalley v. Wight*, 44 Me. 442; 69 Am. Dec. 112; 1 Daniel on Negotiable Instruments, sec. 130; Tiedeman on Commercial Paper, sec. 20; *Little v. Rogers*, 1 Met. 108.

The language of the learned judge in *Smalley v. Wight*, 44 Me. 442, 69 Am. Dec. 112, is that the note "is no better than blank paper, so long as it remains in the hands of the maker; and although it has the form, it has not the legal vitality of a contract. It becomes a contract only by being negotiated. . . . We cannot doubt, for the reasons already stated, that

such paper is invalid as a contract until it is indorsed. It is the indorsement alone which gives it efficacy."

Now, when one indorses such an incomplete instrument before it is made perfect, by the indorsement of the maker as payee, and delivers it to such maker, what is his contract? What can his contract be other than to authorize the maker to make it a complete and binding contract on him as an indorser, by writing over his name the maker and payee's name, on the back of the note as first indorser? This would seem to follow with as much or more force than the assumption that one who indorses a completed note, having one person for its maker and another person for its payee, but to which he is a stranger, before it is indorsed by the payee, intended to contract as a maker. In the one case, by indorsing the note, in itself a complete contract on which he is neither payee or indorsee, he must be presumed to have intended to charge himself in some relation, and as he could not on this completed contract charge himself as indorser, he must be presumed to have intended to charge himself as maker. In the other, by indorsing a note which in itself is not a complete contract, he must be presumed to have intended to charge himself only in the manner in which his name will appear on the note, when the contract is perfected by the indorsement of the maker's name as payee, when he will appear on the paper as indorsee, and his contract with a subsequent holder is that of an indorser; for as such only he appears on the note after it has acquired validity as a contract: *Blatchford v. Milliken*, 35 Ill. 434; *Kayser v. Hall*, 85 Ill. 511; 28 Am. Rep. 624.

The doctrine that when a person, not a party to a note, puts his name upon it before it is delivered as a valid contract, thereby makes himself an original promisor, so long maintained in this state, was taken from Massachusetts, the case of *Powell v. Thomas*, 7 Mo. 440, 38 Am. Dec. 465, being bottomed on *Moies v. Bird*, 11 Mass. 440, 6 Am. Dec. 179; and while the doctrine was maintained there in a long line of decisions with the same persistency as here, until set aside by legislative enactment in 1874 (Pub. Stats., Mass., c. 77, sec. 15), yet in 1859, long before such legislative interference, the supreme court of that state refused to extend the principle to the case of a note payable by the drawer to himself and indorsed by a stranger to the note before negotiation by the drawer; that court saying, in *Clapp v. Rice*, 13 Gray,

403, 74 Am. Dec. 639, that "the correctness of these decisions, however much they may be obnoxious to criticism upon principle, it is too late to question. They have formed an established rule for the construction of that class of contracts in Massachusetts, which cannot now be disturbed without manifest injustice; but the doctrine is somewhat anomalous, and is not to be extended beyond the line of adjudged cases."

This is precisely the situation with us, and as we have seen, the case in hand does not come within the line of the decisions in this state sustaining this doctrine, and, if our reasoning be correct, is not within the principle upon which they are based, and ought not to be ruled by them. We also are unwilling to extend the doctrine beyond the line of the adjudicated cases.

It follows that on the uncontradicted evidence of the plaintiff, the finding and judgment ought to have been for the defendants. The judgment of the circuit court is therefore affirmed. All concur.

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**WITNESSES — DEATH OF ONE PARTY TO CONTRACT — COMPETENCY OF THE OTHER.** — The surviving party to a contract will not be permitted to testify against the assignee or representative of the deceased in respect to an alleged alteration thereof: *Harris v. Bank*, 22 Fla. 501; 1 Am. St. Rep. 201, and note. The death of the vendor in a parol contract to convey renders the vendee incompetent to testify as to improvements made by him on the land: *Emmel v. Hayes*, 102 Mo. 186; 22 Am. St. Rep. 769. A party cannot testify as a witness to a contract or conversation between himself and a deceased person when the opposite party derives his title from such decedent: *Larsen v. Johnson*, 78 Wis. 300; 23 Am. St. Rep. 404. The same rule is maintained in the following cases: *Welch v. Adams*, 63 N. H. 344; 56 Am. Rep. 521, and note; *Chapman v. Dougherty*, 87 Mo. 617; 56 Am. Rep. 469; *Davis v. Davis*, 26 Cal. 23; 85 Am. Dec. 157.

**NEGOTIABLE INSTRUMENTS — INDORSEMENT BY ONE NOT PAYER.** — A stranger indorsing a note at the time of execution is presumed to indorse as a guarantor: *Dietrich v. Mitchell*, 43 Ill. 40; 92 Am. Dec. 99, and note with cases collected; *Moore v. McKinney*, 83 Me. 80; 23 Am. St. Rep. 753, and note. See extended note to *Perkins v. Catlin*, 29 Am. Dec. 297, discussing the liability of one other than a payee or holder who indorses a promissory note in blank; also, notes to *Hall v. Newcomb*, 42 Am. Dec. 86; *Powell v. Thomas*, 38 Am. Dec. 467; and *Bright v. Carpenter*, 34 Am. Dec. 433.

## YOUNGER v. JUDAH.

[111 MISSOURI, 303.]

**CIVIL RIGHTS — SEPARATION OF WHITE FROM COLORED PERSONS IN THEATER.** — In the absence of valid legislation to the contrary, the owner or manager of a theater or other place of public amusement may make and enforce a rule requiring colored persons to occupy separate seats and a separate portion of the building from white persons. Such rule is a reasonable regulation, and is not in conflict with nor in violation of the the fourteenth amendment to the constitution of the United States.

*Henry R. Hall*, for the appellant.

*Henry Woolman and Alexander New*, for the respondent.

BLACK, J. The questions presented for our consideration in this case arise out of the action of the court in sustaining a demurrer to the plaintiff's evidence.

The substantial averments of the petition are: That the defendant was the lessee of the Ninth Street Theater in Kansas City, that the plaintiff purchased two tickets calling for seats in the orchestra, and that defendant and his employees unlawfully and maliciously refused to seat him in the seats so purchased. There is the further allegation that defendant and his agents unlawfully, maliciously, and insultingly ejected plaintiff from the theater.

The evidence discloses these facts: After the plaintiff had purchased the tickets as alleged, he and his companion, a colored woman, passed up a flight of stairs. An employee, stationed at the upper landing, received the tickets, detached portions of them, and handed the seat coupons back to the plaintiff. He and the woman passed to the orchestra floor, where he gave the seat coupons to an usher, and they all three started toward the seats. On their way, this usher was met by another one, and the two had a conversation. Plaintiff in his evidence says they held a "whispered confab for a few minutes"; that during this conversation he overheard the word "nigger"; that one of the ushers informed him that he could not have the seats; that there had been some mistake. After a further conversation, the usher said: "You cannot stay here; it is against the rules." The usher then proposed to exchange the tickets for others, and seat him in a different part of the house, and for that purpose started up to the balcony; but the plaintiff refused to follow.

As to what then occurred, the plaintiff testified: "I went on down to the box office and presented the tickets to the



person who sold them to me, and asked him why I could not have the seats. He seemed to be indignant, and said: 'You can have them.' He looked at me again, and I suppose he discovered that drop of African blood in me, and said: 'It is a mistake; those seats are occupied.' " The person in charge of the ticket office offered to exchange the tickets for tickets in the balcony or refund the money paid by plaintiff; but the latter refused both offers, and left of his own volition. He and his companion went to another theater, where he procured seats set apart for colored persons. He had attended entertainments at the defendant's theater on former occasions, and, when in company with colored persons, took a seat in the balcony, but when alone was admitted to the orchestra. He says the usher on the occasion in question used sneering language; but his further examination shows clearly that the usher did no more than say in firm but respectful language that he could not have the seats, because it was against the rules of the house.

The charge made in the petition that defendant ejected plaintiff from the theater is not supported by any evidence, and must therefore be disregarded.

The tickets for seats in the orchestra were sold to plaintiff on the supposition that they were to be used by white persons. This is evident. It is clear, too, that defendant had a rule to the effect that colored persons attending his place of amusement should occupy seats in the balcony; and the only real question in this case is, whether he had a right to make and enforce such a rule. If he had, the plaintiff has no cause of action.

It is earnestly insisted on behalf of the plaintiff that such a rule amounts to discrimination against colored persons, and that such discrimination is prohibited by the fourteenth amendment of the constitution of the United States. The clauses of that amendment relied upon by the plaintiff are those whereby it is declared that "no state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws." These clauses do not undertake to confer new rights, nor do they undertake to regulate individual rights. They are simply prohibitory of state legislation and of state action. All this was held and ruled in the *Civil Rights Cases*, 109 U. S. 3. As there stated "individual invasion of individual

rights is not the subject-matter of the amendment." This state has enacted no law having any application to the present case. It does not undertake to say how theaters and other places of amusement shall be managed. As the state does not by itself or through the city of Kansas undertake to regulate theaters, and as the clauses of the fourteenth amendment before noted are prohibitory of state action only, they have nothing to do with the question in hand. There is nothing upon which the prohibitions can operate.

Many of the states have enacted laws known as civil rights statutes, and we are cited to cases upholding and giving effect to such laws. Under them it has been held that the proprietor of a theater will be liable in damages for a refusal to admit a colored person: *Joseph v. Bidwell*, 28 La. Ann. 382; 26 Am. Rep. 102; *Donnell v. State*, 48 Miss. 661; 12 Am. Rep. 375; and for a refusal to admit a colored person to the several circles or grades of seats in a theater: *Baylies v. Curry*, 128 Ill. 287; and for refusing a colored person admission to a skating rink: *People v. King*, 110 N. Y. 418; 6 Am. St. Rep. 389; and for drawing any line of distinction between a white and black man at a restaurant: *Ferguson v. Gies*, 82 Mich. 358; 21 Am. St. Rep. 576; but, as we have no such statute, these cases furnish no aid in the solution of the question now in hand.

We have held that our statute which establishes separate schools for colored children does not violate the fourteenth amendment, and this, for the reason that separation of children for such purposes is but a reasonable regulation of the exercise of a right conferred upon all children, whether white or black: *Lehew v. Brummell*, 103 Mo. 546; 23 Am. St. Rep. 895; and so it has been held in several states, as will be seen by the authorities cited in that case and in the brief of defendant in this one. We believe it is conceded on all hands that a common carrier of passengers may make and enforce reasonable rules for seating passengers; and it has been held that such a carrier, in the absence of any statute to the contrary, may separate white and black passengers in a public conveyance, as a railroad car: *Westchester etc. R. R. Co. v. Miles*, 55 Pa. St. 209; 93 Am. Dec. 744.

In *Hall v. DeCuir*, 95 U. S. 485, the defendant was the master and owner of a steamboat enrolled and licensed under the laws of the United States. The plaintiff, a colored woman, being refused accommodations, on account of her color, in the cabin specially set apart for white persons, brought

suit for damages. She based her cause of action upon a statute of Louisiana which provided that the rules prescribed by common carriers should make no discrimination on account of color. The state court construed the law as applying to those engaged in interstate commerce; but the supreme court of the United States held the act unconstitutional so far as it applied to foreign and interstate commerce. Says the court: "Congressional inaction left Benson [the defendant] at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana; . . . we think this statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from Congress and not from the state."

While the statute was held void as to cases like the one then in hand, because it interfered with interstate commerce, still the opinion, as we view it, proceeds upon the theory that in the absence of valid legislation the defendant had the right to set apart a portion of the steamboat for the special and exclusive use of white passengers. If common carriers may make and enforce such rules, there can be no good reason assigned why proprietors of theaters may not do the same thing. This being so, it is not necessary to a proper disposition of this case to say how far or to what extent theaters are to be regarded as public places; nor is it necessary to say to what extent they may be made public places by statute or local municipal laws. In any event, the proprietors of theaters may make and enforce such rules as the one now in question.

Colored persons have their own schools, their own churches, and often their own places of amusement. Whites attending places of amusement designed specially for colored persons may be required to occupy separate seats. When colored persons attend theaters and other places of amusement, conducted and carried on by white persons, custom assigns to them separate seats. Such separation does not necessarily assert or imply inferiority on the part of one or the other. It

does no more than work out natural laws and race peculiarities. It ordinarily contributes to the convenience and comfort of both. The colored man has and is entitled to have all the rights of a citizen, but it cannot be said that equality of rights means identity in all respects. Here the defendant did not exclude or attempt to exclude colored persons from his theater. He provided accommodations for them, but in doing so required them to purchase tickets for and take seats in the balcony, and this rule adopted by him accords with the custom and usage prevailing in this state. Such custom has the force and effect of law until some competent legislative power shall establish some other and different rule. The defendant's rule was no more than a reasonable regulation which he had a right to make and enforce.

The judgment is therefore affirmed. All concur.

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**CIVIL RIGHTS — SEPARATION OF WHITE FROM COLORED PERSONS IN PUBLIC PLACES.** — A law merely separating the two races for the purposes of instruction deprives no one of any rights, and is not unconstitutional when colored children are given all the privileges and advantages afforded white children: *Lehew v. Brummell*, 103 Mo. 546; 23 Am. St. Rep. 895, and note; *People v. Gallagher*, 93 N. Y. 438; 45 Am. Rep. 232, and extended note. But in Michigan the keeper of a public restaurant cannot discriminate against a colored person as to the part of the building in which he shall be served, solely on account of his color: *Ferguson v. Gies*, 82 Mich. 358; 21 Am. St. Rep. 576, and note discussing the right of a theater manager to separate the races. See also note to *Louisville etc. R'y Co. v. State*, 14 Am. St. Rep. 605, in which the latter subject is further discussed, and in which all the cases in the series are collected.

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## SPOTTS v. WABASH WESTERN RAILWAY COMPANY.

[111 MISSOURI, 380.]

**NEGLIGENCE OF RAILROAD TO SERVANT OF ANOTHER COMPANY.** — When a person employed by an elevator company to unload freight cars belonging to a railroad company, and standing on one track, is killed without any signal of warning, and while in the exercise of ordinary care, by the sudden backing of other cars upon an adjacent track, where he is standing while an unloaded car is being weighed, the railroad company, having prior notice of his employment and presence about the tracks, is guilty of negligence and liable in statutory damages.

**NEGLIGENCE OF RAILROAD — EVIDENCE OF FAILURE TO GIVE WARNING.** — When one lawfully upon the premises of a railroad company is injured by the sudden backing of a car, evidence that no signal of warning was given is admissible on the issue of negligence as part of the *res gesta*.



**NEGLIGENCE OF RAILROAD — EVIDENCE.** — When one lawfully upon the premises of a railroad company is injured by the sudden backing of a car, evidence that the company had prior notice of his employment and presence about its tracks is admissible on the issue of negligence.

**RAILROADS — DUTY TO PERSONS LAWFULLY UPON PREMISES.** — A railroad company must exercise at least ordinary care and reasonable diligence to prevent injury to a person lawfully upon its premises.

**ACTION** to recover damages. The plot on the opposite page shows the locality in which the injuries were suffered:—

*F. W. Lehman and George S. Grover*, for the appellant.

*A. R. Taylor*, for the respondent.

**BARCLAY, J.** Mrs Spotts, the plaintiff, recovered statutory damages (five thousand dollars) in the circuit court for the killing of her husband, and the defendant has appealed against that judgment.

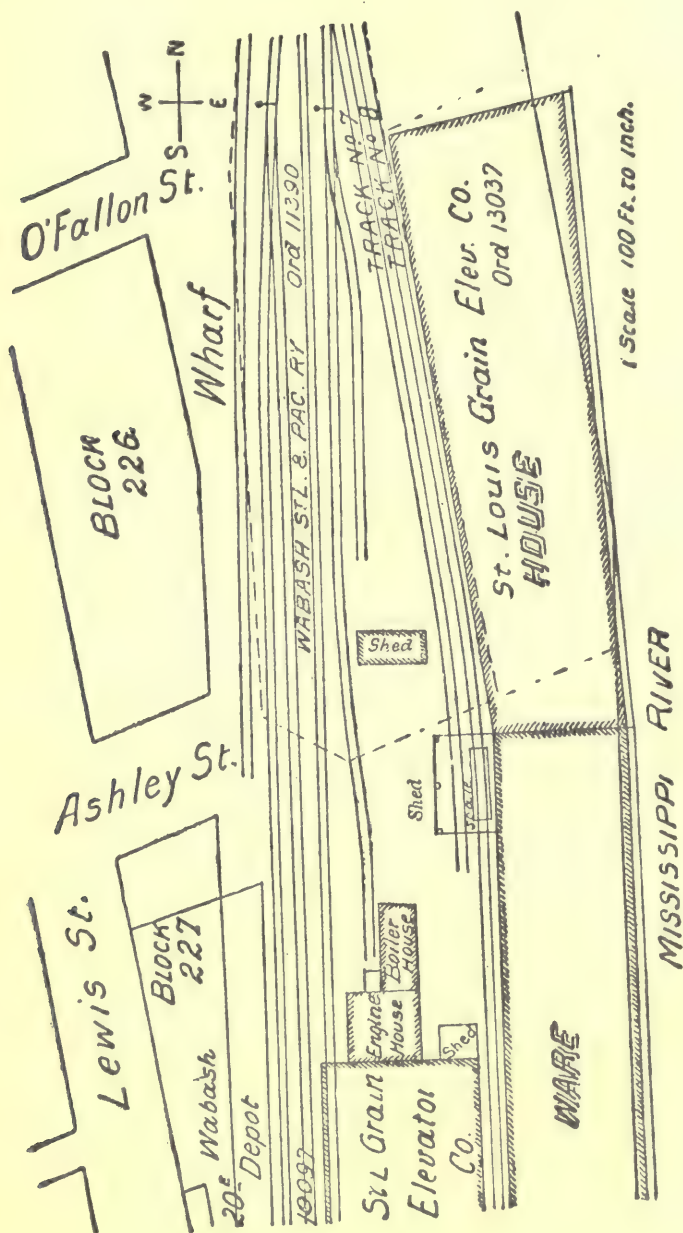
The ground of the action, as indicated by the petition, is, shortly, that Mr. Spotts met his death by reason of negligent movements and handling of defendant's cars, and of its failure to observe city ordinances requiring the engine bell to be rung while cars are moving; that a man be stationed on top of the car farthest from the engine of any backing train, etc.

The defense put in issue the charges of negligence, and asserted contributory negligence of the deceased, which, in turn, was denied by a reply.

The plaintiff's evidence tended to account for the death of Mr. Spotts in this wise: He was in the employ of Mr. Michael Walsh, who had a contract to furnish the necessary labor to unload cars, etc., for the St. Louis Grain Elevator Company, at the time of the accident, August 17, 1888. The place of the accident was on premises used by defendant, adjacent to the warehouse of the elevator company, on the wharf or levee near the foot of Ashley Street, St. Louis. Its prominent features are shown at once by the accompanying diagram, offered in evidence by defendant, without objection.

The small parallelogram, crossed by track number 8, represents the car scales. Track number 7 ended, or disappeared from view and from use (by reason of earth or dirt covering it), at a point about opposite to and west of the scales.

A "string" of freight cars was standing on track 7, the last of which, toward the south, stood some two or three feet from the point where that track disappeared as stated. That point we shall hereafter refer to as the end of track 7, after this explanation of our meaning.



Mr. Walsh had twenty-two men engaged, on the date mentioned. They were unloading sacks of wheat from defendant's cars on track 8, and putting the sacks in the warehouse of the elevator company. When one car was unloaded, it was pushed by hand, northward, upon the scales to be weighed. The men were told to stand clear, while the clerk was weighing it. They did so. Spotts and some others took positions near the cars on track 7, a few feet south of the point where it ended. The space between those cars and that on track 8 was two and a half feet. Just then there was a sudden movement or jerk of the cars, southward, on track 7, which caught Spotts, threw or dragged him some fifteen or twenty feet beyond the end of that track, and inflicted injuries from which he died. That movement was occasioned by a switch engine of defendant backing south on track 7 to shift some of the cars.

All this occurred in daylight. No warning of any sort was given of the movement described. Nor was there any man on top of the car farthest from the engine. The plaintiff's relationship to the deceased was also shown. The foregoing exhibits the substance of her case.

1. The first point is that these facts did not warrant the submission of the cause to the jury for any finding of negligence on defendant's part. The place of the injury was part of the public wharf of St. Louis, and the deceased and the gang to which he belonged were working, thereabout, for the elevator company, to which the contents of defendant's cars were consigned. Defendant had notice of the particular work which the gang had on hand. (We shall have occasion to mention that notice more particularly, further along.) In such circumstances it is too plain for any extended discussion that defendant, in moving its cars, was bound to use reasonable care not to run down any one of the working force, engaged as was the deceased. The physical surroundings of the spot made it evident that some of Walsh's men were likely to stand where Spotts was standing, while the empty car was being weighed. Defendant was chargeable with the exercise of at least ordinary care toward persons thus lawfully upon such premises. The jury found that it failed to use such care, and we consider that there was ample evidence to support that finding. The very movement of the car described, on track 7, speaks for itself as evidence of its negligent management in the circumstances: *Mooney v. Connecticut Riv. Lumber Co.*, 154 Mass. 407.

2. In this connection it may be remarked that it was proper to permit the witnesses to state that no signal or warning was given of the sudden backing of the car that did the damage. Such evidence was clearly admissible as part of the *res gestæ*. It had an obvious bearing upon the issue of negligence already discussed.

3. Error is next assigned on the admission of a statement by witness Walsh, touching prior notice to the defendant of the presence of his men about these tracks. He testified that, on the day before this accident, some cars were run southward on track 8, and struck a car from which his men were, at the time, unloading wheat. No one was hurt, but the escape from a casualty was so narrow that Walsh went at once to the foreman of the yard and had an interview with him, which he describes thus: ". . . told him: 'Mr. Wells, you want to be careful on those two tracks, they are so close together, you came near killing some of my men; they were walking out of the cars with sacks on their shoulders when you kicked in some cars there, and knocked my gangway down; and we are very busy on that track now, busier than we have been for some time, and you will have to be very careful when you work on those tracks.' He didn't say anything, and walked away; and the next day Spotts got killed; . . . Mr. Wells was the foreman of the crew of this engine that threw those cars down."

This evidence was, no doubt, admitted to establish notice to defendant that the gang to which deceased belonged was engaged about the place of the accident, a fact, obviously, having an important bearing in forming an estimate of the care that would be reasonable in such circumstances in moving cars in close proximity thereto, but beyond that no objection was made to the admission of that statement, or exception taken to it. So we need consider it no further.

4. As to the issue of contributory negligence of deceased, we regard that as fairly one for the jury on these facts. When deceased was struck he was south of the point where track 7 ended. There was nothing to suggest the probability of any such movement of cars in that direction as actually took place. He was not a trespasser. The limited space available as standing room indicates that his taking position where he did, while awaiting the weighing of the empty car on track 8, was a most natural act.

But, without repeating facts already mentioned, it is enough



to say that we do not consider his action in the premises as justifying a ruling that he was negligent as a matter of law. The jury have found that he was not, as a matter of fact.

5. It does not seem necessary to review the instructions in detail. They submitted the case in conformity to the principles above declared. We see no reason to reverse the judgment, or to prolong our comments upon the case.

The judgment is affirmed.

SHERWOOD, C. J., BLACK and BRACE, JJ., concur.

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**RAILROADS — LIABILITY FOR NEGLIGENCE TOWARDS SERVANT OF ANOTHER COMPANY LAWFULLY ON ITS PREMISES.** — Where a common switch yard is used by different railroads, each having its track passing very near the other, each company owes the same duty as to care towards the employees of the other necessarily upon its track in the discharge of their duty that it owes to its own employees upon its own track under similar circumstances: *Mc-Marshall v. Chicago etc. R'y Co.*, 80 Iowa, 757; 20 Am. St. Rep. 445; *Sullivan v. Tioga R'y Co.*, 112 N. Y. 643; 8 Am. St. Rep. 793. A railroad company, over a section of whose road another company runs its trains by virtue of a contract, is liable in tort to brakeman of the latter who is injured by the former's negligence without fault of his or his employer: *Nugent v. Boston etc. R. R.*, 80 Me. 62; 6 Am. St. Rep. 151, and note. See also note to *Missouri Pac. R'y Co. v. Jones*, 16 Am. St. Rep. 883. A railroad is liable for its negligence or that of its servants causing personal injury to one traveling in charge of live stock on its train: *Missouri Pac. R'y Co. v. Ivy*, 71 Tex. 409; 10 Am. St. Rep. 758; or to a mail clerk while traveling in a mail car under a contract for his transportation in that car: *Gulf etc. R'y Co. v. Wilson*, 79 Tex. 371; 23 Am. St. Rep. 345, and note with cases collected discussing a railroad's liability for injuries to the employees of other companies lawfully on its train; and a railroad will also be liable for negligence to one who is on a freight car that is being loaded, by permission of the conductor, unless he knew that the conductor could not grant such permission: *Alabama etc. R. R. Co. v. Yarborough*, 83 Ala. 238; 3 Am. St. Rep. 715.

**RAILROADS — DUTY TO GIVE WARNING TO PERSONS RIGHTFULLY ON ITS PREMISES:** See *Sullivan v. Vicksburg etc. R. R. Co.*, 39 La. Ann. 800; 4 Am. St. Rep. 239, and note.

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## PITZMAN v. BOYCE.

[111 MISSOURI, 387.]

**EASEMENT BY ADVERSE USER.** — When a party has enjoyed an easement for such length of time as to confer title to land from the true owner to the disseisor, this adverse enjoyment will establish the right to the easement as against the owner of the servient estate.

**EASEMENT BY ADVERSE USER.** — To make the enjoyment of an easement adverse to the owner of the servient estate, the intent to claim and enjoy the easement must exist. In the absence of such intent and claim no adverse enjoyment will arise.

**LICENSE BY PAROL — WHAT CONSTITUTES REVOCATION — EXPENDITURES BY LICENSEE.** — When one lays sewer pipe on the land of another without

his consent but with his knowledge, his use is not adverse, but merely permissive, and constitutes only a revocable parol license, notwithstanding expenditures made by the licensee.

**LICENSE BY PAROL — REVOCATION AFTER EXECUTION — EXPENDITURES BY LICENSEE.** — A parol license executed upon the land of another without agreement or consideration may be revoked at pleasure by the licensor, so far as its further enjoyment is concerned, notwithstanding expenditures made by the licensee, and without remedy to him for the recovery of such expenditures.

**PAROL LICENSE — REVOCATION — NOTICE.** — A parol license to lay and use sewer pipe upon the land of another, in the absence of agreement or consideration, may be revoked at the pleasure of the licensor, without notice to the licensee, although he has made expenditures; and a severance of the pipe between the lands of the licensor and the licensee is a revocation of such license.

**PETITION** for an injunction to prevent the defendant from removing certain sewer pipes on her land, whereby complainant is enabled to drain his premises. The parties to the action are adjoining landowners. In 1869 the plaintiff laid such sewer pipe in and upon the land of defendant, without her consent, although she was informed of it and of its purpose in 1874 or 1875. The laying of the pipe was done openly, and the use to which it was put was open to the observation of anyone. The pipe remained so laid and in use until 1889, the plaintiff having expended four or five hundred dollars in raising and straightening the pipe and perfecting his system of drainage. In 1889, the defendant being about to sever the pipe between her land and that of the plaintiff, he obtained a temporary injunction restraining her from disturbing the pipe. The plaintiff claims a prescriptive right to continue in his use of the sewer pipe on defendant's land. The court below dissolved the temporary injunction, and dismissed the petition.

*Fred. Wislizenus*, for the appellant.

*E. T. Farish*, for the respondents.

**SHERWOOD, P. J.** The correctness of the view taken by the lower court is now to be examined. The question first to be determined in this case is whether the use was really adverse to the owner, or was it merely permissive in its character. If permissive in its inception, then such permissive character, being stamped on the use at the outset, will continue of the same nature, and no adverse user can arise until a distinct and positive assertion of a right hostile to the owner, and brought home to him, can transform a subordinate and friendly holding into one of an opposite nature, and

exclusive and independent in its character: *Budd v. Collins*, 69 Mo. 129; *Estes v. Long*, 71 Mo. 605; *Wilson v. Lerche*, 90 Mo. 473; *Wilkerson v. Thompson*, 82 Mo. 317. It is true that the cases just cited relate to adverse possession in the ordinary way; but the principle is the same in either case.

Though the statute of limitations has no reference to easements, yet where a party has enjoyed an easement for such length of time as to confer title to land from the true owner to a disseisor, this adverse enjoyment will in law establish the right to the easement as against the owner of the servient estate: *Wood on Nuisances*, sec. 704; *House v. Montgomery*, 19 Mo. App. 170; *State v. Walters*, 69 Mo. 463; *State v. Wells*, 70 Mo. 635; *State v. Proctor*, 90 Mo. 334.

And such adverse user for the statutory period will give origin to the rebuttable legal presumption of a grant, even though the use in its inception was a trespass: *Wood on Nuisances*, secs. 704, 705.

The circumstances of this case already detailed conspicuously show that the use in this instance was not adverse, but merely permissive. And long-continued user is not sufficient in and of itself to establish an easement of the sort here claimed. To make the enjoyment of an easement adverse to the owner of the servient estate, the intent must exist to claim and enjoy the right adversely. In the absence of such intent and such claim, no adverse enjoyment will arise.

The right in this case, then, must be regarded as merely permissive,—in short, a license. Now, from its very nature, a license is revocable; but the authorities are divided as to whether a license is revocable after it has been executed, money expended, etc. Touching this point, an eminent author observes: "Some of the courts, indeed, deny the right of the (parol) licensor even to revoke the license, after outlay under it, resting the case on the ground of estoppel *in pais* or treating the situation as equivalent to part performance of a parol agreement for the sale of an interest in real estate. But the better view, in presence of the statute of frauds, appears to be that, so far as the question of further enjoyment is concerned, the license may be revoked, though no action can be maintained against the licensee for what he has been induced or led to do. *Volenti non fit injuria*": *Bigelow on Estoppel*, 5th ed., 666, 667.

And a distinction is taken by the authorities between acts done on the licensor's land and those done on that of the

licensee, the former being revocable, the latter not: Washburn on Easement and Servitude, 3d ed., 25, 679; 1 Washburn on Real Property, 5th ed., 672.

The view of Bigelow as to what is the correct doctrine as to executed licenses, and as to their revocability, evidently meets the approval of another text writer of recognized authority, who touching this subject says: "Another class of cases where the license may be revoked is where the act licensed to be done is to be done upon the land of the licensor, and if granted by deed would amount to an easement therein. If such license be by parol, it may be revoked as to any act thereafter to be done, even though in order to enjoy it the licensee may have incurred expenses upon the premises of the licensor. Thus where A, by B's license, laid an aqueduct across B's land, who then revoked it and cut off the pipe that conducted the water, the court, as a court of equity, refused to interfere, because B had a right to revoke the license at his pleasure. And in another case the licensee not only had laid an aqueduct, but dug a well to supply it upon the land of the licensor, and was without remedy, though the licensor cut it off. In another, the licensee, under a license to enter upon land, had expended money thereon and incurred expense on account of the same, and it was held revocable. The importance of the principle involved in the foregoing propositions in respect to the power of a licensor to revoke his license, even though the licensee, acting under such license, may have incurred expense for which he can claim no remuneration, seems to render a review of some of the cases where the question has been raised, proper by way of illustration. In one class of these, the licensee at a considerable expense cut a drain in the licensor's land, by which the water of a spring flowed to his own land, and, after enjoying it some years, the licensor revoked the license and stopped it. The licensee was held to be without remedy. In another, the licensor gave the licensees permission to construct a culvert on their land, and thereby divert a current of water onto his land, which they did at their own expense, and it was held to be revocable. In another, the license was to build a dam, or part of it, on the licensor's land, for the purpose of working a mill belonging to the licensee. And in another the license was to flow the licensor's land for raising a head of water to licensee's mill. And in both the licenses were held revocable, without remedy to the licensee for the expenses incurred. . . . In another class



of cases the license has been to erect and maintain a house on the licensor's land, and in some cases the revocation has been before the building was completed, in others after it had been erected, and in both the builder was obliged to remove it without any right to claim compensation for loss": 1 Washburn on Real Property, 5th ed., 665, 666, and cases cited.

The learned author then cites and quotes from adjudicated cases which hold a different view; but the rulings in those cases, as he shows, are evidently grounded on some earlier English cases, notably *Taylor v. Waters*, 7 Taunt. 384, the doctrine of which was exploded in *Wood v. Leadbitter*, 13 Mees. & W. 838, in an elaborate and able opinion by Alderson, B. The facts, on which the litigation was there based, were these: "The owner of land on which was a stand for the spectators at a horse race, sold a ticket to the plaintiff to enter and witness the race. Before the race was over, without any misconduct on the part of the plaintiff, or tendering him back the admission fee, the owner ordered him to leave the premises, and afterwards removed him; and it was held that his ticket was a mere license which was revocable."

In that case, when illustrating his position, Baron Alderson said: "A mere license is revocable, but that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it so as to defeat his grant, to which it was incident. . . . But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a valid grant, and it is therefore revocable. Thus a license by A to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the license, would have been unlawful. If the license be . . . not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a license annexed to come on the land; and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it; he would be estopped from defeating his own grant or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a watercourse to flow on the land of the licensee. In such a case there is no valid grant of the watercourse, and the licensee

remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the license would be irrevocable."

In this state *Wood v. Leadbitter*, 13 Mees. & W. 838, has been cited approvingly in *Desloge v. Pearce*, 38 Mo. 599. In that case, acting under a parol license, one, at great expense, had entered upon the land of another and excavated the same for minerals, and had remained there thus mining for over ten years, when the owner revoked the license, and the licensee was held without remedy. It is not believed that the cases of *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484, and *Baker v. Chicago etc. R. R. Co.*, 57 Mo. 265, intend to declare any different rule.

In the latter case there was something more than a mere parol license; it was a contract evidenced by a conveyance delivered in escrow to the agent of the company granting the right of way, and to be delivered on compliance with its terms. "The doctrine of the revocability of licenses rests upon the familiar principle that a freehold interest in lands can only be created or conveyed by deed; and as before stated, an easement in the land of another cannot be created except by deed, or what is equivalent, prescription": 1 Washburn on Real Property, 670.

In *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384, 54 Am. Rep. 243, the very clear distinction is taken between a mere parol license, followed by expenditures and improvements, and a parol contract for the sale of the land followed by like improvements placed upon the land on the faith of the parol contract being performed; and the holding is there made that in the latter case equity could intervene on the ground of part performance, but not in the former case, where no such basis, to wit, a contract made, was in existence. And in that case it was aptly said: "To say that the license is irrevocable, because the thing permitted to be done necessarily involved the expenditure of money, would be going beyond the most extreme views on the subject, and make most licenses irrevocable. The practical effect of such a doctrine would be to make most licenses conveyances of an interest in land by mere estoppel *in pais*. . . . Such a decision would establish the rule that all licenses founded upon a valuable consideration, or necessarily involving the expenditure

of money, would be irrevocable, which would practically destroy the distinction between a license and a grant."

In *Wolfe v. Frost*, 4 Sand. Ch. 90, it was forcibly said that if the doctrine of the irrevocability of an executed license maintained in some jurisdictions is law, "a parol license, executed, or acted upon, is sufficient to pass an incorporeal hereditament; thus not merely repealing the statute of frauds, but abolishing the rule of the common law that such an estate can only be conveyed by a deed." See also *Jamieson v. Milleman*, 3 Duer, 255, and *Fargis v. Walton*, 107 N. Y. 398, and cases cited.

Guided by these authorities, it should be ruled that in the case at bar a mere parol license was given to the plaintiff, a license revocable at the pleasure of the licensor. But if, on the other hand, the doctrine that an equity is created where, under a parol license, money has been expended and improvements made, and therefore the powers of a court of equity may be invoked, and specific performance decreed, the plaintiff, in this instance, must fail of obtaining such relief for the additional reason that the expenditures and labor were done without any prior and distinct agreement, and without any consideration. Parol agreements for the conveyance of land must not only be founded upon a valuable consideration, but the contract to be performed must be clearly defined by satisfactory testimony, and be accompanied by acts unequivocally referable to the alleged agreement. There are no such constituent elements to be found in this case: *Wiseman v. Luck-singer*, 84 N. Y. 31; 38 Am. Rep. 479.

But one point remains to be discussed, and that is whether the plaintiff was entitled to any notice before the removal of his pipes. Under the authorities a reasonable time is allowed a licensee in which to enter on the land of his licensor, and to remove whatever structures or improvements he has placed thereon. And even in the case of a nuisance, as where one builds a house where another has a right of common, it has been held that before the latter could forcibly abate the nuisance, it was his duty to notify the wrongdoer to remove it. Where a nuisance is merely permitted to exist, and the case not urgent, notice and an opportunity for its removal are necessary, and should be afforded to the party creating the same, before resort is had to more extreme measures: *Wade on Notice*, 2d ed., sec. 480b.

But none of those instances afford any illustration of the

point in hand. Here there are no structures or improvements to remove, the sole question being whether without notice defendant could sever the connection between the sewer pipes on the land of plaintiff and those on the land of defendant, and we hold that she could, and that such removal was a revocation of the previously granted parol license. Therefore, judgment affirmed. All concur.

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**EASEMENTS BY ADVERSE USER.** — In order to establish an easement in the lands or waters of another it is necessary that the enjoyment be adverse and under claim of right, with the knowledge and contrary to the interests of the owner, and that it has continued in that manner for the period fixed by the statute: *Houg v. Place*, 93 Mich. 450; *Totel v. Bonnefoy*, 123 Ill. 653; 5 Am. St. Rep. 570, and note; *Blaine v. Ray*, 61 Vt. 566; note to *Conner v. Woodfill*, 22 Am. St. Rep. 570; note to *Hesperia Land etc. Co. v. Rogers*, 17 Am. St. Rep. 210; note to *Bonelli v. Blakemore*, 14 Am. St. Rep. 556. The rule is that the acquisition of an easement by adverse use follows the analogy of the acquisition of title by adverse possession: *Ballard v. Demmon*, 156 Mass. 449. Where each of two adjoining landowners permits the other to pass over his fields merely as a matter of mutual accommodation, the user of neither party will be adverse to the other and no easement will be acquired: *Bennett v. Biddle*, 140 Pa. St. 396.

**LICENSES BY PAROL — CREATION AND REVOCATION OF.** — This question is thoroughly discussed in *Lawrence v. Springer*, 49 N. J. Eq. 289; 31 Am. St. Rep. 702, and an extended note thereto; and *Metcalf v. Hart*, 3 Wyo. 513; 31 Am. St. Rep. 122, and note. A mere parol license is revocable at the will of the licensor while it remains executory, but an executed parol license granted upon consideration, or upon the faith of which money has been expended, cannot be revoked: *Messick v. Midland R'y Co.*, 128 Ind. 81; *Nowlin v. Whipple*, 120 Ind. 596; *Ferguson v. Spencer*, 127 Ind. 66; and where the license has been so far executed that its revocation would work a fraud, actual or constructive, upon the licensee, equity will restrain such revocation: *Morton Brewing Co. v. Morton*, 47 N. J. Eq. 158.

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## EYRE v. JORDAN.

[111 MISSOURI, 424.]

**LANDLORD AND TENANT — LIABILITY OF LANDLORD FOR DEFECTS IN LEASED PREMISES.** — The fact that the top step of a short stairway, furnishing the usual entrance to the leased premises, is twelve inches shorter than the remaining steps, does not constitute such stairway a nuisance so as to make the landlord liable for injury to a person using it in the dark without any invitation, express or implied, from such landlord.

**LANDLORD AND TENANT — LIABILITY OF LANDLORD FOR CONDITION AND USE OF PREMISES.** — When leased premises, harmless in themselves, become dangerous merely by the manner of their use by a tenant in possession, the landlord is not liable for injuries arising from such use.



**LANDLORD AND TENANT — LIABILITY OF LANDLORD FOR INJURY TO TENANT'S GUEST.** — A landlord is not responsible for injury to his tenant's guest arising from such a danger as is created by the negligence of such tenant only.

**LANDLORD AND TENANT — LIABILITY OF LANDLORD FOR OBVIOUS DEFECTS IN PREMISES.** — In the absence of fraud and deceit a landlord is not liable to a tenant or his guest for obvious defects in the leased premises, which do not constitute a nuisance.

*Thomas F. Gatts*, for the appellant.

*Karnes, Holmes and Krauthoff*, for the respondent.

**BARCLAY, J.** Plaintiff became nonsuit in the circuit court because of its ruling denying her a recovery of damages for personal injuries sustained as follows: —

Defendant owned a small dwelling in Kansas City, Missouri. It had been let by him to a tenant, Mr. Bettis, and was in possession of the latter, except the basement, which he had sublet to plaintiff's husband. On a night in December, 1888, about eight o'clock, plaintiff was invited by Mrs. Bettis to come up the front steps leading to a porch or landing at the entrance occupied by the latter. The occasion of this invitation to the premises was that an alarm of fire had just been given, and the machines of the fire department were passing on a neighboring avenue. The porch commanded a better view of them than did the plaintiff's quarters.

Plaintiff accepted the invitation, passed up the steps, and stood a while with Mrs. Bettis on the porch. The steps were constructed so (to quote from the petition) "that the top step, just immediately below the landing to the porch, . . . extends the entire width of said porch, and from the outside of the steps up to and attached to the building, said top step being in manner, form, and appearance, constructed the same as any ordinary step is usually made; that the next step immediately below said top step is so constructed that it is over twelve inches shorter than the top step as above described, on the side next to the building or inside of the porch; and the remaining steps, from the last one described to the ground, are all short in the same manner."

These steps were within the private inclosure or yard, appurtenant to the dwelling, and some fifteen feet from the street. The porch was four or five feet above the level of the surrounding yard and of the walk leading to it. There was no light upon the steps, and the night was dark. When plaintiff started to descend from the porch, she stepped from the

top step into the vacancy at the end of the next lower one, and consequently fell to the ground, a distance of nearly five feet. She sustained severe injuries. It is alleged that the premises were let to the tenant, Mr. Bettis, in the condition described; and that for that reason, defendant is liable to plaintiff for the consequences of this misadventure.

1. The only deficiency in the steps in question was in the particular that all the lower ones were twelve inches shorter than the top step. The landing or entrance to which they led was but four or five feet above the surrounding land, so the number of the steps must have been small. Their condition was obvious to the most casual inspection by daylight.

Such a short flight of steps, so situated, could not, by any just process of ratiocination, be found to be a nuisance. The dangerous character which they possessed, at the time plaintiff was injured, arose from the fact that they were then unlighted. Had they been illuminated, so that their condition could be seen and proper use of them made, they would have been harmless in themselves.

Defendant had parted with possession of the premises by letting them to a tenant. He is not, therefore, legally chargeable, on the case stated, with a liability by reason of the darkness in which the stairs were enveloped.

Plaintiff was not using the steps by any invitation, express or implied, of defendant. Any liability for negligence (in omitting to properly light them) that may spring from the invitation she received to come there must rest upon the inviter.

Where things, harmless in themselves, become dangerous merely by the manner of their use by a tenant in possession, the landlord is not generally called upon to respond for injuries resulting from such use: *Taylor v. Bailey*, 74 Ill. 178; *Ryan v. Wilson*, 87 N. Y. 471; 41 Am. Rep. 384; *McCarthy v. York Co. Bank*, 74 Me. 315; 43 Am. Rep. 591.

The steps were sound and safe enough under proper conditions. Defendant is certainly not responsible for mishaps to his tenant's guest arising from such a danger as was created by the alleged negligence of the tenant.

2. Nor is plaintiff's case strengthened by consideration of her relationship to the demised estate as subtenant.

She was not upon the premises of which she was entitled to the possession as subtenant. The place of the accident was let to Mr. Bettis only. She was there as a stranger to

that tenancy; but even had she been the tenant of that part of the building, defendant would not have been liable to her on these facts. No fraud, deceit, or concealment by defendant is charged. In their absence, the fact that part of the front steps were not as wide as the top steps, discoverable by any one at a glance under a good light, could scarcely be said to create a right of action in the tenant for such an injury to him as is here described, in view of the precedents on this subject: *Jaffe v. Harteau*, 56 N. Y. 398; 15 Am. Rep. 438; *Ryan v. Wilson*, 87 N. Y. 471; 41 Am. Rep. 384; *Quinn v. Perham*, 151 Mass. 162.

In no aspect of the facts do we discern any substantial basis for a recovery by plaintiff. The trial court took the same view, and we think correctly.

The judgment is affirmed.

SHERWOOD, C. J., BLACK and BRACE, JJ., concurred.

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**LANDLORD AND TENANT.** — The liability of the lessor when the premises are out of repair or in a dangerous condition is treated in the note to *Lowell v. Spaulding*, 50 Am. Dec. 776-783; the liability of the landlord for injuries sustained by a visitor to his tenant in the note to *Nalley v. Hartford Carpet Co.*, 50 Am. Rep. 53-55; and the respective liability of the landlord and the tenant for nuisances in the note to *Godley v. Hagerty*, 59 Am. Dec. 733-740. See also as to the last point, *Ahern v. Steele*, 115 N. Y. 203; 12 Am. St. Rep. 778. Decayed steps at the back of rented premises are not a nuisance as regards the occupant of the adjoining premises: *Sterger v. Van Sicklen*, 132 N. Y. 499; 28 Am. St. Rep. 594. Cases in which the tenant, not the landlord, was held liable for the dangerous condition of the premises are *Jennings v. Van Schaick*, 108 N. Y. 530; 2 Am. St. Rep. 459; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47; 4 Am. St. Rep. 279; *Ahern v. Steele*, 115 N. Y. 203; 12 Am. St. Rep. 778; *Rosenfield v. Arrol*, 44 Minn. 395; 20 Am. St. Rep. 584. A tenant taking possession of demised premises with a dangerous opening at the street line or in the sidewalk is bound to guard the same so as to secure passers-by from falling into it: *Ryan v. Wilson*, 87 N. Y. 471; 41 Am. Rep. 384; *Irvine v. Wood*, 51 N. Y. 224; 10 Am. Rep. 603; *Wolf v. Kilpatrick*, 101 N. Y. 146; 54 Am. Rep. 672.

## BECK v. DOWELL.

[111 MISSOURI, 506.]

**DAMAGES.** — EVIDENCE OF FINANCIAL CONDITION OF PLAINTIFF is admissible in an action to recover for personal injury, when the evidence will justify the jury in awarding exemplary or punitive damages.

**PRACTICE ON APPEAL — DEFECTIVE RECORD.** — When the record on appeal is defective, the remedy is by *certiorari* or by stipulation correcting the error; but the mere filing of certified copies of omitted instructions will not remedy the irregularity of failing to set them out in the record.

*Blair and Marchand, and M. McKeag, for the appellant.*

*Clay and Ray, F. L. Schofield, and J. C. Anderson, for the respondent.*

GANTT, P. J. This cause was appealed from the circuit court of Lewis County to the St. Louis court of appeals. That court, in an opinion by Judge Rombauer, affirmed the judgment of the circuit court; but Judge Biggs being of the opinion that the conclusion reached by the majority, that evidence of the financial condition of the plaintiff in an action when the evidence will justify the jury in awarding exemplary or punitive damages was admissible, is in conflict with and opposed to two decisions of this court, to wit: *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, and *Stephens v. Hannibal etc. R. R.*, 96 Mo. 207, 9 Am. St. Rep. 336. The cause was, under the constitution, certified to this court.

1. When the cause was heard in the court of appeals, the instructions were not in the record. No efforts were made to supply them in that court, and that court rightly proceeded on the assumption that the trial court had correctly declared the law to the jury. Since the case has reached this court a certified copy of the instructions has been filed with the record. The propriety of considering these declarations of law by this court under these circumstances suggests itself at once.

While this court obtains jurisdiction to "rehear and determine a cause so certified to us by either of the appellate courts, as in cases of jurisdiction obtained by ordinary appellate process," there is nothing in the constitution that justifies parties in assuming that we will or can take cognizance of matters not in the record.

When a record is deficient in any material respect, the practice is uniform that the party desiring the absent record should suggest the diminution and apply for a writ of *certio-*



rari, or file stipulations in this court, supplying the record. In this case, nothing of the kind has been done, but from the brief of the appellant, we take it, he assumes that these instructions are properly before us.

There is no hardship in requiring parties to govern themselves by the rules of procedure established for the disposition of causes. For the purposes of this appeal, these instructions are no part of the record, and the cause will be determined on the presumption that the trial court correctly instructed the jury. Parties must pursue legal methods in perfecting their transcripts, and in the proper courts, and in proper seasons.

2. The point in this record, then, is that upon which the court of appeals divided. Is evidence of the financial condition of the plaintiff admissible in an action for damages when there are circumstances of oppression or malice?

That exemplary damages may be recovered in actions for trespass or personal torts accompanied by circumstances of malice or oppression, is no longer open to question in this state: *Buckley v. Knapp*, 48 Mo. 152. Nor is it controverted that it is perfectly competent to show the financial ability of the defendant in such case.

The case of *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 214, 9 Am. St. Rep. 336, was an action for compensatory damages alone, and the learned judge who wrote the opinion expressly says: "There is nothing in the case to justify the giving of exemplary damages, and the damages should be confined to compensation for the injuries sustained."

The case of *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, had no element in it justifying exemplary damages, and this court held that it was not improper to exclude evidence of the mother's financial condition in a suit for the death of her child which had been drowned in a pond, "in view of the fact that she had been allowed to state her condition in life, and that she did her own housework and had no servant." We do not think either of these cases can be considered as decisive of the point in this case. Exemplary damages are allowed, not not only to compensate the sufferer, but to punish the offender: *Franz v. Hiltbrand*, 45 Mo. 121; *Callahan v. Caffarata*, 39 Mo. 137.

The evidence in this case tended to show that the plaintiff was a girl about sixteen years old; that her father was a tenant of defendant; that on the day she was shot by defendant

her father and his sons were trying to water a cow in a lot of the defendant; that a difficulty ensued, a general fight; that she was standing in the lot looking on, unarmed, when the defendant turned upon her and shot her through the thigh. In other words, the defendant with a deadly weapon shot an unarmed girl without lawful provocation. We think there was ample evidence from which the jury could find willful, wanton injury.

In 1 Sutherland on Damages, page 745, it is said: "In actions for torts, the damages for which cannot be measured by a legal standard, all the facts constituting and accompanying the wrong should be proved; and though there be a legal standard for the principal wrong, if aggravations exist, they may be proved to enhance damages; and every case of personal tort must necessarily go to the jury on its special facts; these embrace the *res gestæ*, and the age, sex, and *status* of the parties; this, whether the case be one for compensation only, or also for exemplary damages, where they are allowed."

In *Bump v. Betts*, 23 Wend. 85, the supreme court of New York, on a question of excessive damages, pointed to the fact that the defendant had the command of great wealth and that the plaintiff was a poor man. In *McNamara v. King*, 7 Ill. 432, in an action for assault and battery, the court permitted the plaintiff to show he was a poor man with a large family. The supreme court of Illinois, in affirming that ruling, said: "We are also of the opinion that the circuit court decided correctly in admitting the evidence and giving the instruction. In actions of this kind, the condition in life and circumstances of the parties are peculiarly the proper subjects for the consideration of the jury in estimating the damages; their pecuniary circumstances may be inquired into. It may be readily supposed that the consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessities of life. It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured."

In *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88, in an action for seduction, the trial court admitted evidence to show

plaintiff was a poor man. The supreme court on appeal said: "The court, therefore, decided correctly in admitting evidence showing the pecuniary condition of the plaintiff. This evidence does not go to the jury for the purpose of exciting their prejudices in favor of the plaintiff because he is a poor man, but to enable them to understand fully the effect of the injury upon him, and to give him such damages as his peculiar condition in life and circumstances entitle him to receive."

In *Gaither v. Blowers*, 11 Md. 536, in an action for assault and battery, the trial court having admitted evidence for the plaintiff with a view of increasing his damages, that he was a laboring man and had a wife and children to support, the supreme court, after quoting the language of *McNamara v. King*, 7 Ill. 432, says: "This is good sense, and is sustained by the decisions in most of the states. An injury done to a person not dependent on manual labor for the support of himself and family is in nowise as great as one to a person so situated."

In *Reed v. Davis*, 4 Pick. 215, the supreme court of Massachusetts, in an action for trespass in forcibly evicting plaintiff from his home, says: "One of the defendants stated to a witness in answer to his inquiry, whether he thought the plaintiff could not make him suffer, that 'the plaintiff had been to jail and sworn out, and was not able to do anything.' Now that circumstance was to be taken into consideration by the jury. There is nothing more abhorrent to the feelings of the subjects of a free government than oppressing the poor and distressed under the forms and color, but really in violation, of the law. . . . It is found that the dwelling house was small, but the damages are not to be graduated by the size of the building. The plaintiff also was poor. He had seen better days, but had been reduced in his circumstances. He was thought not to be able to do anything in vindication of his rights at the law."

In *Dailey v. Houston*, 58 Mo. 361, this court said: "It is next insisted that the court improperly told the jury that in the estimation of damages they might take into consideration the 'condition in life of plaintiffs and their pursuits and nature of their business.' There is no doubt but that, in estimating the damages in such cases, the jury may properly take into consideration the pecuniary condition of the parties, their position in society, and all other circumstances tending to show the vindictiveness or atrocity, or want of atrocity, in the transaction, and which tend to characterize the assault."

This decision of Judge Vories was concurred in by all the judges. It has never to our knowledge, and so far as we can ascertain, been questioned, denied, or criticised. It is in harmony, as we have seen, with the decisions of other courts of great ability. It is in harmony with the tendency of the courts to place before the triers of facts, whether court or jury, every fact that will aid them in arriving at a correct verdict. It is evident in this case its effect was not to create prejudice or passion. There is nothing that smacks of either in the verdict.

Accordingly we affirm the judgment of the court of appeals, as indicated by the opinion of the majority of the judges of that court, on this as well as all other points ruled in the case, and it will be so certified to that court.

All concur.

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MEASURE OF DAMAGES AS AFFECTED BY THE PECUNIARY CIRCUMSTANCES OF THE PARTIES; See note to *Rowe v. Moses*, 67 Am. Dec. 562-568. In an action against a railroad company by a wife for the wrongful death of her husband, it is competent for her to state the number and ages of her minor children, where she is, as in Missouri, bound to support such children: *Tetherow v. St. Joseph etc. R'y Co.*, 98 Mo. 74; 14 Am. St. Rep. 617. In a suit against a railway company for personal damages suffered by plaintiff when a passenger, it was not error to allow proof that he had a wife and four children: *San Antonio etc. R'y Co. v. Robinson*, 73 Tex. 277. On the other hand, it is held that in an action for personal injuries to a minor, evidence of the pecuniary circumstances of his father is not admissible: *Vosburg v. Putney*, 78 Wis. 84; and that in an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, evidence as to the poverty of the plaintiff, i. e., that he was dependent upon his earnings for his support, is incompetent as bearing on the question of damages: *Alberti v. New York etc. R. R. Co.*, 118 N. Y. 77.

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## STATE v. WILCOX.

[111 MISSOURI, 569.]

**RAPE — EVIDENCE.** — A FATHER MAY BE CONVICTED of the rape of his daughter under fourteen years of age on her uncorroborated and contradicted testimony, and although no force was used and she failed to complain of the wrong done her.

*Dysart and Mitchell*, for the appellant.

*John M. Wood*, attorney-general, for the state.

MACFARLANE, J. Defendant was convicted in the circuit court of Macon County of rape, by carnally knowing Ollie



Wilcox, a female child under fourteen years. From the judgment he has appealed to this court.

The evidence of complaining witness, if true, discloses a most revolting picture of domestic life. She testified that defendant was her father, and that she was fourteen years old May 10, 1891, and that from the time she was eight years old until April, 1891, he had defiled her at intervals of every few weeks, the last time in Macon County in April, 1891.

Without objection she detailed by her evidence that when she was eight years old, in Randolph County, the defendant first carnally knew her. At that time he bruised and tore her so that she was confined to her bed for a number of days; that from that time until she became fourteen years of age these assaults were repeated every few weeks. After the first assault she told her mother, but not until she had examined her and found blood and bruises. She told no one after that until July, 1891, when she told her half-sister. She told it then because she was "tired of living that way." Did not tell it before because she was afraid of defendant, who said he would kill her if she told. Defendant told her that all fathers did that way with their girls.

She removed to Macon County with her father's family about two years prior to the trial which occurred October 26, 1891. The testimony of this witness was all the evidence offered by the state in chief.

The defendant testified in his own behalf and contradicted every charge testified to by the prosecutrix. He also gave a history of his relations with his family, and showed that they were invariably good; that within the last few years he was frequently away from home as much as weeks and months at a time. In all of this he was corroborated by his son Willie, eighteen years of age, who further testified that his father's treatment of his wife and children was good, and that he had never seen or heard of any misconduct between his father and Ollie until after the arrest; that he was raised and had lived in the family all his life except a few months he had worked out.

Dr. Pickett testified to the improbability, and almost impossibility, of the story related by the prosecuting witness.

Three other witnesses, relatives of Ollie Wilcox, testified that a few days before the arrest of defendant she vehemently protested that her father had never mistreated her, and threatened to shoot the man who said it. One witness testified that

Ollie had told her that this lie had got out through the Cohorns, and that there was a man she could ruin by laying her hands on him, George Stanfield, son of Mrs. Cohorn. Prosecuting witness contradicted these witnesses in her testimony.

An effort was made to impeach the character of defendant for truth. Three witnesses with some qualifications testified that his reputation was bad, while four gave evidence tending to prove it good.

The court gave, with others, the following instructions: "The jury are instructed that although they may believe from the evidence that in the commission of the offense charged there was no force used by the defendant on Ollie B. Wilcox, yet if the jury believe from the evidence that at any time, in the county of Macon, before the finding of the indictment in this cause, and while she was under fourteen years of age, the defendant had carnal intercourse with the said Ollie B. Wilcox, then you will find the defendant guilty.

"The jury are instructed that the defendant, William D. Wilcox, is charged with carnally and unlawfully knowing one Ollie B. Wilcox, a female child under the age of fourteen years; therefore, if you believe from the evidence that the defendant did carnally know the said Ollie B. Wilcox while under the age of fourteen years, then the state is not required to prove that the defendant forcibly ravished the said Ollie B. Wilcox. It is sufficient for the state to prove that the defendant had intercourse with her while she was under the age of fourteen years."

The last paragraph of this instruction is taken by defendant's counsel as an independent instruction. The record gives it as above, the instructions are not numbered, and we must take and treat them as they appear upon the record.

1. It is urged with great earnestness by counsel for defendant that the uncorroborated evidence of Ollie Wilcox, the complaining witness, contradicted as it is by the positive and unequivocal testimony of defendant, is insufficient to justify or support the verdict and sentence. The majority opinion in *State v. Patrick*, 107 Mo. 147 is confidently cited in support of this contention. The fourth paragraph of that opinion, in which the learned judge who wrote it so ably discusses the necessity that prompt complaint be made, and other circumstances be shown corroborative of the evidence of the prosecutrix, and the conclusions reached therein, were not concurred

in by a majority of the judges. It will be seen that the fifth paragraph is introduced by an assertion of the inferences to be drawn from the authorities cited and the conclusion reached in the fourth paragraph. Here the expression is used upon which the defense in this case so confidently relies: "Where, as here, the defendant occupies the witness stand and explicitly denies the perpetration of the offense charged, thus creating an equipoise of oath against oath, then the evidence is wholly insufficient, as there is no corroboration whatever in this case."

After this introduction, the learned judge proceeds to argue the absolute insufficiency of the evidence to support a conviction, and in his conclusions a majority coincided. The decision settled nothing but that, in the opinion of a majority of the judges, the evidence in that case was insufficient, and followed numerous precedents in like cases, that where the evidence is clearly insufficient this court will render a final judgment of acquittal. There is no doubt that the failure of the prosecutrix to make timely complaint, and her conduct immediately after the alleged outrage, had great and probably controlling weight in determining the result.

The case of *State v. Patrick*, 107 Mo. 147, and the case at bar are different in almost every essential feature of the offense charged. Carnally and unlawfully knowing a female child under fourteen years of age is made rape under the statute; with this crime defendant is charged. Forcibly ravishing a woman of fourteen years or over is also rape, and of committing that offense, Patrick was charged. These acts are different in every element, except that of carnal knowledge, and calls for different proof. In the case of *State v. Patrick*, 107 Mo. 147, the crime was charged to have been committed by forcibly ravishing; in this case it was by simple carnal knowledge. The first involves force on the part of the ravisher and want of consent on that of the victim; the latter may have been without force and with consent. In the one case the instincts of woman's nature, at the first opportunity, should have spontaneously given utterance to her anguish on account of the wrong committed; in the other the child may have been anxious to conceal the wrong and protect the wrongdoer. These distinctions between the criminal acts, and the difference in the proof necessary to establish them, are sufficient to show that the failure of a wronged child to make outcry or complaint has but little if any weight in discrediting her tes-

timony. Indeed, it would have none at all in case the wrong was done with her consent, and her testimony was given unwillingly.

It will be seen by reference to the authorities cited in the case of *State v. Patrick*, 107 Mo. 147, that long delay in making complaint "may be explained and excused by proof of sufficient cause therefor; as, for instance, want of suitable opportunity or duress, or threats by the perpetrator of the wrong." Assuming that the failure of the girl to complain or disclose the wrongs done her should ordinarily have affected her credit as a witness, we think the relation of the defendant to and his authority over her, together with the threats which she testified were made, should be considered in determining the probative force of her conduct.

There is another and better ground, to our minds, than fear of personal injury, which tends to excuse this girl for keeping silence. According to her story, the first act was committed when she was only eight years of age, not old enough to understand the signification of the wrong done her. Thus from that day she was trained and corrupted by her own father by repeated acts until she probably lost those womanly feelings which prompt instinctive utterance of horror and anguish at such outrages.

We cannot say, then, that the evidence of this prosecutrix should be altogether ignored. Improbable as her evidence may be, contradicted on collateral facts as the witness is, monstrous as the accusation against defendant may be, it is still, after all, a question of fact for the trial court and jury, and this court should not interfere.

2. The second error assigned is that, under the instruction complained of, the jury may have found defendant guilty of some offense committed in Randolph County. We do not think the jury could have been misled from this instruction into such an error. The first paragraph of the instruction requires the jury to find that the offense must have been committed in Macon County. The second does not refer to the place at which the act was committed, but to the manner of its accomplishment and to the evidence necessary to establish it. We do not see how an intelligent jury could have been misled, even though the two paragraphs of this instruction had been separated into two distinct instructions.

We find no error, and affirm the judgment. All concur.



**RAPE — PROOF OF COMPLAINTS BY PROSECUTRIX:** See generally note to *Smith v. State*, 80 Am. Dec. 371, 372. That a delay in making complaint is sufficiently explained by the fact that the injured person is of tender years, and appears to be under a sort of duress caused by fear of a whipping which the perpetrator of the offense had threatened to inflict if she told her parents, see *People v. Gage*, 62 Mich. 271; 4 Am. St. Rep. 854. The testimony of a neighbor that she heard a stepfather, who is accused of rape upon his stepdaughter, a child of ten years of age, whipping and beating the child is admissible in corroboration of her statements as to cruel treatment and fear; *People v. Lenon*, 79 Cal. 625. That sexual intercourse with a female under the age of consent is conclusively presumed to be rape, see *State v. Miller*, 42 La. Ann. 1186; 21 Am. St. Rep. 418; *State v. Wray*, 109 Mo. 594; *State v. Lacey*, 111 Mo. 513; *People v. Ten Elshof*, 92 Mich. 167; and note to *McGuff v. State*, 16 Am. St. Rep. 30.

CASES  
IN THE  
SUPREME COURT  
OF  
MONTANA.

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EDGERTON v. EDGERTON.

[12 MONTANA, 122.]

**MARRIAGE AND DIVORCE — SEPARATE MAINTENANCE OF WIFE — JURISDICTION OF EQUITY TO GRANT.** — Courts of equity have jurisdiction to enforce the maintenance of a wife by decreeing proper relief in an action brought by her against her husband, independently of an action for divorce, when it is shown that he, without just cause, has abandoned her, or by his cruelty or other improper conduct has given her just cause for living separate and apart from him, and she is without means of support while he is able to maintain her. Such decree does not, however, amount to a divorce from bed and board, nor does it place any obstacle in the way to a reconciliation of the parties.

**JUDGMENTS — JURISDICTION — COLLATERAL ATTACK.** — A domestic judgment of a court of general jurisdiction, valid on its face, cannot be collaterally attacked in the courts of the same state by showing facts outside of the record, although such facts might be sufficient to impeach such judgment in a direct proceeding against it.

**JUDGMENTS — DECREE OF DIVORCE — COLLATERAL ATTACK.** — A decree of divorce, valid upon its face, obtained by a husband against his wife, cannot be collaterally attacked in the same state in an action by the wife to enforce maintenance, by the averment of facts sufficient to avoid such decree for want of jurisdiction.

*A. C. Botkin and E. P. Cadwell, for the appellant.*

*McConnell and Clayberg, and Thomas C. Bach, for the respondent.*

HARWOOD, J. There are two questions brought here for determination by this appeal. The first relates to the jurisdiction, in equity, of the district courts of this state, and may be stated by the following proposition: Have the district courts of this state power, in the exercise of their equity jurisdiction,

to enforce maintenance of a wife by decreeing proper relief in an action brought by her against her husband, independently of an action for divorce, where it is shown that he, without just cause, has abandoned her, or by his cruelty or other improper conduct has given her just cause for living separate and apart from him, and she is without means of support, and he is able to maintain her?

An action of this character, if maintainable at all, would naturally lie within the equitable jurisdiction of the district court. The subjects of equity, as well as common-law jurisdiction, are so well defined there can seldom arise a dispute as to whether a particular action for the enforcement of rights or the redress of wrongs lies within the cognizance of one or the other, or whether such action is not within either of these jurisdictions. In relation to the question just propounded, however, there have been and still are differences of opinion in the courts and among able jurists; and the discussion of it has sounded the depths and surveyed the scope and circumference of the equity jurisdiction of courts where it has been brought in question.

It is unnecessary to recite the facts involved in the case at bar in order to treat this proposition. It may be treated as a question of law, relating to the equity jurisdiction of the court, without reference to any particular action.

That the marriage relation lays upon the husband an obligation to furnish his wife necessary and comfortable maintenance, commensurate with his ability to provide, is a proposition upon which there is no dispute. It is an obligation imposed by law as one of the conditions of the marriage contract, and is recognized by all courts of justice, and is enforced, in proper cases, where the jurisdiction lies. Courts of common-law jurisdiction (as distinguished from equity courts) enforce that obligation by giving judgment against the husband for necessary supplies furnished the wife by third persons, where the husband, without just cause, withholds the same, or abandons his wife, or by cruelty or otherwise makes it unsafe or improper for her to abide at the family home.

In this way it will be seen that even courts of common-law jurisdiction not only recognize, but to some extent enforce, performance of that obligation. The jurisdiction exercised by the common-law courts was usually explained on the theory that the law presumed the wife to be the agent of the husband to the extent of authority to obtain upon his credit

necessary personal supplies; but it is plainly observable by an investigation of these cases that the common-law courts proceed upon a different ground than the mere relation of principal and agent; for when the husband had abandoned his wife, or driven her away by cruelty or other improper conduct, and had sought to avoid responsibility of her maintenance by giving notice forbidding parties to furnish her supplies, and attempting to revoke her authority in that respect still the common-law courts, notwithstanding such notice, held him bound for her necessary supplies, by an obligation irrevocable at will, arising by virtue of the marriage relation, and gave judgment against him: Schouler on Domestic Relations, sec. 66; *Sykes v. Halstead*, 1 Sand. 483; 1 Bishop on Marriage and Divorce, 572, and cases cited. It will be observed in these cases, too, that where the wife was living separate and apart from her husband, it was always a proper inquiry whether she had just cause for so doing; and if she had not, that was a good defense. It seems to be clear, then, that the common-law courts proceeded in such cases upon a different principle than the law of agency alone, and founded their judgments on the obligation of the husband to support his wife, even separate and apart from his habitation, where, by his conduct, he had justified her separation, or where he had, without cause, forsaken her—an obligation which he could not terminate at will, as may be done in case of principal and agent: 2 Kent's Commentaries, 146; Schouler on Domestic Relations, sec. 66; 1 Bishop on Marriage and Divorce, secs. 550–572, and cases cited; *Liddlow v. Wilmot*, 2 Stark. 86; *Casteel v. Casteel*, 8 Blackf. 240; 44 Am. Dec. 763; *Clement v. Mattison*, 3 Rich. 93; *Hall v. Weir*, 1 Allen, 261; *Cartwright v. Bate*, 1 Allen, 514; 79 Am. Dec. 759; *Cunningham v. Irwin*, 7 Serg. & R. 247; 10 Am. Dec. 458; *Rumney v. Keyes*, 7 N. H. 571; *Allen v. Aldrich*, 29 N. H. 63; *McGahay v. Williams*, 12 Johns. 293; *Mayhew v. Thayer*, 8 Gray, 172; *Walker v. Simpson*, 7 Watts & S. 83; 42 Am. Dec. 216; *Schnuckle v. Bierman*, 89 Ill. 454; *Reese v. Chilton*, 26 Mo. 598; *Rutherford v. Coxe*, 11 Mo. 347; *Breinig v. Meitzler*, 23 Pa. St. 156; *Billing v. Pilcher*, 7 B. Mon. 458; 46 Am. Dec. 523; *Snover v. Blair*, 25 N. J. L. 94; *Blowers v. Sturtevant*, 4 Denio, 46.

Although the common-law courts will give judgment against the husband in such cases, it must be admitted by all to be an uncertain and inadequate relief; for in many cases she



may be unable to obtain credit under such circumstances, where she can only offer the chance of compelling payment by suit against a husband who is endeavoring to escape such liability. Her position is also embarrassed by the reluctance of parties generally to becoming directly or indirectly implicated in family troubles, or to undertake to show justification for the conduct of the wife, which operates as a powerful influence in deterring persons from giving her credit. The relief offered by the common-law courts is inadequate for still other reasons. While it may succeed for a brief period in some cases, the derelict husband is left free to carry out his purpose to abandon and neglect the support of his wife, and avoid such judgments altogether by disposing of his property, or by carrying it beyond the jurisdiction. In this way he not only ignores his obligation, but sets at naught the attempt of the common-law courts to compel its performance. There are other aspects of this method of granting relief which ought not be passed without observation. If that remedy happens to be effectual in some cases, because the husband fails to use the means within his power to escape the liability, that method of enforcing maintenance would involve a multiplicity of law suits; for the wife must usually go to various parties to secure supplies, whereby would arise a separate cause of action in favor of each party from whom supplies were obtained, and as often as one collection was made, another cause of action would begin to accrue. Again, the inadequacy of relief worked out by the common-law remedy is not alone relative to the position of the wife. It has its counterpart of hardship in reference to the husband. In case the husband has just grounds for his conduct, and desires to establish the same, he would have to present his defense in as many actions at law as happened to be brought against him for supplies furnished the wife; for having established his defense in one or more actions would not preclude the annoyance, loss of time, and expense of defending other actions of the same character. So the question naturally arises whether or not, upon principle, these cases lie within the jurisdiction of courts of equity; and the conditions just pointed out suggest two familiar principles of equity as grounds upon which courts exercising that jurisdiction take cognizance of actions, and determine the rights of parties, namely: 1. Inadequacy of the relief which can be obtained in the courts of law; 2. That to obtain relief in courts of

common-law jurisdiction would involve a multiplicity of suits. Mr. Pomeroy, upon this head, observes: "In fact, the multiplicity of suits which is to be prevented constitutes the very inadequacy of legal methods and remedies which calls the concurrent jurisdiction into being under such circumstances, and authorizes it to adjudicate upon purely legal rights, and confer purely legal reliefs. On the other hand, the prevention of multiplicity of suits is the occasion for the exercise of the exclusive jurisdiction": Pomeroy's Equity Jurisprudence, sec. 243.

This class of actions was not generally entertained by the English chancery court for the obvious reason that in England the ecclesiastical tribunal existed, to which, as was conceded by all, such adjudications peculiarly belonged. There was therefore no reason in general for the chancery court in England to concern itself with actions seeking such relief: Fonblanque's Equity, 4th Am. ed., 98, n. 105; but it nevertheless seems plain that had not another court existed in the judicial system of England which had jurisdiction of this class of cases, there is every analogy which would have brought those cases within the jurisdiction of the court of chancery. This court took cognizance of other cases concerning marital rights. It enforced against the husband antenuptial contracts and settlements made on behalf of his intended wife; compelled settlements to be made on behalf of the wife, where he was seeking to obtain possession or control of her property; withheld her separate property from his grasp, and devoted it to her maintenance, where he had so conducted himself as to justify her living in separation from him; enforced agreements by the spouses as to property rights and maintenance made in contemplation of separation; by the writ of *ne exeat*, "restrained the husband from quitting the kingdom to evade the payment of an agreed or decreed allowance"; used its power to enforce decrees of the spiritual court awarding separate maintenance to the wife; and by process known as the "writ of *supplicavit*," the chancery court protected the wife against the husband's violence, and in cases where it was found unsafe for her to abide with him, as incident to such proceedings, compelled the husband to provide maintenance for her while she was separate and apart from him, by reason of his violent conduct towards her. This proceeding, however, appears to have become obsolete, probably because statutes provided a remedy for protection

of all persons from threatened violence. No doubt other instances could be pointed out wherein the English chancery court exercised jurisdiction in reference to the marital rights and obligations: Fonblanque's Equity, 90-106, and notes; 2 Spence's Equitable Jurisdiction, 489, 526; 2 Story on Equity Jurisprudence, secs. 1423, 1476; 3 Pomeroy's Equity Jurisprudence, secs. 1114-1120; 2 Bishop on Marriage and Divorce, sec. 352. It is also clear that within the principals, procedure, and practice applied by courts of equity there are ample and appropriate methods to adequately enforce in one action the right of the wife to support against a husband who, without cause, abandons her, and at the same time, in the same action, vouchsafe to the husband any defense he may have to offer in justification of his conduct.

It is proper at the outset of this investigation to inquire whether, by statute, any provision has been made in relation to the right in question, and the remedy to be applied in case of its nonfulfillment. Our statute provides that the district court, "sitting as a court of chancery," may, for certain causes specified, decree a "dissolution of the bonds of matrimony"; and that "when a divorce shall be decreed, it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the care and custody of the children, or any of them, as, from the circumstances of the parties and nature of the case, shall be fit, reasonable, and just; and in case the wife be complainant, to order the defendant to give reasonable security for such alimony and maintenance, or may refuse the payment of such alimony and maintenance in any other manner consistent with the rules and practice of the court, and may also grant alimony '*a pendente lite*'; and the court may, on application from time to time, make such alterations in the allowances of alimony and maintenance as shall appear reasonable and just": Comp. Stats., secs. 1000, 1004, 1006, div. 5.

It is contended that these provisions of the statute as to the decree for alimony and maintenance "when divorce is granted," by implication, exclude from the courts the jurisdiction to enforce the maintenance, except in an action where divorce is decreed. Some have so held, but upon this phase of the question, as upon nearly all aspects of it, eminent authorities are opposed to one another in the views entertained. Our own conclusion upon this particular feature of the question is, that the great weight of reason is against the idea that

the legislature, in adopting the statute referred to, intended any regulation of the right of the wife to maintenance, or the obligation of the husband to furnish the same, arising and existing by virtue of the marriage bond prior to and in no manner dependent upon the dissolution of that bond by decree of court, or that by such statute the legislature intended to take away or in any manner control whatever jurisdiction the courts may have had to enforce the fulfillment of that obligation in an action independent of a proceeding for divorce. In construing or applying a statute, the cardinal rule, always applicable, is to seek the intention of the legislature. The simple question then is, did the legislature, in providing for the granting of divorces on certain prescribed grounds, and providing that when divorce was decreed, alimony and maintenance might also be decreed, intend to have it inferred or implied therefrom that the obligation of the husband to maintain his wife should not be enforced, unless the bonds of matrimony were first dissolved? Or was it only the intention of the legislature, as manifest in such statute, to make sure by the provisions authorizing the decree for alimony and maintenance of the wife after dissolution of the bonds of matrimony, to fasten upon the husband the continued obligation to support his wife, even though the bonds of matrimony had been dissolved because of his wrongful conduct? After divorce the obligation to maintain the wife, which arose by virtue of the marriage contract, could not be referred to that relation, because of its nonexistence; and there might be grave reason to doubt whether a court was authorized to continue to enforce that obligation after dissolution of the bond by which it arose, without a statutory provision to that effect. It is manifest by said statute that the legislature intended that the offending husband should not escape the obligation he had entered into, to support his wife while she kept faith with her marriage vows and duties, even though he succeeded by his wrongful conduct in driving her to obtain a divorce. If this provision implied that the obligation could only be enforced by first dissolving the bonds of matrimony, the law would be open to the charge that it was so framed as to encourage divorces; for the wife who kept faith with the marriage vows might be driven by privation, in some cases at least, to release the husband from the bonds of matrimony by applying for a divorce, in order to obtain relief from penury and want. Such a construction of the legislative in-



tent would make the statute provide, in effect, that in case a wife was driven away or deserted, and left without means of support, if the husband remained in the state and committed no more flagrant violations of the marriage bond, she must wait a year, and in the meantime suffer in destitution, or suffer the humiliation of becoming a public charge, or seek relief through friends or strangers before she could call upon a court to grant her a divorce, and then compel the offending husband out of his substance to fulfill his obligation to support her, at which time the derelict husband may have placed himself and property beyond the reach of the court; at least, he would in such case be given ample opportunity to do so. It can hardly be presumed that the legislature, while carefully providing for the continuance of the obligation of the husband to maintain his wife after divorce, intended by the statute to cut off any jurisdiction which might be in the courts to simply enforce the obligation while the bonds of matrimony still existed. A more reasonable conclusion, we think, is that the statute under consideration manifests no such intention, but leaves the marital rights and obligations before divorce to be dealt with by the courts in whatever respect their jurisdiction might allow.

We therefore return to the main question as to whether there is in the equity courts of this state any jurisdiction to interfere on behalf of a wife deserted and left destitute, without cause, and compel the husband, if able, to support her. This subject has led to a very close investigation by the American courts (see cases cited in briefs of counsel) of the manner in which the chancery court of England dealt with such cases. The jurisdiction exercised by that court upon kindred subjects has already been adverted to; but upon this particular branch of adjudication, as is affirmed by some, the holding of the English chancery court has not been harmonious; and while this criticism is probably correct, it must still be admitted that the doctrine finally became settled to the effect that cases where such relief was sought would not be entertained in the chancery court, but left to the spiritual court. This was, of course, the natural result when we consider the judicial system prevailing at that time in England. Even with these conditions, however, the English chancery court did not seem to have construed its jurisdiction as so unyieldingly restricted in this matter that no relief could be granted in that court. There is a notable case as late as

1811, where Lord Eldon, one of the greatest and most conservative of English chancellors, ordered certain property in probate devoted to the support of a deserted wife. It is not clearly stated in the opinion or statement of the master that this property belonged to the husband by descent, but that seems to be the case from the context; for if the property had descended to the wife in her own right, according to the course of equity, there would have been no hesitation whatever in applying it to her separate maintenance, where she was abandoned by her husband. In ordering the property applied the lord chancellor said: "I have a strong impression on my mind that this has been done; and independent of precedent, I think the court may do it; as the husband deserting his wife leaves her credit for necessaries, and would be liable to an action, and though execution could not be had against the stock, the effect might be obtained circuitously, as he could not relieve himself except by giving his consent to the application of this fund": *Guy v. Pearkes*, 18 Ves. 196.

In the American states the ecclesiastical court was not made a part of the judicial system. There being a court of chancery or equitable jurisdiction, however, and there being the conditions involved, whereby that court had grounds, upon principle, to take jurisdiction of such cases, it is not at all strange that some of the American courts of equity entertained them; and thus was established what Judge Story termed the broader jurisdiction asserted by the American courts in such cases. In his work on Equity Jurisprudence, he says: "In America a broader jurisdiction in cases of alimony has been asserted in some of our courts of equity; and it has been held that if a husband abandons his wife, and separates himself from her without any reasonable support, a court of equity may in all cases decree her a suitable maintenance and support out of his estate, upon the very ground that there is no adequate or sufficient remedy at law in such a case; and there is so much good sense and reason in this doctrine that it might be wished it were generally adopted": 2 Story on Equity Jurisprudence, sec. 1423.

It will be seen from these remarks that this eminent authority on equity jurisprudence saw clearly that these cases involved conditions which, upon fundamental principles of equity, would bring them into that jurisdiction, i. e., there was a legal right of the wife to maintenance, existing and deeply implanted in the law — a right capable of judicial en-

forcement — and that the common-law courts, although recognizing and attempting to enforce such right, by reason of their forms of procedure, fell far short of giving adequate relief. There was therefore the ground in principle for equitable relief.

Since Judge Story wrote, the doctrine of the American courts of equity, which he mentions, has steadily been gaining ground, until now it is held, without the aid of statute, in a large number of the states, as will be seen by reference to citations of appellant's brief. The latest case we have examined was decided in the year 1890 by the supreme court of South Dakota, wherein Kellam, J., in a very able opinion, held that the case was within the equitable jurisdiction of the courts of that state; and he did not base the conclusion upon any specific constitutional or statutory provision or implication mentioned in his opinion: *Bueter v. Bueter*, 45 N. W. Rep. 208, S. Dak., April 1, 1890.

The supreme court of the United States, in 1858, had occasion, in the case of *Barber v. Barber*, 21 How. 582, incidently to review a number of cases in which the equity jurisdiction was held to extend over this class of cases; and no expression is found in the opinion, showing that the court regarded the exercise of such jurisdiction as extraordinary, or in any manner an arbitrary assumption of a jurisdiction not properly belonging to courts of equity on principle.

Over against the holding which Judge Story mentions, there are courts of eminent authority holding the contrary. (See cases cited by counsel for respondent.) But the divergence of views upon this subject held by the American courts may not be without reasonable explanation, which would apply at least to some states. While there is a general harmony in the American courts of equity with one another, and with the English court of chancery, in the practice, procedure, and principles applied, and the precedents emanating from them may be safely referred to as authority in cases lying within their jurisdiction, still, when the question is as to the extent of the equitable jurisdiction possessed by courts of one State, the determination of courts of another as to the extent of their own jurisdiction cannot, as a rule, be relied on as furnishing an exact criterion for measuring the boundaries of the jurisdiction in the former state, unless the statutory or constitutional provisions governing the subject are substantially alike. This arises from the great variation in the constitutional and statutory

provisions establishing and defining such jurisdiction in the different states. Therefore, for example, to quote from Massachusetts, as denying that the equitable jurisdiction of their courts extends to cases like the one at bar, cannot be regarded strictly as authority for denying that such jurisdiction belongs to equity courts at all, nor that such jurisdiction may not pertain to the equity courts of another state, because, although emanating from one of the ablest benches in the Union, the court is speaking of the extent of its own equity jurisdiction, which appears to be limited to certain heads, specifically defined by statute, and that jurisdiction does not appear to be as broad as that exercised by the English court of chancery, or that exercised by other states of the Union: 1 Pomeroy's Equity Jurisprudence, sec. 286; Gen. Stats. of Mass., 1860, p. 558; *Adams v. Adams*, 100 Mass. 365; 1 Am. Rep. 111. There, also, the statute not only provided for absolute divorce, but for a decree of separation from bed and board, with separate maintenance out of the husband's estate. Gen. Stats. of Mass. c. 107, p. 531.

These variations in the scope of the equitable jurisdiction granted to the federal courts, and that possessed by the courts of the various states, is fully explained by Mr. Pomeroy in his great work on Equity Jurisprudence. He says: "In some of the states, this statutory delegation of power is so broad and comprehensive that the jurisdiction which it creates is substantially identical with that possessed by the English court of chancery, except so far as specific subjects, like administration, have been expressly given to different tribunals; but in others the delegation of power is so special in its nature and limited in extent that a reference to the statutes themselves, on the part of the courts, as the source and measure of their jurisdiction, is a matter of constant practice and of absolute necessity. A correct knowledge of these statutory provisions in the various states is of the highest importance from another point of view. Without it the force and authority of decisions rendered in any particular state cannot be rightfully appreciated by the bench and bar of other commonwealths": 1 Pomeroy's Equity Jurisprudence, sec. 283. In the same chapter the author brings to view the statutory and constitutional provisions under discussion. It is therefore not surprising, when these conditions are considered, to find different views held by different courts, when the question turns upon the extent of the equitable jurisdiction possessed.



Mr. Bishop, in his valuable work on the subject of marriage and divorce, exerts the great weight of his authority against the proposition that cases like the one at bar lie within the equitable jurisdiction, unless jurisdiction is given by statutory or constitutional provisions. It is observable that, in treating the question, he has in mind a court in this country, invested with an equitable jurisdiction measured exactly by that exercised by the English court of chancery, "at the time of the settlement of this country." With his usual accuracy, he states how the English chancery court dealt with the question at that time, and arrives at the conclusion that said court did not then exercise the jurisdiction in question. But he goes further, and lays down the proposition that "there is no one head of equity power to which, by analogy, this can be said to belong." If it is meant, in view of the right involved, and the relief obtainable through common-law courts, that there is no analogy, when the principles of equity are considered, by which the case would come within the equitable jurisdiction, upon the same principles as many cases come within that jurisdiction, we cannot subscribe to his views. It is fair to say, however, as to Mr. Bishop's views, that he at all times, in treating this subject, reasons from the proposition that to enforce the right of the wife to support, who by the wrongful conduct of her husband is compelled to live separate and apart from him, is equivalent to, and in fact amounts to, the granting of a divorce *a mensa et thoro*. From this position he asserts his conclusion that there is no analogy which would bring the case under any head of equitable power, and draws a very striking picture of a court, admittedly without any jurisdiction in a certain case, arbitrarily holding the alleged offender, and, "dodging all difficulties," administering a drastic remedy for an alleged wrong: 2. Bishop on Marriage and Divorce, 6th ed. sec. 356. With great deference to the learned author, and admiration for the method and discrimination generally employed by him in the treatment of subjects of the law to which he has devoted his labor, we are unable to adopt his conclusion until we find reason to adopt his premise, that merely to compel the husband, who wrongfully abandons or drives away his wife, to support her, is in fact granting her a divorce *a mensa et thoro*. This is the difficulty which must be either confronted with attention and fairly treated, or "dodged." He states the proposition in this way: "A divorce from bed and board given to the wife concludes with the same decree

for alimony which this proceeding does. But it also contains a finding and a judgment, not that the marriage is dissolved, but that she who is to be alimented is entitled, by reason of the fault of the other party, to live in separation. In the proceeding under consideration, a court acknowledging itself without power to adjudicate the right to live in separation — for that would be simply and exactly to pronounce a divorce from bed and board — undertakes to make a permanent order for alimony. And yet, as foundation for the order, it passes upon, without reducing to record, the very question of right which it admits not to be within its jurisdiction": 2 Bishop on Marriage and Divorce, sec. 356. As long as courts of equity are induced to admit that this proceeding is equivalent to granting a divorce from bed and board, no doubt the jurisdiction will be denied. Let us, therefore, examine this proposition. In every case (where the husband and wife are living separate and apart) in which the common-law courts give judgment for necessities furnished the wife by third persons, one of the facts upon which the judgment rests is that the wife has just cause for living in separation from her husband during the time in question, when such necessary supplies were furnished: See cases from common-law courts, and other authorities cited, *supra*. Now, may it not be said with quite as much force that in these cases the common-law courts (admittedly without any jurisdiction to authorize the spouses to live separate and apart) do by their judgments confirm the proposition that during the time in question the wife had good cause for living in separation from her husband? In the case of *Liddlow v. Wilmot*, 2 Stark. 86, brought in the common-law court by a third person, against a husband, for necessary supplies furnished his wife while she was living separately from him, Lord Ellenborough said: "The first question for consideration is whether the defendant turned his wife out of doors, or by the indecency of his conduct precluded her from living with him; for then he was bound by law to afford her means of support adequate to her station." In *Hultz v. Gibbs*, 66 Pa. St. 360, the same doctrine is stated as follows: "When a husband turns his wife out of doors, without any reasonable or just cause, or forces her to withdraw from him, without any means for her support, the law implies that he has given her credit to supply herself with such necessities as are suitable and proper for her to have, namely, clothing, boarding, lodging, and the like. Her con-

dition would be deplorable, indeed, if this were not so, because of her inability to contract for such things, and to obtain them, if she happens to have no separate estate. When, therefore, necessities are furnished to a wife so situated, on the credit of her husband, the party claiming to be paid for them must bring himself, in order to recover for them, within the rule stated. He must make out a case which shall negative all idea of a captious, voluntary abandonment of the husband's domicile, and show that she has either been turned out or forced to leave his residence: *Walker v. Simpson*, 7 Watts. & S. 85; 42 Am. Dec. 216, and the authorities therein referred to." Declarations of this doctrine could be quoted by great number from the common-law courts. See cases *supra*.

So the common-law court must try the question whether the wife was abandoned without cause, or compelled to withdraw and live separately. In other words, these conditions must be shown before judgment can be given in favor of a third party for necessities furnished her living separately from her husband. Then, is not the judgment in such case an affirmation by the common-law court that the wife had just cause for living in separation? And, if the conditions thus judicially affirmed as sufficient ground still exist, such judgment would not be far from judicially sanctioning her continuance of the separation. It would at least affirm indirectly that as long as the cause for separation, which was adjudged sufficient, existed, she would be justified in living separate and apart. Yet the jurisdiction of the common-law courts to give such judgments does not appear to be questioned on the ground that the same amounts to adjudging the wife justified in living apart from her husband, which, if decreed in terms, would amount to a decree of divorce *a mensa et thoro*. The proposition, however, is held up before the equity court as an all-sufficient "difficulty," whenever it is called upon to do, in a more adequate, direct, simple, and just manner, the very thing which the common-law court fearlessly attempts. But does the judgment or decree, whether of common-law or equity court, simply compelling the husband to continue to support his wife when he has without cause abandoned her, amount to a divorce from bed and board? We have seen that she must be fully justified in her separation, and that justification must be shown before either the common-law or equity court will give relief. But the proposition that such inquiry and the giving of relief is equivalent to the granting of a

divorce from bed and board, it would seem, must involve the common-law court in the same embarrassment as Mr. Bishop has attempted to draw the equity court into whenever it affirms that it lies within the equitable jurisdiction to grant such relief. Is there anything in the proceeding, whether in the common-law or equity court, which authorizes the spouses to live separate and apart, or authorizes the delinquent husband to continue his neglect, without cause, to provide for his wife? Is not the wrongful conduct of the husband, instead of the proceeding whereby a court compels him to support his wife, the only justification she has for her separation? And is there anything in the proceeding either authorizing the husband to continue his wrongful conduct, or fail to resume the voluntary discharge of his marital duties? Is there anything in the proceeding which merely compels him to support his wife in the nature of casting an obstacle in the way of his seeking reconciliation with her, and resuming the voluntary discharge of his marital obligations? It is within the power of courts of equity to make their decrees in all such cases subject to such modifications as circumstances may demand; and it is worthy of consideration whether the actual effect of a just and proper exercise of such jurisdiction would not tend to induce reconciliation by checking the husband in his willful and unjustifiable abandonment of his marital obligations. The proceeding, it would seem, simply checks the husband in his attempt to entirely abandon his obligation, without sanctioning the separation any further than inquiring whether it is enforced by the husband's conduct, the same as done in common-law courts, and without placing the slightest obstacle in the way of reconciliation. These considerations are in no way suggested as furnishing the reasons upon which to base an answer to the question whether the equity courts of this state possess the jurisdiction in question. They are brought to view in connection with the proposition asserted by some, as we have seen, that to grant such relief is equivalent to and in fact includes the decree of divorce *a mensa et thoro*. But we are inclined, after much reflection, to regard the proposition as untenable. When the whole nature and effect of the relief are considered, it appears to be an extreme view, born of a zealous advocacy of one side of this disputed question of jurisdiction.

We will close the inquiry upon this branch of the case by bringing to view certain statutory and constitutional provis-



ions of this state, which to some extent, we think, should influence our determination. The statute provides that, "women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman which her husband does as a man; and for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone": Comp. Stats., sec. 1439, div. 5. Our constitution provides that "the district courts shall have original jurisdiction in all cases at law and in equity, . . . and for such special actions and proceedings as are not otherwise provided for": Comp. Stats., sec. 11, art. 8. And further, that "there shall be but one form of civil action, and that law and equity may be administered in the same action": Comp. Stats., sec. 28, art. 8. And further, that "courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character, and that right and justice shall be administered without sale, denial, or delay": Comp. Stats., sec. 6, art. 3. This latter provision was, we think, set before the courts by the framers of the constitution as a tenet for consideration in a case like this, where clearly there is an established right existing, subject to judicial enforcement, and the question is raised on purely artificial grounds as to whether such right shall be enforced in such an action and in such jurisdiction as by its practice and methods of procedure can insure an appropriate, just, and adequate relief, or whether there shall be a denial of such appropriate and adequate remedy as the courts can afford. It is admitted that the right exists, and it is contended there is a remedy at law; but we have seen that in many cases that answer would be but a mockery to the aggrieved in her unjust abandonment. The court is then confronted with the question whether there shall be a denial of enforcement of this right, except where absolute divorce is granted. We think the intendment of our constitution and statutes is to negative that proposition. With these provisions before us, in addition to the grounds of equity jurisdiction considered, we are drawn to the conclusion that our courts are invested with a jurisdiction broad enough to give proper and adequate remedy for the enforcement of the right in question, in proper cases, where it is shown that such

jurisdiction ought to be exercised, and that such remedy lies within the equity jurisdiction of our district courts.

The second proposition of law to be determined in this case will be developed by a brief statement of facts set forth in plaintiff's complaint. Among other things, it is alleged that plaintiff and defendant intermarried on or about the ninth day of September, 1879, at Watkins Glen, Schuyler County, state of New York, and lived together as man and wife until October 24, 1886; that from September, 1882, until October, 1886, they resided in the city of Helena, territory of Montana; that in May, 1887, defendant, without any cause or provocation on the part of plaintiff, willfully abandoned and deserted her, and compelled her to live separate and apart from him; that from the last date up to about seven months prior to the commencement of this action defendant contributed the sum of fifty dollars per month, and at times seventy-five dollars per month, for plaintiff's support; that for about seven months last past defendant has neglected and refused, and still refuses, to furnish plaintiff any money whatever, and that she is now wholly without means of support, and is entirely dependent upon her personal exertions and the contributions of her friends for support of herself and infant son, the issue of said marriage, now in plaintiff's care and custody; that about April 24, 1887, at the city and state of New York, defendant, by threats and menaces, particularly alleged and described, compelled plaintiff to write and sign, as dictated by defendant, a letter of authority addressed to E. D. Weed, Esq., an attorney at law, residing and engaged in the practice of law at the city of Helena, territory of Montana, authorizing him to appear as her counsel in an action which defendant proposed to commence against her to obtain a divorce from the bonds of matrimony existing between plaintiff and defendant; that when defendant had thus compelled the writing of said letter by plaintiff, he took the same into his possession; that thereafter plaintiff requested defendant to destroy said letter, and that he then told plaintiff, in order to deceive and defraud her, that he had destroyed said letter, but that, contrary to such statement, defendant retained said letter in his possession, and thereafter presented the same to said attorney, and told said attorney that plaintiff desired said letter to be delivered to him, and desired him to appear for plaintiff, and "represent her in a divorce proceeding to be commenced by the defendant"; that thereafter said attorney

appeared as counsel for this plaintiff in an action commenced in the district court of the fourth judicial district of the territory of Montana, within and for the county of Yellowstone, by defendant herein against this plaintiff, to obtain a divorce from her; that such proceedings were had in said action as resulted in defendant obtaining from said court a decree of divorce from this plaintiff. Plaintiff further alleges that she did not appear in said action, nor had any knowledge of the fact that said attorney had appeared for her therein.

Respondent interposed a demurrer to this complaint, which was sustained by the court, and plaintiff appealed from that order.

Appellant's counsel succinctly state their position on this branch of the case as follows: "Are the parties hereto husband and wife? Is said decree void or voidable? If void, we will then claim that plaintiff is the wife of defendant, and is entitled to maintain this action. If voidable, then we concede that we are premature in our action."

It is not contended by appellant that the decree of the territorial district court dissolving the bonds of matrimony which theretofore existed between plaintiff and defendant is void for any reason that appears on the face of such decree. It was pronounced by a court of general jurisdiction, and of special statutory jurisdiction of actions for divorce: Comp. Stats., sec. 1000, div. 5. Moreover, by appellant's own showing in her complaint, it appears that said court had jurisdiction of her person, by her appearance, through her attorney, duly and expressly authorized by letter: Code. Civ. Proc., secs. 80, 491.

This decree must be regarded, of course, as if pronounced by a court of this state, as the transformation from territorial to state form of government is for many purposes to be considered as a continuity of government: Const., sec. 2, art. 20.

The theory of appellant's counsel is that the judgment is void, not by reason of any fact appearing on the face of the proceedings, but by reason of the facts pleaded as to the conduct of defendant, which led up to the court obtaining jurisdiction to grant said decree. They contend that, by reason of those facts pleaded, which are deemed admitted on demurrer, it is shown that the court had no jurisdiction over the person of appellant, who was defendant in said proceedings for divorce. On this premise they submit "that wherever want of jurisdiction over the person of defendant is shown, the judgment rendered without such jurisdiction is absolutely void,

and is a nullity, and that this want of jurisdiction may as well be shown by evidence *aliunde* the record as from the face of the record; that in either case, if this want of jurisdiction is shown, the decree is absolutely void, and of no force or effect."

It seems to us that, if such a premise be followed, it would sweep away all distinction between judgments void for reasons manifest on the face of the record, and those which, as appears by the record, are valid, and must be given full faith and force until impeached in a proper proceeding, by establishing facts *aliunde* the record sufficient for that purpose. While there is much conflict relating to certain questions of law concerning judgments, we think it may be safely said to be almost uniformly settled now that domestic judgments of courts of general jurisdiction, valid on their face, cannot be collaterally attacked in courts of the same state by showing facts *aliunde* the record, although such facts might be sufficient to impeach the judgment in question if brought to bear upon it in a proper proceeding. The proposition in this case appears to be to open a way through said decree of divorce for the progress of this action, by going back of that judgment, and raising a question as to the good faith and lawfulness of the plaintiff's conduct in obtaining it. Such a practice cannot be sustained. It is needless to go into a discussion of the reasons, and the public policy which forbid such a rule. These are fully developed in the authorities: Freeman on Judgments, secs. 116, 128; 1 Black on Judgments, secs. 170, 270; *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742; *Carpentier v. Oakland*, 30 Cal. 440; *Granger v. Clark*, 22 Me. 128; *Penobscot R. R. Co. v. Weeks*, 52 Me. 456; *Prince v. Griffin*, 16 Iowa, 552; *Callen v. Ellison*, 13 Ohio St. 446; 82 Am. Dec. 448; *Coit v. Haven*, 30 Conn. 190; 79 Am. Dec. 244; *Clark v. Bryan*, 16 Md. 171; *Wingate v. Haywood*, 40 N. H. 437; *Galpin v. Page*, 1 Saw. 309; *Horner v. Doe*, 1 Ind. 130; 48 Am. Dec. 355; *Baker v. Stonebraker*, 34 Mo. 172; *Reed v. Pratt*, 2 Hill, 64; *Harshey v. Blackmarr*, 20 Iowa, 161; 89 Am. Dec. 520. See, also, a late case from Oregon, *Morrill v. Morrill*, 20 Or. 96, published in 23 Am. St. Rep. 95, with an elaborate note by Mr. A. C. Freeman, editor, and also author of Freeman on Judgments, citing many cases upon the subject.

Upon the view that said decree was not void, but only voidable in a proper proceeding for that purpose, the court sus-



tained respondent's demurrer, and in our opinion the ruling is correct.

The judgment will therefore be affirmed.

BLAKE, C. J., and DE WITT, J., concur.

**MARRIAGE AND DIVORCE — SEPARATE SUIT FOR MAINTENANCE.** — A separate suit for alimony and support may be maintained by the wife in equity, independent of a suit for divorce: *Ewle v. Earle*, 27 Neb. 277; 20 Am. St. Rep. 667, and note; *Smith v. Smith*, 154 Mass. 262. Courts of equity may allow a wife a separate support where the husband has been guilty of such conduct that she cannot live with him in safety or decency: *Helms v. Franciscus*, 2 Bland, 544; 20 Am. Dec. 402, and note; *Almond v. Almond*, 4 Rand. 662; 15 Am. Dec. 781, and note. But in *Adams v. Adams*, 100 Mass. 365, 1 Am. Rep. 111, it was held that a wife could not maintain such a suit in equity where she had good and sufficient grounds for divorce, although she had conscientious scruples against applying for one. See also the extended note to *Methvin v. Methvin*, 60 Am. Dec. 666.

**JUDGMENTS — COLLATERAL ATTACK GENERALLY.** — Domestic judgments and those standing on a like footing import verity, and public policy forbids their indirect collateral contradiction or impeachment: *Ambler v. Whipple*, 139 Ill. 311; 32 Am. St. Rep. 202, and note; *Dyer v. Leach*, 91 Cal. 191; 25 Am. St. Rep. 171, and note; extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 104. See also *Hardy v. Beaty*, 84 Tex. 562; 31 Am. St. Rep. 80, and note; note to *Williams v. Haynes*, 19 Am. St. Rep. 755; and note to *Gould v. Sternburg*, 15 Am. St. Rep. 143.

## STATE v. HERRON.

[12 MONTANA, 230.]

**ASSAULT WITH DEADLY WEAPON — WHAT CONSTITUTES.** — When one person points a rifle or other firearm at another and threatens to blow his head off if he does not turn around, this, in law, constitutes an assault, although it is not proved that the gun was loaded; and a direction by the court to acquit is erroneous. It is to be presumed that the gun was loaded, and the fact that it was not loaded is a matter of defense.

**INFORMATION** for an attempt to commit an assault with a deadly weapon. From the evidence introduced by the prosecution it appeared that the defendant, Herron, met the complaining witness, Nelson, upon the public highway driving a team, and ordered the latter off the road. Nelson refused. Defendant then procured his rifle, and pointing it at the complaining witness, said in an angry and threatening manner "Will you stop? If you move another step forward, I will blow your head off. Turn around, and turn around quick." At the close of the evidence for the prosecution the defendant

moved the court to direct the jury to acquit, on the ground that the material allegations of the information were not proven, in this; that the evidence failed to prove that the gun was loaded, and that proof of pointing the gun with threats was not sufficient to sustain the information. The court instructed the jury to acquit, as requested, and judgment was rendered in favor of the defendant. The state appealed.

*Henri J. Haskell, attorney-general, W. S. Shaw, and H. F. Titus, for the state, appellant.*

*H. R. Whitehill, for the respondent.*

DE WITT, J. It is not questioned but a loaded rifle is a deadly weapon. In this case a rifle was used. It was used with threats. The defendant said that he would blow Nelson's head off. He thus threatened to do that which he could do only if the gun were loaded. The gun could be used, as threatened to be used, only when loaded. Under these circumstances, on an information for an attempt, must the state prove that the gun was loaded, or is it a matter of defense to show the fact (if it be a fact) that there was no load in the gun? This was the proposition fairly before the district court, and that upon which we will decide the appeal. It seems to be a first impression in this jurisdiction. Whether the instrument in question was a deadly weapon has been held to be a question of fact for the jury: *Doering v. State*, 49 Ind. 56; 19 Am. Rep. 669. Also, that it was a matter of law for the court: *State v. Rigg*, 10 Nev. 284; Bishop on Criminal Law, sec. 335. It has also been held that it is sometimes a mixed question of law and fact: Bishop on Criminal Law, 335, n. 4; but we may pass a decision of that point.

The district court took the matter as a question of law, and we will only inquire whether it was correctly decided from that point of view. The authorities are not uniform. In *State v. Napper*, 6 Nev. 113, it was directly held, in a case of this nature, that the court should have directed a verdict for the defendant, for the reason that it was not proven that the pistol was loaded. This case cites *State v. Swails*, 8 Ind. 524, 65 Am. Dec. 772; but the latter was a very different case. There it seems to have appeared affirmatively that the gun was charged with only powder and a light cotton wad, and the court held, in the state's appeal, that the following instruction was not error: "If you believe from the evidence that at the time the defendant fired the gun at said Lee, it was not

charged with anything but powder and a light cotton wad, Swails being at the distance of forty feet from Lee at the time, and that at that distance the life of Lee was not at all endangered or put in jeopardy by the act of Swails in discharging the gun at him, in consequence of the manner in which it was loaded, the defendant cannot be convicted, although he may have thought that the gun was properly loaded with powder and ball, and although he may have intended to murder Lee." This case is also referred to in Wharton's Criminal Law, section 1280, cited in the Nevada case above. The Nevada case also cites *State v. Neal*, 37 Me. 468. But the Maine case does not go to any such extent as does the Nevada case. The case of *Fastbinder v. State*, 42 Ohio St. 341, decided by a divided court, and cited by respondent, was decided largely upon the ground that the circumstances of the case did not show an intent to commit the offense charged.

It is said in *State v. Shepard*, 10 Iowa, 126: "Mr. Greenleaf (vol. 1, sec. 59) states that the presenting a gun or pistol at a person is an assault. But he adds that 'whether it be an assault to present a gun or pistol, not loaded, but doing it in a manner to terrify the person aimed at, is a point upon which learned judges have differed in opinion.' It is held to be such in *Regina v. St. George*, 9 Car. & P. 483; *State v. Smith*, 2 Humph. 457; and see *Vaughan v. State*, 3 Smedes & M. 553; *State v. Benedict*, 11 Vt. 236; 34 Am. Dec. 688. But on the contrary, see *Blake v. Barnard*, 9 Car. & P. 626; *Regina v. Baker*, 1 Car. & K. 254; *Regina v. James*, 1 Car. & K. 530, which last two cases, however, were under a statute. Wharton's Criminal Law, page 545, says that it is not an assault, and cites only the above case of *Regina v. James*." This opinion further holds: "After reviewing the question in its various lights, we are inclined to hold with those who regard it as an assault where the person aimed at does not know but that the gun is loaded, or has no reason to believe that it is not." Simply pointing a pistol at one, or drawing a weapon, is not, in itself, an assault, if the person so acting says or does that which makes it clear that he has no intention to commit an assault. Such was the situation in the oft-cited example of him who laid his hand on his sword and said: "If it were not assize time, I would not take such language from you." And also the instance of one remarking: "If it were not for your gray hairs, I would tear your heart out." As remarked in *Keefe v. State*, 19 Ark. 192: "In these cases there was held to be no

assault, because the words explained the act, and took away the idea of an intent to commit an assault." See also, *Richels v. State*, 1 Sneed (Tenn.), 606, and *State v. Church*, 63 N. C. 15.

But in the case at bar defendant's declarations of his intent to commit the assault are very plain. Nor does it matter that he put his threats in an alternative — that is, using the language, "Turn around, or I will blow your head off." In the language of *Keefe v. State*, 19 Ark. 192: "But where the weapon is drawn, and the threat to use it is merely conditional, it may nevertheless be an assault. As where the defendant, standing within a few feet of the prosecutor, presented a pistol at him, saying, 'If you do not turn the Negro loose, I will shoot you,' etc.: *State v. Cherry*, 11 Ired. 475. So, where the defendant raised an ax, within striking distance of another, and said, 'Give up the gun or I'll split you down,' and the person at the time did not give up the gun, but proposed some arrangement upon which the defendant let the ax down, it was held that he was guilty of an assault: *State v. Morgan*, 3 Ired. 186; 38 Am. Dec. 714." See also, *Beach v. Hancock*, 27 N. H. 223; 59 Am. Dec. 373, and *Richels v. State*, 1 Sneed (Tenn.), 606. Cases wherein it appears in evidence that the gun was not loaded are not in point. If the gun had been shown to be unloaded, that would have presented another question, upon which we are not now called upon to pass.

This case is a prosecution for an attempt. The attempt is clear. The intent is expressly declared by defendant himself. The ability is proven, that is, if the gun was loaded. Under these circumstances it has been held that the gun is presumed to be loaded (see *Keefe v. State*, 19 Ark. 192; *Beach v. Hancock*, 27 N. H. 223; 59 Am. Dec. 373; and *Richels v. State*, 1 Sneed (Tenn.), 606), and that the fact that it was unloaded was a matter of defense: See cases last cited, and *Crow v. State*, 41 Tex. 468. We find the following in Russell on Crimes, vol. 1, p. 1019: "It has been laid down by a very learned judge, notwithstanding a contrary opinion in an earlier case, that if a person present a pistol, purporting to be a loaded pistol, so near as to produce danger to life if the pistol had gone off, it is an assault in point of law, although in fact the pistol be unloaded. The learned judge said: 'My idea is that it is an assault to present a pistol at all, whether loaded or not. If you threw the powder out of the pan, or took the percussion cap off, and said to the party, "This is an empty pistol," then that would be no assault, for there the party must see



that it was not possible that he should be injured; but if a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent": *Regina v. St. George*, 9 Car. & P. 483; see, also, Wharton's Criminal Law, sec. 1244, and *State v. Church*, 63 N. C. 15.

Although there is a division of views in the decided cases, we think that the better opinion is that, if a firearm is the alleged deadly weapon — a weapon the only ordinary use of which is by its being loaded — if it be pointed at the complainant in a threatening manner, if defendant make threats to shoot, if the circumstances are such as would exist if one were using a loaded gun — in short, that if all the elements of the offense be made out, as required by the criminal laws and procedure, except the direct, we may say visual, proof that the weapon is loaded — under these circumstances a direction to the jury to acquit is error; and the fact that the gun was unloaded, if such be the fact, is a matter of defense. Such view seems to be held by the weight of authority, and such is the only practical view in the enforcement of the statute in reference to assaults with deadly weapons of this character.

It is therefore ordered that the judgment of the district court be reversed, and the case remanded for a new trial.

BLAKE, C. J., and HARWOOD, J., concur.

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**ASSAULT WITH DEADLY WEAPON — WHAT CONSTITUTES.** — To constitute the crime of assault with a deadly weapon there must be an unlawful attempt with a weapon, deadly either in its nature or capable of being used in a deadly manner, to inflict a bodily injury with the present ability to do it: *State v. Napper*, 6 Nev. 113, cited in opinion to *People v. Lee Kong*, 29 Am. St. Rep. 167. To point an empty gun at another at a distance of from thirty to seventy yards, whereby such other is put in fear, is not an assault with a deadly weapon: *State v. Godfrey*, 17 Or. 300; 11 Am. St. Rep. 830, and note. So it is no assault with intent to kill where A fires a gun at B at the distance of forty feet, with the intent to murder him, if the gun is in fact loaded with powder and a light cotton wad, although A believed it to be loaded with powder and ball: *State v. Swails*, 8 Ind. 524; 65 Am. Dec. 772, and note. *Contra*, see *Mullen v. State*, 45 Ala. 43; 6 Am. Rep. 691. Whether or not a gun is loaded, and how loaded, is very material on the question of intent, upon an indictment under a statute against shooting at another: *Allen v. State*, 28 Ga. 395; 73 Am. Dec. 760. *Contra*, see *Clark v. State*, 84 Ga. 577. To constitute an assault there must be an unlawful attempt and a present ability to inflict the injury: *People v. Lee Kong*, 95 Cal. 666; 29 Am. St. Rep. 165, and note; note to *People v. Moran*, 20 Am. St. Rep. 744.

An assault is committed by a person who aims a gun in a threatening manner at another standing three or four rods off, and snaps it two or three

times, even though the gun was unloaded, if such fact was unknown to the person at whom the gun was pointed: *Beach v. Hancock*, 27 N. H. 223; 59 Am. Dec. 373, and note with cases collected. An indictment charging an assault with a pistol, alleging that it was a deadly weapon, is not bad for not charging that it was loaded nor presented within range: *Burton v. State*, 3 Tex. App. 403; 30 Am. Rep. 146. In *Davis v. State*, 25 Fla. 272, the evidence showed that the defendant pointed his gun at another, but it did not show that he fired it, or attempted to fire it, or that it was loaded. It was held that the evidence did not show an assault with intent to murder.

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## NORRIS v. HEALD.

[12 MONTANA, 282.]

**MORTGAGE OF PRE-EMPTION CLAIM — VALIDITY OF.** — An ordinary mortgage of his claim by a pre-emptor of public land prior to the time of making his final proofs is valid and is not a grant or conveyance within the prohibitory clause of section 2262, Revised Statutes of the United States, providing that any grant or conveyance which such pre-emptor may have made, except in the hands of *bona fide* purchasers for value, shall be null and void.

**MORTGAGE OF PRE-EMPTION CLAIM — EVIDENCE OF GOOD FAITH.** — In an action to foreclose a mortgage of a pre-emption claim on public land, evidence of the purpose for which the mortgage money was borrowed is admissible and material to show that the mortgagor was acting in good faith and not in collusion with the mortgagees to convey the title or to evade any provision of law.

*Luce and Luce*, for the appellant.

No appearance for the respondent.

BLAKE, C. J. This action was commenced to foreclose three mortgages which were given to secure the payment of certain promissory notes. The court below, in passing upon a demurrer to the answer, decided that the case of *Bass v. Baker*, 6 Mont. 442, was applicable to the issue of law raised by the pleadings, and judgment was entered for the mortgagors.

It appears from the record that Charles P. Bradley, Sr., made, in the year 1877, a pre-emption filing upon the tract of land which is described in the pleadings and mortgages. Bradley died in the year 1879, and the answer alleges that "the final proof in said described premises was made by said Jennette C. Kelleher, as administrator for the estate of Charles P. Bradley, deceased, for the heirs of said Charles P. Bradley, Sr., deceased, and not otherwise, and patent duly issued to them on the thirtieth day of January, 1885; and that the said

defendant, Jennette C. Kelleher, made and executed the said mortgage mentioned in said first cause of action prior to the issuing of the final receipt for said pre-emption claim." These allegations of facts must be treated as admitted upon this hearing. The first mortgage was executed November 23, 1880, by Jennette C. Bradley, the widow of Charles P. Bradley, Sr.; the second mortgage was executed February 21, 1881, by Jennette C. Bradley and Darwin J. Bradley, a son of Charles P. Bradley, Sr.; and the third mortgage was executed February 26, 1881, by Jennette C. Bradley. At some time, which is not mentioned in the pleadings, Jennette C. Bradley married John C. Kelleher.

An examination of the transcript in *Bass v. Buker*, 6 Mont. 442, which is filed with the records of this court, and the report of the case, shows that Buker filed March 5, 1874, his declaratory statement of a pre-emption claim to certain lands; that he executed September 16, 1881, a mortgage thereon to Bass; that he sold January 17, 1883, his interest in the premises to Fruen, and delivered the possession thereof; and that Fruen disposed of the same August 7, 1883, to Warner, who filed thereon as a pre-emptor, and obtained February 18, 1884, his final receipt from the United States. Bass, in September, 1884, brought an action to foreclose the mortgage against Warner and Buker. It will be observed that Buker did not perform any act to secure his title from the government after the filing of his claim in March, 1874, and that he abandoned the same in the year 1883, and that the rights of Warner were derived from the United States, and were not connected in any manner with Buker.

It was adjudged in *Bass v. Buker*, 6 Mont. 442, that the mortgage could not be enforced, by reason of the provisions of section 2262 of the Revised Statutes of the United States. Two sentences of this section should be examined. The pre-emptor is required to make oath, among other things, that "he has not settled upon and improved such land to sell the same on speculation, but in good faith, to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself." It is further provided that "any grant or conveyance which he may have made, except in the hands of

*bona fide* purchasers for a valuable consideration, shall be null and void, except as provided in section 2288."

It is evident that *Buker* did not have any interest in this land in the year 1884, which could be encumbered by the mortgage, and the conclusion of the court is undoubtedly sound. The court did not discuss these propositions; and the opinion is confined solely to the effect of the section, upon the mortgage. The rule is asserted therein, without any qualification, that a mortgage made by a settler upon land which is subject to entry under the pre-emption laws, before the issuance of the final receipt, is a grant or conveyance within the terms of the section, and is therefore null and void.

We have reconsidered *Bass v. Buker*, 6 Mont. 442, and cannot yield our assent to this principle which is upheld in the opinion. We are aware of the conflict in the authorities upon the construction of this section, and will present the different views. The supreme court of the United States has commented upon and explained the object of this legislation. In *Myers v. Croft*, 13 Wall. 291, Mr. Justice Davis, for the court, said: "It had been the well-defined policy of Congress, in passing these laws, not to allow their benefit to inure to the profit of land speculators, but this wise policy was often defeated. Experience had proved that designing persons, being unable to purchase valuable lands, on account of their withdrawal from sale, would procure middlemen to occupy them temporarily, with indifferent improvements, under an agreement to convey them so soon as they were entered by virtue of their pre-emption rights. When this was done and the speculation accomplished, the lands were abandoned. This was felt to be a serious evil, and Congress in the law under consideration undertook to remedy it by requiring of the applicant for a pre-emption, before he was allowed to enter the land on which he had settled, to swear that he had not contracted it away, nor settled upon it to sell it on speculation, but in good faith to appropriate it to his own use. . . . The object of Congress was attained when the pre-emptor went, with clean hands, to the land office, and proved up his right, and paid the government for his land."

In *Quinby v. Conlan*, 104 U. S. 420, Mr. Justice Field refers to *Myers v. Croft*, 13 Wall. 291, and says: "The act of Congress forbids the sale of pre-emptive rights to the public lands acquired by settlement and improvement. The general pre-emption law declares that all transfers and assignments of



rights thus obtained prior to the issuing of the patent shall be null and void. This court held, looking at the purpose of the prohibition, that it did not forbid the sale of the land after the entry was effected, that is after the right to a patent had become vested, but did apply to all prior transfers. The policy of preventing speculation through the instrumentality of temporary settlers would otherwise be defeated."

It is not alleged in the answer that the mortgages were executed for the purpose of aiding speculators, or to cause the title which might be acquired from the United States to be assigned or transferred, or inure to the benefit of any person except the mortgagors. The language of the opinions in *Myers v. Croft*, 13 Wall. 291, and *Quinby v. Conlan*, 104 U. S. 420, does not contemplate a mortgage, or an instrument of like character. This question was not investigated in these cases, and has not been directly determined by the supreme court of the United States.

The decisions of the department of the interior and the general land office, relating to this matter, have been uniform during the past ten years. Mr. Teller, the secretary of the interior, rendered April 24, 1882, in *Larson v. Weisbecker*, 1 Dec. Dep. Int. 422, a decision and construed the section. It is therein said: "I am aware that the former rulings of your office and of this department, following the precedent of an early decision, have held that an outstanding mortgage given by a pre-emptor upon the lands embraced in his filing defeats his right of entry, upon the ground that such mortgage is a contract or agreement by which title to the lands might inure to some other person than himself. A careful consideration of this section leads me to a different conclusion, and to the opinion that, unless it shall appear under the rules of law applicable to the construction of contracts or otherwise, that the title shall inure to another person, it does not debar the right of entry; and that the mere possibility that the title may so result, as in the case of an ordinary mortgage, is not sufficient to forfeit the claim. . . . The statute under consideration requires from a pre-emptor, in my opinion, in order to the defeat of his right of entry, a contract by force of which title to the land must vest in some other person than himself; and it must appear that such was his intention at the time of making it. If, on the contrary, the mortgage was a mere security for money loaned, and the contract does not necessarily divert the title from him, it was not a contract or agree-

ment within the meaning of section 2262." This ruling was followed, October 11, 1887, in *Appeal of Ray*, 6 Dec. Dep. Int. 340, wherein it is said: "There is no law or ruling of this department now in force that prohibits a pre-emptor who has complied with the requirements of the pre-emption law, in good faith, from mortgaging his claim to procure money to prove up and pay for his land." To the same effect is *Haling v. Eddy*, 9 Dec. Dep. Int. 337, which was decided September 7, 1889.

The reasons for this ruling of the department concerning the public lands are that the pre-emptor made a conditional alienation, when he might have executed an absolute conveyance, if his purpose had been different; and that by the payment of the loan the title could not inure to the benefit of the mortgagee. In the case at bar the patent had been issued to the mortgagors, as the heirs of Charles P. Bradley, Sr., and the title to the land cannot, within the meaning of the section, inure to the benefit of any other persons. We have confined our inquiries to the interpretation of the section, and will add that this principle has been applied to similar clauses in the statute relating to homestead entries. It is of vital consequence that the courts of the state should be in accord with the general government in the enforcement of the laws which regulate the rights of settlers upon the public domain, and the mode of procuring the title thereto. In many instances the pre-emptor would be unable to borrow money if he could not give a valid mortgage upon his land as security for its payment.

While the decisions of the department of the interior are not binding upon this court, they are to be treated with great respect, and the logic of Mr. Teller in *Larson v. Weisbecker*, 1 Dec. Dep. Int. 422, is forcible and convincing. The other authorities should be reviewed. The case of *Bull v. Shaw*, 48 Cal. 455, supports the judgment of the court in *Bass v. Buker*, 6 Mont. 442, and the facts are substantially the same. Shaw was residing upon public land, and executed in 1867 a mortgage thereon to Williams. In 1868, Shaw sold the same to Delaney, who filed in 1869 his declaratory statement as a pre-emptioner, and in October, 1870, this action was commenced to foreclose the mortgage. Delaney died in November, 1870, and the administrator of his estate, for the heirs, "proved up, entered, and paid for the land." It is stated in the report that "the Delaneys were made defendants, as purchasers from

Shaw, after the execution of the mortgage. The attorneys for the appellant claimed that Delaney bought subject to the mortgage, and that he and his heirs were estopped from denying Shaw's title, and the validity of the mortgage." It was held that the mortgage could not be enforced against the land upon the sole ground that Delaney did not deraign his title from the United States through Shaw. It is obvious that this case does not throw any light upon the argument in *Bass v. Buker*, 6 Mont. 442, and cannot be cited to aid its deductions.

The earliest case we have found that bears upon this proposition is *Whitney v. Buckman*, 13 Cal. 536, which was decided in the year 1859. It was contended by the appellant that "the mortgage of a pre-emption claim is null and void." Mr. Justice Baldwin, for the court, said: "The mortgage does not pretend to transfer to the mortgagee the right to a pre-emption; this is not assignable, but the possession of public land, whether taken for the purpose of getting a pre-emption right, or any other purpose, may be mortgaged, or the land itself, and if the mortgagee gets no title through the mortgage, this is not an objection to be raised by the man who makes it." This case was approved in *Kirkaldie v. Larrabee*, 31 Cal. 457, 89 Am. Dec. 205, and the court said: "The mortgagor of the fee is estopped from denying the existence of the lien which he has attempted to create, and from defeating, by his own act, the enforcement of the lien against the property thus mortgaged": See cases therein cited, and *Cochran v. O'Keefe*, 34 Cal. 554.

In *McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100, decided in 1864, Smith entered into a contract by which she borrowed a sum of money to enable her to purchase from the United States a parcel of public land which she had pre-empted, and made a mortgage to secure the payment thereof. Mr. Justice McMillan, in the opinion, said: "The contract, having been made prior to the purchase of the land by Ann Smith, is clearly within the prohibition of the thirteenth section of the act of Congress of September 4, 1841, under which she pre-empted the lands mentioned in the complaint. . . . The title, in this instance, which Ann Smith acquired, would, if the contract be valid, inure to the benefit of the plaintiff, to the extent of his charge or lien upon the premises. The contract is therefore illegal and void, and the note and mortgage, being the fruit of the contract, must fall with it."

In *Woodbury v. Dorman*, 15 Minn. 338, decided in January, 1870, it was held by a majority of the court that the case was governed by *McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100; and that a mortgage executed by a pre-emptor, after making the proofs required by law, in pursuance of an agreement which had been made prior thereto, was void. Mr. Justice Berry dissented, and was of the opinion that the mortgage was valid, "infringing neither the letter nor the spirit of the pre-emption law." At this term a change occurred in the members of the court, and an application for a reargument of the case was made and denied: *Woodbury v. Dorman*, 15 Minn. 341. Mr. Justice Berry, for the court, said: "To prevent any misapprehension of the effect of the denial, the chief justice and myself deem it proper to say, however, that, with the highest respect for the able and learned chief justice who pronounced the prevailing opinion in this case, as well as for our brother McMillan, who concurred with him, we believe the decision to be erroneous in respect to the validity of the mortgage." In July of the same year, the court, in *Jones v. Tainter*, 15 Minn. 512, overruled *McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100, and *Woodbury v. Dorman*, 15 Minn. 338, upon this point. Mr. Justice McMillan dissented. The reasons which controlled this conclusion are embodied in the following paragraph of the opinion, by Mr. Justice Berry: "In the opinion of the majority of this court, a simple agreement, by a person proposing to apply for and enter land under the act of September 4, 1841, to execute a mortgage to secure the payment of money furnished him with which to pay for such land, is not such an agreement as is referred to in the provisions just quoted from the pre-emption act. It is not an agreement by which the title to be acquired, that is to say, the fee, should inure, in whole or in part, to the benefit of any person other than the pre-emptor; on the contrary, the presumption is that a mortgagor intends to pay the mortgage debt, and discharge his land from the encumbrance of the mortgage, so that his title shall not inure to the benefit of the mortgagee. The result may be that the mortgagee, through the mortgagor's default, will acquire the title, and the same result might have followed if the pre-emptor had given his note only for the warrant, or purchase money, or for any other indebtedness, and such note having been put into judgment, the holder of it had acquired title to the land pre-empted through sale upon execution; but the result is not important. The question is,



was there any contract or agreement by which the pre-emptor fixed this result? Did the pre-emptor contract or agree that the title to be acquired, that is to say, the fee, should inure to the benefit of another? In other words, did the pre-emptor contract or agree to do anything which, when done, would pass the title, in whole or in part, to another, so that the pre-emption would, as to such whole or part, be a mere conduit of the title?" See also *Fuller v. Hunt*, 48 Iowa, 166; *Larison v. Wilbur*, 1 N. Dak. 284.

The supreme court of Kansas, in the year 1875, in *Brewster v. Madden*, 15 Kan. 249, maintained the opposite view of the question, and relied as authority upon *McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100, and *Warren v. Van Brunt*, 19 Wall. 646. Mr. Justice Brewer, for the court, said: "We are inclined . . . to hold that Congress intended, by this section, that when the title passed by the entry to the pre-emptor it should pass perfect and unencumbered. This act was passed in 1841. Mortgages, always in form conveyances, were then regarded by the profession generally more as conveyances, and subject to the laws and conditions of conveyances, than at present, perhaps anywhere, and certainly in Kansas; and in the light of the general understanding, then must this section be considered. It seems more reasonable that by these terms, 'grant and conveyance,' was intended all forms of conveyance, whether absolute, as a warranty deed, or upon condition, as a trust deed or mortgage." The cases which were reported before *Brewster v. Madden*, 15 Kan. 249, are not noticed in the opinion, and the doctrines therein announced are not discussed. This court, in the year 1883, in *Mellison v. Allen*, 30 Kan. 382, approved *Brewster v. Madden*, 15 Kan. 249, and *McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100.

We have already explained the principles which were laid down in *McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100, and will comment on *Warren v. Van Brunt*, 19 Wall. 646. Chief Justice Waite, in the opinion, said: "The pre-emption laws provided, at the time of this entry and purchase, that before any person should be allowed to enter lands upon a claim for pre-emption he must make oath that he had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person, by which the title he might acquire by his purchase should inure in whole or in part to the benefit of any person except himself. Forfeiture of title

to the land purchased and of the money paid for it was made the penalty of false swearing in this particular. An entry could not have been made, therefore, by Van Brunt, in trust for Warren; and if it could not have been made, a court of equity will not decree that it was. All contracts in violation of this important provision of the act are void, and are never enforced. It has been so decided many times by the supreme court of Minnesota. We are satisfied with these decisions." This opinion was delivered at the October term, 1873, and the decree of the supreme court of Minnesota was affirmed. The following decisions are referred to: *St. Peter Co. v. Bunker*, 5 Minn. 199; *Evans v. Folsom*, 5 Minn. 422; *Bruggerman v. Hoerr*, 7 Minn. 343; 82 Am. Dec. 97; *McCue v. Smith*, 9 Minn. 252; 86 Am. Dec. 100. The foregoing sentence in *Warren v. Van Brunt*, 19 Wall. 646, that the court is "satisfied with these decisions," appears to be ambiguous. It was understood in *Bass v. Buker*, 6 Mont. 442, and *Brewster v. Madden*, 15 Kan. 249, to be an approval by that court of the law declaring the invalidity of a mortgage of the public land which has been executed by a pre-emptor before the final proofs have been made. The true meaning of these words must be ascertained by an examination of the facts which were before the court when they were uttered and applied. The subject of a mortgage was not involved or inquired into in *Warren v. Van Brunt*, 19 Wall. 646, or any of the cases which are mentioned therein, excepting *McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100. The court held that contracts which had been made by a pre-emptor, before making final proofs, to sell an interest in the land were contrary to the statutes of the United States, and void. The case of *Warren v. Van Brunt*, 19 Wall. 646, was a contest between two pre-emption claimants, and Warren sought to charge the representatives of Van Brunt as his trustees, and compel them to convey to him the title they had acquired by a patent from the United States. It was adjudged, in effect, that under the decisions of the supreme court of Minnesota, the agreement referred to in the pleadings was void, and could not be executed; and that Van Brunt could not act as a trustee for Warren in the entry of certain lands. There was no issue in *Warren v. Van Brunt*, 19 Wall. 646, which would call the attention of the court to the application of the statute to a mortgage. It was known that *McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100, had been overruled to the extent which has been indicated, and the supreme court

would not ignore *Jones v. Tainter*, 15 Minn. 512, and the decisions of the supreme court of California, *supra*. If that tribunal wished to construe the section, and decide whether a mortgage was embraced within its terms, the investigation would have been thorough, and these cases would have been analyzed and weighed. There is nothing to show that this was the intention.

From this review we are of the opinion that the weight of authority sustains the position that an ordinary mortgage by a pre-emptor of land, prior to the time of making his final proofs, is not a grant or conveyance, within the prohibitory clause of said section 2262. The purpose for which a sum of money may be borrowed becomes material to show that the mortgagor is acting in good faith, and not in collusion with the mortgagee to convey the title, and evade the provisions of the law. The loan of money to enable the settler to buy seed for planting or the necessities of life, is as legitimate as the purchase of land from the government. The judge of the court below asserts, in his opinion, that he was compelled to overrule the demurrer to the answer by the views which were expressed in *Bass v. Buker*, 6 Mont. 442, and hold contrary to his convictions of the law. We have deemed it proper to arrive, if possible, at a true solution of this legal problem, and have concluded that the doctrine of *Bass v. Buker*, 6 Mont. 442, ought not to be followed in this controversy.

It is ordered that the judgment be reversed, and that the cause be remanded, with directions to proceed in conformity with this opinion.

Reversed.

HARWOOD, J., and DE WITT, J., concur.

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PUBLIC LANDS—MORTGAGE OF PRIOR TO ISSUANCE OF PATENT. — Where one has done everything necessary to entitle him to a patent for a tract of public land, he may mortgage it before the patent is issued, and the mortgage may be enforced: *Gilkerson-Sloss Com. Co. v. Forbes*, 54 Ark. 148; 26 Am. St. Rep. 29, and note; note to *Nichols v. Council*, 14 Am. St. Rep. 22; note to *Kirkaldie v. Larrabee*, 89 Am. Dec. 206.

## SAVAGE v. PHOENIX INSURANCE COMPANY.

[12 MONTANA, 458.]

**INSURANCE — CONDITION FOR ARBITRATION — WAIVER OF.** — When, upon a loss under a policy of fire insurance, the insurer immediately denies all liability under the policy, asserting that it was not in force when the loss occurred, and repels every effort on the part of the insured to obtain an adjustment of the loss, such insurer must be held to have waived an arbitration clause contained in the policy requiring an award by arbitrators as a condition precedent to a right of action, and he is estopped from setting it up in defense thereto.

**INSURANCE — PROOF OF LOSS — WAIVER OF.** — A condition in a policy of fire insurance that in case of loss the insured must forthwith give written notice thereof to the insurer, is waived by the latter when, with full knowledge of the loss, he denies all liability under the policy without waiting for such written notice.

**INSURANCE — PREMIUM — EVIDENCE OF PAYMENT OF.** — When, in an action to recover for loss under a policy of fire insurance which recites and acknowledges the receipt of the premium, the insurer denies the payment of any premium and alleges a cancellation of the policy for such nonpayment prior to the loss, the testimony on the part of the insured that he gave the amount of the premium to another party to be paid to the insurer, and the testimony of such other party that he so paid the money received, is, in connection with the recitals in the policy, sufficient evidence to sustain a finding that such payment was made, as against a denial of such fact by the agent of the insured.

**INSURANCE — NOTICE OF CANCELLATION — SUFFICIENCY OF.** — When the premium on a policy of fire insurance has in fact been paid, a letter from the insurer to the insured notifying the latter of the effect of nonpayment of the premium, and calling attention to cancellation conditions in the policy, is not sufficient notice to arbitrarily terminate the policy if the insurer does not refund or offer to refund the amount of unearned premium as required by such cancellation conditions.

**ACTION on a fire insurance policy. Judgment for plaintiff. Defendant appealed.**

*Kinsley and Blackford*, for the appellant.

*Middleton and Light*, for the respondent.

HARWOOD, J. Appellant's counsel first insist that a party pleading a conditional contract, setting out its terms, and stating the cause of action thereon, cannot, after demurrer is sustained, upon leave of court allowing an amendment, "plead another and different contract, unconditional in its character and legal effect, showing a different cause of action from that originally stated."

This may be granted, and we do not see that the proposition is applicable to the case at bar. It is not pointed out how any such departure occurred in the pleadings filed in this



case. The cause of action stated, whether completely or defectively, in the several complaints filed, is founded upon one and the same contract, namely, the alleged policy of insurance; and the purpose of the action is to recover the sum of eight hundred dollars, alleged to be due plaintiff by reason of said contract of insurance, and the loss alleged. It is true the pleader in one complaint avers facts as to the performance of certain conditions of said policy on the part of plaintiff, and facts relied on to justify her delay in the performance of other conditions thereof, and also alleges facts concerning the conduct of defendant in relation to the alleged demands of plaintiff on defendant in her attempt to obtain a settlement thereof, which are not alleged in the other complaints filed. But it does not follow therefrom that the cause of action stated is a "different cause of action from that originally stated."

Much space in the brief of appellant's counsel is devoted to a recitation of facts which they assert are admitted by reason of the averment of such facts in the answer, and the failure of plaintiff to properly deny the same in her replication.

The pleadings in this case whereby the issues were finally settled (not including those which were superseded by filing amended pleadings) occupy sixty-four type-written pages of the record; the replication alone covering fourteen pages thereof. The material questions of issue, however, are not numerous, as plainly appears when these voluminous pleadings are carefully analyzed. After patient study of them, we cannot agree with counsel for appellant that the averments of the answer are not fully met by denials and the allegation of matters in avoidance in the replication: Code Civ. Proc., secs. 109, 248; *Swenson v. Kleinschmidt*, 10 Mont. 478.

It is further contended by appellant that plaintiff cannot lawfully recover in this action, because the amount of the alleged loss was not fixed by arbitration and award, as provided by the terms of said policy, in the event of disagreement as to the amount of the loss. The clause of the policy pointed to reads as follows: "The amount of sound value and of damage to the property, whether real or personal, covered by this policy, or any part thereof, may be determined by mutual agreement between the company and the assured, or, failing to agree, the same shall then, at the written request of either party, be submitted to competent and impartial arbitrators, one to be selected by each party, the two so chosen, in case of disagreement, to select a third, and the award of any two

of whom, in writing, under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not determine the validity of the contract, nor the liability of this company, nor any other question, except the amount of such loss or damage."

"It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

These conditions were set forth in the answer, and it is averred therein "that no such award has been obtained, nor has defendant had an opportunity to obtain such an award," because defendant "agreed with plaintiff that no such award could be made or obtained until after plaintiff had paid the premium aforesaid, and furnished defendant notice, in writing, forthwith of a claim for loss, nor until an inventory had been made, naming the quantity, quality, and cost of each article; and defendant avers that no premium has ever been paid, no notice was given forthwith, in writing, of any loss, nor has any inventory been made as aforesaid, nor has plaintiff done or performed any of the conditions precedent to be performed to entitle the plaintiff to an award under such proposed contract of insurance."

The defense that no arbitration or award was had fixing the amount of said loss appears to be without force when considered in connection with the facts shown in this case. It appears that very soon after said loss occurred, when plaintiff sought an adjustment and payment thereof, she was met by a denial on the part of defendant, through said agent Seyde, of all liability under said policy, and the assertion that said policy was not in force when said loss happened. Defendant has constantly maintained that position, and consistently declined to entertain any claim of plaintiff relating to said insurance, or to proceed in any manner, either by arbitration or otherwise, towards an adjustment and settlement of said loss. Under these conditions, plaintiff could not obtain an award of the amount of said loss by arbitration by the mutual cooperation of both parties in choosing arbitrators and otherwise proceeding as provided by the policy, and for this reason she is not prejudiced by the absence of such arbitration and award. Moreover, the arbitration provided for in said policy was to

take place when disagreement arose as to amount of loss. No such disagreement ever arose concerning the amount of the loss in question. The disagreement in this case was an absolute and unconditional denial of the existence of said alleged policy, or any liability thereon by defendant; while plaintiff maintained on her part that said policy was in force when said loss occurred, and that defendant was liable therefor to the amount stated in said policy. Defendant, consistently with the position it assumed as to said alleged policy, and its liability thereunder, repelled every effort made on the part of plaintiff to obtain an adjustment of said loss. It plainly appears from the attitude of the parties that the occasion for resorting to arbitration did not and could not arise while such attitudes were maintained: *Randall v. American Fire Ins. Co.*, 10 Mont. 340; 24 Am. St. Rep. 50, and cases cited. The assertion of that defense appears strangely inconsistent and illogical when viewed in connection with other positions assumed by defendant in its answer, because, insisting that arbitration should have been had to ascertain the amount of loss carries with it the implication that a contract of insurance existed; that defendant was liable in some amount; that merely an erroneous valuation of the property destroyed was made by plaintiff; and that defendant would have co-operated in seeking an agreement as to the amount of loss, and concurred in such arbitration, if necessary. These implications are in direct antagonism to the main ground of defense set up, namely, that the alleged policy of insurance was not in force.

It is further contended by appellant that the condition of said policy was not fulfilled on the part of plaintiff in reference to giving notice of such loss to defendant. The policy required that "persons sustaining loss or damage by fire shall forthwith give notice, in writing, to the company." It is not pretended that notice was withheld, or that defendant did not have actual and immediate notice of said loss. The facts show that defendant had notice, through its said agent, Seyde, at the place where said fire occurred, and had full knowledge of, and opportunity to investigate, said loss; that plaintiff, in person and by her agent, immediately after said fire, communicated with defendant through said agent Seyde concerning the policy in question, and the alleged loss thereunder, and submitted said policy to defendant, through said agent, but no written notice was then given. It further appears without dispute that defendant, through said agent, without waiting

for formal written notice of said loss, interposed in the matter of plaintiff's claim of insurance under said policy, and asserted to plaintiff that defendant was not liable under said policy, which plaintiff was claiming to exist between herself and defendant. These facts show that all reason for giving such notice in writing was removed by the presence and conduct of defendant in relation to the matter in question: *Clark v. New England etc. Ins. Co.*, 6 Cush. 342; 53 Am. Dec. 44. It is a principle sanctioned by universal approval that even the force of law ceases when the reason therefor ceases. Another principle is, that notice required in proceedings of most solemn nature may be waived by appearance and participation of the parties concerned in the proceedings in question. Nevertheless, plaintiff, in seeking to carry out the requirements of said policy on her part, on or about the thirtieth day after said fire occurred, delivered to defendant, through said agent, a written notice of the occurrence of said loss. Defendant, through its general agents, Brown, Craig, & Co., returned said papers, saying: "We received through Mr. Charles Seyde, agent for the Phoenix Insurance Company of Brooklyn, at Miles City, your letter to him, notifying him of the burning of the property claimed by you as insured by said company under policy No. 94,415." After thus receiving said paper, and referring to it as "notifying" said agent of said loss, defendant claims in its defense to this action that it was not such a notice. The claim that the company had no sufficient notice of said loss is, we think, without merit.

The substantial issue in this case was whether or not the premium for said insurance had been paid by plaintiff. The pleadings on the part of plaintiff alleged the payment of the premium required by defendant for said policy. On the part of defendant it was denied that any consideration for the alleged insurance had been paid, and that for such delinquency the policy in question had been canceled before the fire. Upon this issue the jury found for plaintiff, and there is evidence in the record sustaining that finding. The policy bears date August 4, 1888, and it appears therefrom that it was first issued in consideration of \$13.20; and it is recited in the policy that "the Phoenix Insurance Company of Brooklyn, New York, in consideration of the conditions, limitations, and requirements of this policy, hereinafter mentioned, and of the receipt by this company of \$13.20, will indemnify Mary E. Savage of Livingston, Montana, against loss or damage by



fire to the following specified and located property, only to an amount not exceeding the actual cash value of the property herein described at the time of such loss, and in no event to exceed \$800." George Savage, plaintiff's son, testified that some time during August, 1888, money was left with him by plaintiff's husband, sufficient to pay said premium of \$13.20 to said agent Seyde, and that he was requested to pay the same to said agent; that on the following morning after he received said money he went over and paid Mr. Seyde the amount, being something over \$13. He testified that two or three weeks afterwards "they sent me money from Livingston, to pay the balance on the policy to Mr. Seyde. It was six or seven dollars; somewhere along there. I cannot state the amount. I went there and paid Mr. Seyde seven or eight dollars. He wanted to know if I wanted the policy. I told him 'No,' but that he could send it to Livingston." This witness further testified that he did not know whether those payments were intended to apply on the policy in question or not.

Charles W. Savage, husband of the plaintiff, testified that the policy in question was issued somewhere about the 1st of August, and was sent to him at Livingston. In the course of his testimony, he said: "I came down here [Miles City] during the latter part of August on business, and while here went to Mr. Seyde's office to pay for this policy, but could not get in. Saw my son George. Told him I went to pay for that policy, and would leave the money with him, and told him to go and pay it. Gave him fifteen dollars. I told him it was something about fourteen dollars. Did not owe Seyde any premiums for insurance, except on this particular policy, at that time. About the latter part of August I received a letter from Mr. Seyde, stating that the rate had been raised, and wanted the policy returned. I returned this policy to Mr. Seyde. He stated the amount had been raised, but I don't remember the exact amount. I sent back the policy to Mr. Seyde, and a check payable to my son George for ten dollars, and told him to pay whatever the premium was. The policy was returned to me some time during the month of September. This red ink indorsement was on the face of it at that time." A letter from said agent Seyde was identified by this witness as the one which accompanied the policy in question when it was first sent to Livingston, which letter was introduced in evidence, and reads as follows: "Your Phoenix policy No.

1,029, on furniture in dwelling in rear of store, expired on the 4th instant. Under instructions of Mr. George Savage, I have renewed the risk, and hand you inclosed new policy, No. 94,415. Your remittance of \$45, of July 23d, came duly to hand. Many thanks." Witness Charles W. Savage, in his testimony, explained that the remittance of forty-five dollars, mentioned in said letter, had no relation to policy No. 94,415 in question in this case, but was in payment for another policy witness had received from said agent. In this connection the witness said: "I paid Mr. Seyde everything I owed him. That payment of forty-five dollars, with other payments, settled everything I owed him."

In two instances, witness Charles W. Savage testifies that when said money was left with George Savage to pay the respective amounts called for as premium on the policy in dispute in this case, no other sum was owing to said agent for insurance policies issued to members of the Savage family at Livingston. This witness testifies that the money left with George Savage to pay said agent was for the purpose of making the payments required on the policy in question in this action, and if no other money was owing to said agent on any other account at the time by members of the Savage family at Livingston, these facts, which are not disputed by any testimony offered on the part of defendant, tend to show that said payments, if made, were made upon the policy in dispute here, notwithstanding George Savage did not know on what particular policy the payments were intended to apply.

The indorsement on the policy mentioned in the testimony of Charles W. Savage reads as follows: —

"Indorsement: MILES CITY, Mont., Sept. 20, 1888.

"The rate on this risk having been advanced to \$2.75, the receipt of \$6.80 additional premium is hereby acknowledged.

"CHAS. W. SEYDE, Agent."

This indorsement was said to have been made in red ink, and its terms positively declare the receipt of said sum of \$6.80 as additional premium on said policy by said agent. With this indorsement said policy was returned and delivered to plaintiff. According to the testimony of agent Seyde when he made and delivered this acknowledgment of receipt of said latter sum, neither that sum nor the original sum of \$13.20, premium first required, had been paid, and yet he indorsed on the policy a direct and positive acknowledgment

of the receipt of said \$6.80, and delivered the policy to plaintiff. This would seem to be a peculiar method of doing business if he was not paid said sum. His testimony is in direct conflict with the testimony of George Savage as to the payments which the latter asserts he made, and this is the principal conflict in the testimony offered in the case. George Savage testified that he paid the amounts required at two different times. Charles W. Savage testifies that he delivered those two sums to his son George, with direction to make said payments; and in addition to this, it is shown without dispute that the policy, after receiving the indorsement acknowledging the receipt of \$6.80 thereon, was forwarded to Livingston by said agent. This latter circumstance, shown in evidence, may have been the preponderating fact which drew the minds of the jury to the conclusion shown in its verdict.

Appellant argues that the premium on \$800 insurance at the rate stated, \$2.75 per hundred, would amount to \$22, and plaintiff does not claim to have paid more than \$20; therefore plaintiff did not pay the full amount of the premium at said rate required for said policy. That is true, and shows a mistake on the part of defendant through its agent Seyde; but it does not follow that the insurance fails because defendant did not charge as much premium therefor as it may have proposed to charge. If \$13.20 was sufficient consideration for the issuance of the policy in the first instance, \$6.80 additional premium would be sufficient consideration for the reissuance thereof.

Counsel for appellant insists that it is shown by the evidence that said policy was canceled prior to the loss. The condition of the policy as to the termination thereof reads as follows: "This insurance may be terminated at any time at the request of the assured, in which case the company will retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy." It is alleged in defendant's answer that "on the seventh day of December, 1888, defendant, through its said agent, Charles W. Seyde, by registered letter addressed to Charles W. Savage, agent and husband of the plaintiff at Livingston, which letter was duly received by the plaintiff in this action, notified the plaintiff of the effect of her failure to pay the \$22 agreed upon as before stated,

and directed her attention to the cancellation conditions of her policy; but to pay said premium, plaintiff then and there refused, and the same has not been paid." This averment is not to the effect that said policy was canceled by defendant by complying with its terms in that respect, but the averment is, that in said communication to plaintiff, defendant "directed her attention to the cancellation conditions of her policy." Moreover, it is admitted that defendant did not refund, or offer to refund, the amount of unearned premium, as part of the act of cancellation of said policy, if defendant intended to cancel the same. If the premium was paid, as found by the jury, the terms of the policy required defendant to refund a ratable proportion thereof in order to terminate the policy; and it was not within the conditions of the policy to terminate it arbitrarily, without fulfilling that requirement, by calling the attention of the assured to the cancellation condition of the policy.

Appellant contends that the court committed error, both in giving certain instructions to the jury, and in refusing to give others requested by appellant. We have carefully reviewed the instructions, and find that the law applicable to the case is fairly and fully presented to the jury in them. These instructions, we observe, are very favorable to defendant, and we find no error in this branch of the case.

Neither the assignments of error, nor the proposition that the verdict is unsupported by evidence, can be sustained. The judgment and the order overruling defendant's motion for new trial will therefore be affirmed.

BLAKE, C. J., and DE WITT, J., concur.

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**INSURANCE — CONDITION AS TO ARBITRATION — HOW WAIVED BY THE INSURER.** — This waiver takes place when after a loss the insurer receives the proofs of the amount of loss, without objecting thereto, but denies his liability on the ground that the policy does not exist and was canceled before the loss: *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233, and note. See also notes to *Continental Ins. Co. v. Wilson*, 23 Am. St. Rep. 724, and *Everett v. London etc. Ins. Co.*, 24 Am. St. Rep. 503.

**INSURANCE — WAIVER OF PROOF OF LOSS.** — A denial of all liability by the insurer on the ground that the policy was not in force at the time of the loss by reason of the failure of the assured to pay his premium as provided, dispenses with necessity of furnishing preliminary proofs of loss: *Phoenix Ins. Co. v. Bachelder*, 32 Neb. 490; 29 Am. St. Rep. 443, and note with cases collected.

**INSURANCE — SUFFICIENCY OF NOTICE OF CANCELLATION OF POLICY:** See *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233.



## STATE v. SHEERIN.

[12 MONTANA, 589.]

**JURORS — QUALIFICATIONS OF — OPINION FROM READING NEWSPAPER. —** A juror who states upon his examination that he has formed and expressed an opinion about the case from what he has read in newspapers and from hearsay which it would take evidence to remove, but who states that he does not know the accused, has no bias or prejudice against him, and can fairly and impartially try the case according to the law and the evidence, and a true verdict render, is competent to act as a juror under subdivision 11 of section 287, criminal practice act of Montana touching the qualifications of jurors.

**ASSAULT TO MURDER — INDICTMENT — DESCRIPTION OF WEAPON. —** An indictment for an assault with intent to murder, at common law or under a statute, which does not specify the instrument necessary to be used, need not state the instrument or means employed by the assailant to effectuate the murderous intent. The means of effecting the murderous intent, or the circumstances evincive of the design with which the act is done, are matters of evidence to the jury to demonstrate the intent and not necessary to be incorporated in the indictment.

**ASSAULT TO MURDER — SUFFICIENCY OF EVIDENCE TO CONVICT. —** On the trial of an assault with intent to murder, evidence that the accused threatened to kill the person assaulted and shot at him several times with a large pistol loaded with gunpowder and bullets, wounding him with at least one bullet, is sufficient to show a present ability to commit the crime charged and to support a conviction.

### CONVICTION of an assault with intent to murder.

Subdivision 11 of section 287, criminal practice act of Montana provides, "that if a juror state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court will thereupon proceed to examine such juror as to the ground of such opinion, and if it appear to have been formed upon reading newspaper statements, communications, comments, or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror state, on oath, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial, and will render such verdict, may, in its discretion, admit him as competent to serve in such case."

*Corbett and Wellcome*, for the appellant.

*Henri J. Haskell*, attorney-general for the state, respondent.

**HARWOOD, J.** During the examination of jurors as to their qualification to sit in the trial of this action, defendant challenged one of them on the ground that he was disqualified

because of having formed and expressed an opinion on the merits of the case, and, such challenge being overruled, defendant excepted, and assigns the ruling of the court as error. Upon examination, the juror stated that he had read what purported to be a statement of the facts involved in the case, "simply as a matter of current news"; that he had never heard anything else about the case; that he had formed and expressed an opinion on what he read, which would require evidence to remove; but he said: "Notwithstanding what I have read about this case in the newspapers, and what I have otherwise heard about it, or any opinion that I may have had in regard to it, I think I could sit in this jury box, and try this case, and render a verdict according to the evidence and the law." And upon further examination by the court upon the same point the said juror stated to the court as follows: "I feel that, notwithstanding that opinion, I could sit on the jury, and fairly and impartially try this action, and a true verdict render according to the law and evidence. I do not know the defendant, William Sheerin. I have no bias or prejudice against him. I do not know of any reason why I cannot fairly and impartially try this case according to the law and the evidence, and a true verdict render under the instructions as given me by this court." The ruling of the court in refusing to sustain defendant's challenge of this juror for cause is in harmony with the provisions of the eleventh subdivision of section 287, third division of the compiled statutes, and the views expressed in *Territory v. Bryson*, 9 Mont. 32, concerning the application of said statute, which we approve. The answers of said juror on oath clearly brought him within the provisions of the statute cited.

Appellant was indicted for the crime of assault with intent to commit murder, and convicted of the same. After conviction, motion was made in arrest of judgment, on the alleged ground that the facts stated in the indictment do not constitute a public offense, in that it is not shown that defendant possessed "a present ability" to commit the crime with which he is charged, because the indictment fails to allege that the weapon used in the assault was a "deadly weapon." Said motion was overruled by the trial court, and appellant insists on the same objection here. The indictment (omitting the formal portions) charges as follows: "That one William Sheerin, late of the county," etc., "on or about the first day of March, 1891, at," etc., "unlawfully, willfully, and feloniously, with a

revolving pistol, loaded with powder and leaden bullets, which he, the said William Sheerin, then and there held in his hand, made an assault upon Anthony Lavan, with an intent then and there unlawfully, willfully and feloniously, with malice aforethought, to kill and murder the said Anthony Lavan."

The statute under which this indictment is laid is section 59, fourth division of the compiled statutes, and reads as follows: "An assault with intent to commit murder, rape, the infamous crime against nature, mayhem, robbery, or grand larceny, shall subject the offender to imprisonment in the state prison for a term not less than one year nor more than fourteen years." It is observed that the statute defining this offense "of assault with intent to commit murder" does not mention any particular weapon or means used to effectuate the purpose, or evince the intent, like section 60 of the same title, which defines "assault with a deadly weapon, instrument, or other thing, with intent to inflict upon the person of another a bodily injury." An assault with intent to commit murder may be made, "coupled with a present ability" (Comp. Stats. div. 4, sec. 58), without the use of a deadly weapon; as, for instance, the hands of a strong person violently seized on the throat of a weak one, with intent to murder the latter. Here the intent might as surely be accomplished without, as with, the use of some deadly weapon; or a felonious attempt by a strong person to cast a weaker one over a precipice, or the like, with intent to destroy the life of the latter, where the circumstances show that the assailant was able to accomplish the act, and that its accomplishment would undoubtedly effect the purpose intended. Here would appear to be all the elements of assault with intent to murder, without the use of "a deadly weapon, instrument, or thing," strictly speaking.

The greater weight of authority appears to be against the position taken by appellant's counsel on this point. In speaking of the requisites of an indictment for the crime under consideration, Mr. Bishop says: "Where it is a statutory crime to assault any one with intent to kill him, to murder him, or the like, the indictment need only charge that the defendant, at a time and place, 'did make an assault' on a person named, or, in some other form of words, did what else is necessary to be alleged in an indictment for simple assault, 'with intent then and there feloniously, willfully, and of his malice aforethought, to kill and murder' such person. Of course, if the

statute requires a battery also to constitute the offense, it must be alleged; otherwise it need not be. But in the absence of anything special in the statute, the manner of the assault or of the beating, or the kind of weapon, need not be stated": 2 Bishop's Criminal Procedure, sec. 77, and cases cited. In the case of *State v. Croft*, 15 Tex. 575, the indictment was like the one at bar in respect to the point under consideration, and was held good. Mr. Wharton also lays down the same doctrine as to the essential averments of an indictment for the crime under consideration, saying: "In an indictment for an assault with intent to murder it is not necessary to state the instrument or the means made use of by the assailant to effectuate the murderous intent": Wharton's Criminal Pleading and Practice, 8th ed., sec. 159, and cases cited. Again, in his work on Criminal Law, 8th ed., sec. 644, Mr. Wharton observes: "In an indictment for an assault with intent to murder at common law, or where the statute does not specify the instrument, it is not necessary to state the instrument or means made use of by the assailant to effectuate the murderous intent. The means of effecting the criminal intent, or the circumstance evincive of the design with which the act was done, are considered matters of evidence to the jury to demonstrate the intent and not necessary to be incorporated in an indictment." In *People v. English*, 30 Cal. 215, the court say: "The indictment charges, in substance, that the defendant feloniously assaulted one Derbin with a pistol loaded with powder and ball, with intent him, the said Derbin, of his malice aforethought, to kill and murder. The demurrer to the indictment was properly overruled. The indictment contains all the terms that enter into the description of the offense, as given in the statute, together with allegations relating to the character of the weapon used." It is unnecessary to multiply citations to establish the correctness of this holding, because the authors on criminal law and procedure have cited numerous authorities in support of the rule laid down as quoted above: See also *Territory v. Milroy*, 8 Mont. 361. We conclude that appellant's objection to the indictment is not well taken.

It is further contended by appellant that the evidence does not support the verdict of conviction, because the evidence does not show that defendant "had a present ability to commit the crime charged." We cannot sustain this assignment. The testimony of several eyewitnesses to the assault is to the



effect that the weapon used was a 41-caliber revolving pistol, loaded with gunpowder and bullets. Said weapon was identified and exhibited to the jury and the court at the trial. The testimony is to the effect that only a few minutes prior to the assault defendant threatened to kill Lavan, the person assaulted, and that defendant deliberately discharged said pistol at Lavan several times, striking and wounding him in the side with at least one bullet, which passed entirely through his body. There is no question but that the testimony contained in the record is sufficient to support conviction.

The order of this court will be that judgment of the trial court be affirmed, and be carried into effect according to the terms thereof.

BLAKE, C. J., and DE WITT, J., concur.

**JURORS — DISQUALIFICATIONS — OPINIONS FROM READING NEWSPAPERS.** A juror is not disqualified to try a criminal case because he has an opinion founded upon rumor or newspaper statements, if he has expressed no opinion and swears that he can fairly and impartially render a verdict according to the law and the evidence: *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320; *People v. Gage*, 62 Mich. 271; 4 Am. St. Rep. 854; *Guetig v. State*, 66 Ind. 94; 32 Am. Rep. 99, and note; *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 501; and see extended note to this case discussing the various disqualifications which will exclude jurors from acting. See also extended note to *Commonwealth v. Brown*, 9 Am. St. Rep. 744, discussing the rejection of jurors for bias; also extended note to *Smith v. Eumes*, 36 Am. Dec. 521, on preconceived opinions as grounds for challenge to jurors.

**ASSAULT WITH INTENT TO KILL — INDICTMENT. — SUFFICIENCY OF:** See *Plake v. State*, 121 Ind. 433, 16 Am. St. Rep. 408, and note at page 411. The mode of making an assault need not be set out in an indictment for an assault with a gun "loaded with powder and ball" with intent to kill: *State v. Chandler*, 24 Mo. 371, 69 Am. Dec. 432, and note with cases collected.

## RAYMOND v. WIMSETTE.

[12 MONTANA, 551.]

**PRACTICE ON APPEAL — REVIEW OF ORDER OVERRULING DEMURRER.** —

Error in overruling a demurrer to an answer will not be reviewed on appeal when a replication has been filed after the demurrer has been overruled, and the answer is defective and uncertain in form of averment, or in such matters as can be cured by verdict. Otherwise when the answer fails to state facts sufficient to constitute a cause of action.

**WATER RIGHTS — DIVERSION — INJUNCTION.** — An upper proprietor and junior appropriator will not be enjoined from diverting a certain amount of the waters of a creek for irrigation purposes, when it appears that such creek is not a running stream during the irrigating season, and that during such season none of the waters flowing in such creek at his

point of diversion can in the course of its natural flow reach plaintiff's ranch fifteen miles below, because the waters of such creek during the irrigating season of each year sink into the ground at a point three miles below the defendant's ranch, and from there to a point one mile below plaintiff's ranch the channel of the creek is entirely dry in places.

**WATER RIGHTS — PRIOR APPROPRIATION — DIVERSION — INJUNCTION.**

An upper owner and prior appropriator of the water of a stream for irrigation purposes is not entitled to enjoin a lower owner from diverting a portion of it during the irrigating season, on the ground that if such water was not diverted it might, in the event of an unusual flow in the stream, reach the land of such lower owner, when it appears that in the natural and usual flow of such stream no water reaches his land, for the reason that it sinks and the channel of the stream becomes entirely dry between the lands of such owners during the irrigating season.

**WATER RIGHTS OF PRIOR APPROPRIATOR. — A PRIOR APPROPRIATOR** of the water of a stream has a right to insist as against the junior appropriator that all the water remain in the stream in order to carry the flow down to his point of diversion, although a large portion of it is lost by evaporation and percolation, only so long as any useful quantity thereof would reach his point of diversion if allowed to remain.

**WATER RIGHTS AS BETWEEN SENIOR AND JUNIOR APPROPRIATORS. — A** prior appropriator of the waters of a stream may insist as against the junior appropriator that all the water be allowed to remain in the stream only so long as some useful quantity thereof will reach such prior appropriator's point of diversion, and when it is shown that the water diverted by the junior appropriator for a useful purpose would, if not so diverted, sink and disappear before reaching the prior appropriator's point of diversion, the latter is not entitled to an injunction to compel the former to allow all the water to remain in the stream.

**ACTION** to enjoin defendant from diverting any of the waters of Sweetwater Creek, and to determine the priority of all water rights therein. A preliminary injunction was granted as prayed for, but on the trial the court found defendant entitled to forty-five inches of the waters of said creek prior to plaintiff's rights therein, and also found plaintiff entitled to nine hundred and sixteen inches of the waters of said creek under various appropriations made at different times. The court rendered judgment accordingly enjoining each party from interfering with the rights of the other. Plaintiff's motion for a new trial was overruled and he appealed from that order and also from the judgment. The following statement was prepared by Mr. Justice Harwood as being necessary to an understanding of the opinion.

"The first proposition urged by appellant is, that defendant's answer fails to state facts sufficient to constitute a defense; and this assignment will require a consideration of the allegations of the complaint and the answer. The complaint con-

tains averments usual in such cases, in substance as follows: That plaintiff is the owner and in possession of certain tracts of land, particularly described as situate in Madison County, state of Montana, which several tracts of land aggregate altogether 1,360 acres, that the same is agricultural land in character, dry and arid, but valuable for the production of grain, grasses, and vegetables, which can be grown thereon and matured with the aid of artificial irrigation, and not otherwise; that said land lies along on either side of a certain stream of water known as 'Sweetwater creek'; that in order to make said land productive, as aforesaid, plaintiff and his predecessors in interest, at certain stated dates, appropriated certain stated quantities of the waters of said creek, and diverted the same upon said land, by the construction of irrigating ditches, all of which are described, and are alleged to have the capacity altogether of carrying sixteen hundred inches of water; that said creek contains at certain seasons one thousand inches of water, but in dry seasons it has not more than one hundred to two hundred inches at the point where plaintiff's first ditch taps said creek; that plaintiff has enjoyed the uninterrupted use of the waters of said creek, since the times of appropriating the various quantities thereof, as alleged, to irrigate his said land, until the interruption of defendant, by his wrongful taking and diversion of a large quantity of said water, as alleged; that all the water of said creek is necessary for the irrigation of plaintiff's land, all of which the plaintiff and his predecessors in interest actually appropriated, and diverted and used the same, in the years 1873 and 1874, by the means and for the purposes aforesaid; that about the 15th of May, 1889, defendant wrongfully, and without plaintiff's consent, diverted one hundred inches of the waters of said stream, to which plaintiff was entitled, and that on or about the 20th of May, 1890, defendant, without consent of plaintiff, and wrongfully, diverted about two hundred inches of the waters of said stream, thereby depriving plaintiff of his right to the use of said water, as aforesaid; that defendant threatens to continue the diversion and use of said water, and to deprive the plaintiff thereof, thereby rendering valueless the land of plaintiff, and causing irreparable injury to plaintiff's rights; upon the statement of which facts plaintiff demanded the judgment mentioned above.

"The answer of defendant to the allegations of plaintiff's complaint is, in substance, as follows: Defendant denies, on

information and belief, that plaintiff is the owner of the land described in his complaint; 'admits that plaintiff has, at times, used certain of the waters that have flowed down what is known as "Sweetwater creek," to plaintiff's said claims, but denies that there is any such stream known or called "Sweetwater creek," which has a regular or continuous flow from the lands of defendant, hereinafter described, down through or upon the lands claimed by plaintiff in his complaint'; denies that there can be annually grown or harvested upon the land of plaintiff crops of grain, vegetables, and grasses; admits that the said lands claimed by plaintiff are dry and arid, and will not produce the crops aforesaid, without irrigation; 'denies that defendant has prevented plaintiff from using and enjoying the full benefit and uninterrupted use of the waters of said "Sweetwater creek," to which plaintiff is, or has been, in anywise entitled; denies that the plaintiff is, or that his predecessors in interest ever were, the owner or owners of all waters of said stream, or of any interest therein exceeding two hundred inches thereof'; denies that plaintiff, or his predecessors in interest have ever 'appropriated or used all or any of the waters of said stream which have been appropriated or used by this defendant; denies that plaintiff, or his predecessors in interest, in the year 1873 or 1874, or at any other time, 'appropriated all of the water of said stream for agricultural purposes or otherwise; and further denies that plaintiff has used or enjoyed the uninterrupted usufructuary right of the waters of said creek (so called) upon the lands of plaintiff.'

"And for a further defense herein defendant expressly avers that one of his predecessors in interest, to wit, one Samuel Weightman, in the year 1881, settled upon the premises now possessed and claimed by defendant, to wit, about one hundred and sixty acres of land, and during said year constructed an irrigating ditch, for the purpose of raising grain, grass, and other agricultural products on said land; that by 'means of said ditch there was, at the date aforesaid, appropriated by said Weightman, as aforesaid, near the headwaters of said Sweetwater creek, about one hundred inches of water, measured according to the law of the state of Montana, passed by the fourteenth legislative assembly, approved March 12, 1885, and that defendant was, at the commencement of this suit, and now is, the owner of said Weightman ditch, and is entitled to the use of the waters thereof; 'that defendant, through



the original appropriation of said water by Weightman, as aforesaid, and his predecessors in interest, has continuously used and enjoyed the benefit thereof, from year to year, until the injunction served by the plaintiff against the defendant herein; 'that the lands possessed and claimed by defendant, as aforesaid, are chiefly dry and arid lands, and it is necessary to water the same by means of artificial irrigation, to grow thereon grains, grasses, and other vegetation; that said lands are valuable for agricultural purposes, but for no other purposes; that, during the fall of the year 1889, defendant, in in order to utilize the waters of certain springs that did not flow into or form a part of said so-called Sweetwater creek, constructed three certain ditches, and appropriated the waters of said springs, and also thereby increased the volume of said creek about twenty-five inches of water;' 'that during the spring of 1890, about the month of April, defendant constructed a certain reservoir to catch the waters of certain springs on the mountain side, which said waters did not constitute any part of said Sweetwater creek, and defendant alleges that the said twenty-five inches of water, appropriated from said springs, and also from said spring secondly above mentioned, and said reservoir, by reasons of such appropriations and improvement, belong to him as his sole and undivided property, separate and independent of any claim whatsoever of said plaintiff, and form no part of the natural flow of said Sweetwater creek.' 'Defendant further alleges that his possessions of land and water are situate up said Sweetwater creek, above where plaintiff claims to have appropriated waters thereof, a distance, as the channel of said stream runs, of about fifteen miles; that said Sweetwater creek is fed at all times between about the 1st of June each year, and until the fall months, when the snow comes, each year, by springs or rainfall only.' Defendant denies 'that said stream, from the premises of defendant to the points of the alleged appropriation of the waters of said stream by plaintiff, is a continuous stream; but, on the contrary, says that said Sweetwater creek, from a point about three miles below the premises of defendant, during the dry seasons of each and every year, ceases to flow down the channel of said creek, but sinks into the ground, and is lost to sight, and no man knoweth whither it wendeth its way.' Defendant further avers that during a period of twenty years last past, 'from about the 1st of June of each year, and until the end of the irrigating season each year,

said Sweetwater creek has ceased to flow in the alleged channel thereof, as a continuously flowing stream; and that from a point about three miles below the premises owned by the defendant to a point about one mile below the land claimed or possessed by plaintiff, on said creek, covering a distance along the channel thereof of about fifteen miles, said creek has been and was, at places in its channel; entirely dry, and no water whatsoever flowed therein.'

"Plaintiff demurred to the answer on the ground that it failed to state facts sufficient to constitute a defense, and also that it was ambiguous and uncertain. Plaintiff also moved to strike out several portions of the answer. Both the demurrer and motion were overruled, and plaintiff filed a replication, traversing the new matter of defense set up in the answer, and on these pleadings the trial ensued, with the result above stated."

*Word, Smith and Word, for the appellant.*

*F. N. & S. H. McIntire, for the respondent.*

HARWOOD, J. Appellant urges the order of the court overruling his demurrer to respondent's answer as error. It would seem that, as a matter of practice, if the answer failed to state facts sufficient to constitute a defense as to substantive matter, the objection raised by demurrer could be urged in the appellate court, even after replication was made and trial had. But if the answer was defective in form of denial or averment only, or the defects were such as could be cured by trial and verdict, the same would not be ground for reversal on appeal after replication and trial. In *Bohm v. Dunphy*, 1 Mont. 340, it is said in the opinion of the court: "Appellant claims that inasmuch as the plaintiff did not abide his demurrer to the answer, but filed a replication, his demurrer was thereby waived, and the issue of law thereby raised cannot be reviewed on this appeal. This would be true if the answer was defective only in form, or in such matter as could be cured by verdict."

We have set out in the statement above the complaint, in substance, and the answer, almost entirely by quotation of its own terms, in order to bring these pleadings to view for the consideration of the objections raised thereto. In our opinion, the court committed no error in overruling the demurrer to defendant's answer. This answer traverses each allegation of the complaint, either by direct, positive denial,

or by denial on information and belief. Therefore, as to that portion of the answer, the demurrer cannot be sustained: Boone on Code Pleading, secs. 110-112.

In addition to that part of the answer which traverses the allegations of the complaint, it set forth as new matter of defense that said Sweetwater creek is not a running stream during the irrigating season, i. e., "from about the 1st of June each year until the ending of the irrigating season"; and that none of the waters flowing into said creek at defendant's ranch could, in the course of its natural flow, reach plaintiff's ranch, fifteen miles below. The facts alleged in relation to this condition of said creek during the season in question are set forth sufficiently; and in our judgment, if such facts could be established, the same is proper matter of defense in an action of this nature. We think the court ruled correctly in overruling the demurrer as to these allegations. This feature of the case will be further treated below in considering the sufficiency of evidence offered in support thereof. The answer also sets up the fact that defendant has collected certain waters from springs, by means of ditches and reservoirs, which he alleges would not otherwise reach said creek, and used the same for the irrigation of his land. These allegations are not as certain as a pleading ought to be. It would seem from implication only that the waters so collected, or at least some portion thereof, are conducted into said Sweetwater creek. That fact is not directly alleged, but it is asserted that defendant "also thereby increased the volume of said creek twenty-five inches of water." From one point of view these allegations, as to the collection of water by defendant from entirely different sources than Sweetwater creek, might be considered as irrelevant; but if the water so collected was turned into said creek, as implied by other averments, and then taken out by defendant, those allegations become relevant to the controversy, as showing the real source of the water, or a portion thereof, which defendant was diverting from said stream. As before observed, these allegations are not sufficiently certain, but there was no motion by plaintiff to require defendant to make his answer more definite in this respect. These defects, being of form,—looseness of statement only,—are such as would be cured by evidence and findings, and are not sufficient to reverse the cause on appeal.

Upon the other assignments, there is more difficulty in-

volved in arriving at a determination of them, but, on the whole consideration, we have arrived at the conclusion that the judgment and order appealed from ought to be affirmed.

There are two defenses set forth in the answer: 1. That none of the water of that branch of said creek on which defendant's ranch is situate, flowing therein at the point at which defendant diverts it, ever would or could reach plaintiff's ranch in the natural course of its flow during the irrigating season; 2. That defendant was entitled to the water which he diverted from said creek by right of prior appropriation thereof by his predecessors in interest, to whose rights and interests he alleged he had succeeded. The court found both defenses established by the proof introduced, except that defendant had at times diverted some more than the forty-five inches of water from said creek to which the court found him entitled, the amount of which excess the court could not definitely find. Both of these findings are attacked by appellant on the ground of insufficiency of evidence to support either of them.

As to the first defense, in the order stated above, namely, that the waters of said creek, if allowed to remain therein, could not, in the course of its natural flow, reach plaintiff's place of diversion, several witnesses testified at the trial that this condition existed as to that branch of said creek on which defendant's ranch is located, and from which he diverted the water in controversy. These witnesses testified that defendant's ranch is located at or near the head of one of the branches of said creek; that said branch does not constitute a running stream during the irrigating season; that the water which flows therein at and above defendant's ranch during that season sinks and disappears a short distance below defendant's ranch, and a long distance above plaintiff's ranch; that in many places between said ranches during said season said creek, so called, is entirely dry, and is not a flowing stream. This testimony, according to the statement of said witnesses, was based upon many years of observation, and a thorough acquaintance with said creek.

It appears from reading the testimony that the trial court had ample evidence to support its finding that the waters of said creek, to the extent of forty-five inches, which defendant was charged with having unlawfully diverted, would not, if allowed to remain in the creek, reach plaintiff's ranch during the irrigating season. The effect of the testimony and finding



on this point of the case appears to be that, when the waters of said branch diminish during the dry season to about forty-five inches, that amount of water is insufficient to carry the flow down said creek to plaintiff's place of diversion. The further effect of that finding is that when, from any cause, said creek contains a larger volume of water, which would carry its flow down to plaintiff's ranch, he would receive the benefit of all over and above forty-five inches, because defendant is prohibited by the decree from exhausting the volume thereof to any extent greater than forty-five inches; and the effect of the finding and decree appears also to be that if the volume is reduced by natural conditions to about forty-five inches of water, at defendant's ranch, the prohibition upon defendant of diverting the same would be of no benefit whatever to plaintiff, because the same could not reach him by reason of natural conditions, which caused said waters to disappear before reaching plaintiff's point of diversion.

Appellant's counsel argue that if there are forty-five inches of water in said creek at defendant's ranch, and plaintiff had a prior right to the waters of said creek, he is entitled to an injunction to compel defendant to leave said water therein, peradventure one inch might reach plaintiff's irrigating ditch at a point fifteen miles below.

Under the theory of the law of this state relating to water rights, the prior appropriator may insist that the water remain in the stream, from which he has the right of prior appropriation, so long as any useful quantity thereof would reach his point of diversion, if allowed to remain. He is entitled to insist that all of such water remain, in order to carry the flow down to his point of diversion, although a large portion of it would be lost by evaporation and percolation. He has the right to the prior use of the water of the creek, and while he may be entitled to a stated quantity only, it may require much more than that quantity in the creek to carry the amount he is entitled to down to his point of diversion. While these propositions are undoubtedly true, according to the law of water rights prevailing in this state, it should be remembered that the right in question is not of that absolute character, in view of the law which pertains to the ownership of things. One of the primary facts upon which the water right is founded, and without which it cannot exist, is the power of the appropriator to utilize the water which he claims for some lawful and beneficiary purpose. Would it not, therefore, be

unreasonable, and contrary to the theory of the law governing the subject under consideration, to hold that although experience of many years, and actual demonstration, confirm the proposition that none of the water in controversy could, if left in the stream, reach plaintiff's place of diversion, at a distant point below, still defendant should be restrained from the use thereof on the ground of plaintiff's prior claim to the water of said stream, at the place of his diversion? In our judgment, such holding would be entirely contrary to the spirit, if not to the letter, of the law; and there is not, even in the letter of the law, anything tending to such a doctrine; but these observations should not be misconstrued or misapplied, so as to allow wrongful diversion or diminution of the waters of a stream on the pretense that the water so diverted would be lost, unless it can be shown that by a long course of experience, and not as the occasional result of some unusually dry season, none of the water in controversy would, if allowed to remain in the stream, reach the prior appropriator's point of diversion.

There are some difficulties apparent, and perhaps others not at once apparent, in the problem under consideration. From certain points of view there may be some want of completeness in the findings of the court below, in determining the controversy. For instance, if, taking the state of facts as found, forty-five inches of water of said creek, flowing at defendant's ranch, would not reach plaintiff's point of diversion, still it would seem to be shown in effect and admitted that a greater volume of water would carry the flow down to plaintiff's ranch, fifteen miles below. What volume of water would be necessary to carry the flow down to plaintiff's ranch is not found, and cannot be ascertained from the evidence. If, however, for example, seventy-five inches of water flowing past defendant's ranch would carry twenty-five inches thereof to plaintiff, and defendant was allowed to take forty-five inches, it is apparent that, in effect, he would be taking away from plaintiff the twenty-five inches to which he was rightfully entitled, under the conditions stated. And probably, in such a case as we have here, more complete and exact justice would be arrived at by finding what volume of water was necessary in said creek at defendant's ranch, to carry any useful quantity thereof to plaintiff, situated as these litigants are, and also providing in the decree that defendant could only take the water when the volume thereof was reduced so low that none

of it would reach plaintiff's point of diversion; finding, of course, the quantity necessary to produce one or the other of these conditions. But a review of the record shows that no such findings were asked. Perhaps plaintiff and his counsel understood that such findings would be of no practical consequence, for, when the volume of water rose sufficiently to flow down to plaintiff's point of diversion, the supply may be sufficient for plaintiff, notwithstanding defendant was allowed to take forty-five inches. It may be from that practical view of the case no such findings were desired.

The court further found, "that in the year 1884 one Samuel Weightman had, by means of a ditch, diverted and appropriated and used, about forty-five statutory inches of the waters of said creek, for the purpose of furnishing power to operate a water wheel for mechanical purposes, to wit, churning; and that thereafter, in the year 1885, one David Stortvant and one Isaac Seyster, without objection from said Weightman, or any other person, entered into peaceable and quiet possession of said water wheel, ditch, and water right, and continued in such possession until the year 1887, in which latter year they, for a valuable consideration, voluntarily surrendered the possession of said ditch, wheel, and the use of said water to the defendant Wimsette, and that said Wimsette has been continually in the possession thereof ever since, using said water for agricultural and other proper, useful, and beneficial purposes." "That the appropriation of water by Samuel Weightman in the year 1884 was prior in point of time to the appropriation of the plaintiff Raymond in the said year 1884."

Upon these findings the court stated its conclusion of law that defendant is entitled to forty-five inches of the waters of said creek, through said appropriation "by Samuel Weightman in the year 1884, and that said appropriation of Weightman was and is prior in point of time to the appropriation of plaintiff, commenced in the fall of the year 1884, and that he has the proper possessory right and title to land sufficient to require said use."

There are several assignments of error as to the admission of testimony on this branch of the defense, and it is also contended that the evidence is insufficient to justify the findings and conclusion last above quoted. In our view, however, it is unnecessary to consider those assignments, because the determination of the court on the other branch of the case necessarily sustains the decree. By the decree the defendant is not

allowed to take more than forty-five inches of water from said creek, under any conditions, or through any claim or right set up in the action.

The judgment and order appealed from will therefore be affirmed.

DE WITT, J., concurs.

BLAKE, C. J., did not participate in this decision, being disqualified.

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**WATERCOURSES — DIVERSION OF SUBTERRANEAN WATER.** — Where subterranean water emerges and afterwards sinks and re-emerges, if its entire course can be traced, the proprietor of the land at the latter point will be protected against a diversion of the water: *Saddler v. Lee*, 66 Ga. 45; 42 Am. Rep. 62; *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511, and note. See also extended note to *Wheatley v. Baugh*, 64 Am. Dec. 727.

**WATERCOURSES — INJUNCTION TO RESTRAIN DIVERSION.** — To divert or unreasonably obstruct a watercourse is a private nuisance, and in such cases equity will interfere by injunction to prevent irreparable damage and avoid a multiplicity of suits: *Uthricht v. Eufaula Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72, and note; *Heilbron v. Fowler etc. Canal Co.*, 75 Cal. 426; 7 Am. St. Rep. 183, and note with cases collected; note to *Saint v. Guerrerio*, 31 Am. St. Rep. 327.

**WATERCOURSES. — RIGHTS OF PRIOR AND JUNIOR APPROPRIATORS:** See *Saint v. Guerrerio*, 17 Col. 448; 31 Am. St. Rep. 320; *Simmons v. Winters*, 21 Or. 35; 23 Am. St. Rep. 727, and note; *Clark v. Pennsylvania R. R. Co.*, 145 Pa. St. 438; 27 Am. St. Rep. 710, and note; *Strickler v. Colorado Springs*, 16 Col. 61; 25 Am. St. Rep. 245, and note. See also extended notes to *Tolle v. Correth*, 98 Am. Dec. 543, and *Heath v. Williams*, 43 Am. Dec. 269.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NEBRASKA.**

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**COLE v. O'BRIEN.**

[34 NEBRASKA, 68.]

**AGENCY — PERSONAL LIABILITY OF AGENT.** — One who assumes, without authority, to act as the agent of another and to sign his name to a duebill as maker, is not himself personally liable thereon when there is nothing on the face of the instrument to show that he personally promises to pay the amount named therein.

*H. M. Sinclair, and Stewart and Rose*, for the plaintiff in error.

*C. W. McNamar*, for the defendant in error.

NORVAL, J. This suit was brought in the court below by Patrick W. O'Brien against Mary Cole and David Cole upon a written instrument of which the following is a copy:—

“PLUM CREEK, NEBRASKA, September 16, 1885.

“Due P. W. O'Brien for account of D. B. Cole, \$350, three hundred and fifty dollars, within one year from date.

“M. COLE.”

There was verdict for the plaintiff against David Cole for \$314.40, and the jury found no cause for action against Mary Cole. The defendant David Cole brings error.

The defendants were husband and wife. At and for several years prior to the execution of the duebill, Mrs. Cole owned a grocery store at Plum Creek. The business was managed by the husband and was conducted under the name of “M. Cole.” On the sixteenth day of September, 1885, David Cole executed and delivered the duebill sued on, in settlement of a claim of six hundred dollars which de-

defendant in error held against one D. B. Cole, a son of the defendants. Although it appears that David Cole was in the habit of signing his wife's name in the management of the grocery store, yet she did not authorize him to sign her name to the duebill, nor did she know that he had done so until some time afterwards; that he had acted as her agent in the management of the store, conferred no authority to sign her name to the instrument when it was not given for her benefit, of which the plaintiff was aware. It having been given without her authority and not for her use and benefit, or for her separate estate, the instrument, as to her, is void, and the jury so found.

The court charged the jury that, "if David Cole, without being requested by his wife so to do, signed her name to the paper sued on, he is himself liable, and you may render a verdict against him, if you so find, for the amount remaining unpaid." We think this instruction is erroneous and was prejudicial to the plaintiff in error. There is nothing upon the face of the instrument showing that he personally promised to pay the amount therein named. It is not his contract, but purports to be the obligation of M. Cole. While he assumed the act as her agent without authority, he is not for that reason personally liable in an action upon the duebill. The remedy of the defendant in error, if any, is an action for the fraud of David Cole in falsely assuming authority to act as her agent: 1 Parsons on Contracts, 68; *Abbey v. Chase*, 6 Cush. 54; *Oaden v. Raymond*, 22 Conn. 379; 58 Am. Dec. 429; *Bartlett v. Tucker*, 104 Mass. 336; 6 Am. Rep. 240; *McHenry v. Duffield*, 7 Blackf. 41; *Hopkins v. Mehaffy*, 11 Serg. & R. 126; *Hall v. Crandall*, 29 Cal. 568; 89 Am. Dec. 64; *Duncan v. Niles*, 32 Ill. 532; 83 Am. Dec. 293.

There is in the bill of exceptions some testimony tending to show that the store at Plum Creek belonged exclusively to David Cole, and that he carried on the business under the name of "M. Cole," although the weight of the evidence is to the effect that his wife was the sole owner. If the husband was in fact the proprietor of the store and with intent to bind himself, signed to the duebill the name under which he carried on business, instead of his true name, he would be liable in an action on the instrument itself, for in such case it would be his own obligation. The jury could not have found for the plaintiff upon that ground for the reason that such view of the case was not submitted to them by the instructions.

For the error in giving the instruction complained of the judgment is reversed and the cause remanded for further proceedings.

The other judges concur.

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**AGENCY — PERSONAL LIABILITY OF AGENT.** — One who without authority assumes to act as the agent of another, and makes either a deed or a simple contract in the name of the latter, is not personally liable on the covenants in the deed or on a promise in a simple contract, unless it contains apt words to bind him personally; *Hall v. Crandall*, 29 Cal. 567; 89 Am. Dec. 64, and note; *Duncan v. Niles*, 32 Ill. 532; 83 Am. Dec. 293, and note; *Ogden v. Raymond*, 22 Conn. 379; 58 Am. Dec. 429, and note; *Stetson v. Patton*, 2 Greenl. 358; 11 Am. Dec. 111, and note; *Wallace v. Bentley*, 77 Cal. 19; 11 Am. St. Rep. 231, and note; *Johnson v. Armstrong*, 83 Tex. 325; 29 Am. St. Rep. 648, and note.

Where a contract is entered into by one assuming to act as agent for another, without having been authorized to make the contract, such pretended agent is liable personally in the precise terms of the contract: *Keener v. Harrod*, 2 Md. 63; 56 Am. Dec. 706, and note; *Rossiter v. Rossiter*, 8 Wend. 494; 24 Am. Dec. 62, and note with cases collected. See extended note to *Jefts v. York*, 50 Am. Dec. 793; note to *Andrews v. Estes*, 26 Am. Dec. 524.

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## FIRST NATIONAL BANK OF RAPID CITY v. SECURITY NATIONAL BANK OF SIOUX CITY.

[34 NEBRASKA, 71.]

**NEGOTIABLE INSTRUMENTS — CERTIFICATE OF DEPOSIT — TRANSFER — DEFENSES.** — A *bona fide* purchaser of a negotiable certificate of deposit for value before maturity, and without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper; but if such certificate is transferred when overdue, the purchaser takes it subject to all defenses that could have been made had it not left the hands of the payee.

**NEGOTIABLE INSTRUMENTS. — CERTIFICATES OF DEPOSIT** in the usual form, issued by a bank, and made payable to bearer or order, are negotiable.

**NEGOTIABLE INSTRUMENTS — CERTIFICATE OF DEPOSIT — INDORSEMENT WITHOUT RECOURSE.** — When a certificate of deposit is indorsed by the payee "without recourse" before due, this is not sufficient to charge a *bona fide* purchaser with notice of defenses existing against it.

**NEGOTIABLE INSTRUMENTS — CERTIFICATE OF DEPOSIT — TRANSFER OF WHEN OVERDUE — DEFENSES.** — When it appears from the face of a certificate of deposit payable to the order of the payee on its return properly indorsed that it is payable three months after date, it is a time certificate, and if transferred by the payee after the expiration of the three months, though before it has been returned properly indorsed, the purchaser takes it as then overdue and subject to all defenses in favor of the maker which could have been made had it remained in the hands of the original payee.

**NEGOTIABLE INSTRUMENTS — CERTIFICATE OF DEPOSIT — RETURN OF BEFORE SUIT.** — When a certificate of deposit in the ordinary form is payable on its return duly indorsed, a return and tender of the certificate properly indorsed is not a condition precedent to the right to maintain an action thereon.

**NEGOTIABLE INSTRUMENTS — CERTIFICATE OF DEPOSIT — CROSS DEMAND BY MAKER.** — When a negotiable certificate of deposit is transferred when overdue, the maker may, in an action thereon by the purchaser, set off any cross demand existing in his favor against the original payee at the time of the transfer.

*Charles Offutt*, for the plaintiff in error.

*Congdon and Hunt*, for the defendant in error.

NORVAL, J. This suit was brought in the court below by the defendant in error upon four certificates of deposits issued by the plaintiff in error, payable to the order of John W. Rose, and by him indorsed to the Security National Bank of Sioux City, Iowa. Three of the certificates were for \$200 each, and one for \$150.72.

The defense is failure of consideration, and that the defendant in error acquired the certificates after maturity and under such circumstances as to charge it with notice of the maker's defense. On a trial to the court there was judgment for the defendant in error for the full amount of the certificates.

Two questions are presented for consideration: 1. Is the defendant in error a *bona fide* purchaser of the certificates for a valuable consideration, before maturity, in the ordinary course of business, without notice of dishonor or of facts which impeach their validity as between the original parties? 2. Has the consideration failed?

The certificates are alike, except as to amounts and numbers, and in the following form:—

[In border line] "Dakota.

"\$200.

FIRST NATIONAL BANK,

"RAPID CITY, DAK., Oct. 8th, 1887.

"John W. Rose, Esq., has deposited in this bank two hundred dollars, payable to the order of himself on the return of this certificate properly endorsed.

"This certificate is not subject to check.

"No. 8006.

RICHARD C. LAKE,

"No. 10729.

President."

[On margin] "Certificate of deposit."

[Across the face in red ink] "This certificate payable 8 months after date with 6 per cent interest per annum for the time specified."



The proofs show that John W. Rose, on or about the fifth day of October, 1887, called at the banking house of Lake and Halley, private bankers at Buffalo Gap, South Dakota, with three certificates of deposit issued to him by Morton E. Post & Co., of Cheyenne, Wyoming, one for \$739.38, one for \$67.35, and one for \$77, each bearing interest and maturing at different dates, and instructed G. C. Smith, the acting cashier, to send the certificates to the First National Bank of Rapid City, and request that bank to issue four of their certificates, payable to Mr. Rose's order, as follows: Three certificates for \$200 each, and one for \$150.72, in exchange for the Morton E. Post & Co.'s certificate for \$739.38, on which interest expired October 8, 1887. Mr. Rose instructed Cashier Smith to treat the other two certificates in like manner as their interest matured.

On October 5, 1887, Lake and Halley sent the three certificates, duly indorsed by Mr. Rose, to the First National Bank of Rapid City, inclosed with the following letter:—

"BANKING HOUSE OF LAKE AND HALLEY,

"BUFFALO GAP, DAKOTA, Oct. 5, 1887.

"James Halley, Esq., Cashier, Rapid City, Dak.—Dear Sir: Herewith time C. D's, Morton E. Post & Co., Cheyenne, Wyo., drawn in favor of John W. Rose, and indorsed to you, as follows:—

No. 12,300, expiration of 3 mos., Oct. 8, '87. \$739 38

Interest ..... 11 34—\$750 72

No. 12,335, expiration of 3 mos., Oct. 20, '87. 67 35

Interest ..... 1 01— 68 36

No. 12,337, expiration of 3 mos., Oct. 21, '87. 77 00

Interest ..... 1 15— 78 15

"When the first C. D. matures, send us your time C. D's, 3 months, to order John W. Rose, as follows: Three for \$200 each, and one for \$150.72 for the balance. Treat the others as they mature in like manner.

"Yours truly,

G. C. SMITH, A. Cas.

"Would not take our C. D's, as this is not a national bank."

This letter and the certificates were received by the plaintiff in error on the sixth day of October, 1887, and on the same day forwarded the \$739.38 certificate for collection through the First National Bank of Omaha. On the eighth day of the same month the First National Bank of Rapid City issued the four certificates of deposit in suit, and sent them to Lake and Halley on the same day, who delivered them to Mr. Rose.

There was no other consideration for the issue of the four certificates in controversy. They were issued for the exact amount of the principal and interest called for by the Post & Co. certificate first maturing.

When the Post & Co. certificate reached Cheyenne and was presented for payment the makers had failed, having suspended and assigned on the morning of October 10, 1887. The certificate was protested on the following day, and due notice given to all parties. Rose was requested at once to take back the dishonored certificate and return the four certificates issued in exchange therefor, which he declined to do.

On June 7, 1888, Rose sold the certificates to the Security National Bank, of Sioux City, Iowa, for \$750.72, the face value, in cash, and indorsed them to it "without recourse." The defendant in error at once presented the certificates to plaintiff in error and demanded payment, which was refused. Thereupon this suit was instituted.

The defendant in error insists that it is an innocent holder of the paper. The established doctrine is that a certificate of deposit in the usual form issued by a bank and made payable to order or bearer is negotiable, and a *bona fide* purchaser thereof for value before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper: *Bank of Peru v. Farnsworth*, 18 Ill. 563; *Laughlin v. Marshall*, 19 Ill. 390; *Bean v. Briggs*, 1 Iowa, 488; 63 Am. Dec. 464; *Huse v. Hamblin*, 29 Iowa, 501; 4 Am. Rep. 244; *Kilgore v. Bulkley*, 14 Conn. 362; *Drake v. Markle*, 21 Ind. 433; 83 Am. Dec. 358; *National State Bank v. Ringel*, 51 Ind. 393; *Johnson v. Henderson*, 76 N. C. 227; *Purdee v. Fish*, 60 N. Y. 265; 19 Am. Rep. 176; *Miller v. Austen*, 13 How. 218; *Curran v. Witter*, 68 Wis. 16; 60 Am. Rep. 827; *Moore v. Gano*, 12 Ohio 300; *Howe v. Hartness*, 11 Ohio St. 449; 78 Am. Dec. 312.

It is also equally well settled that where a certificate of deposit is transferred when overdue, the purchaser takes it subject to all defenses that could have been made had it not left the hands of the payee: *Coye v. Palmer*, 16 Cal. 158; *Tripp v. Curténus*, 36 Mich. 494; 24 Am. Rep. 610.

It cannot be successfully claimed that the plaintiff below, when it purchased these certificates, had actual notice of the facts surrounding their execution, or that it acted in bad faith in their purchase. It paid Rose the face of the certificates in cash, discounting only the interest. True, they were indorsed

by the payee "without recourse," but notice cannot be implied from such an indorsement alone: *Epler v. Funk*, 8 Pa. St. 468; *Stevenson v. O'Neal*, 71 Ill. 314; *Kelley v. Whitney*, 45 Wis. 110; 30 Am. Rep. 697; *Fox v. Bank of Kansas City*, 30 Kan. 441.

It is important next to determine whether the certificates in suit were past due when purchased by the defendant in error, so as to charge it with notice of facts which would impeach their validity as between the maker and payee. Counsel for the defendant in error insist that the certificates are only payable upon their return and presentation to the maker, properly indorsed, which was after their transfer to the Security National Bank, and therefore were not dishonored when purchased. This contention is based upon the phrase, "on the return of this certificate properly indorsed," used in the printed form of the certificates. If they contained no other stipulation as to time of payment, there would be ground for debate that they did not become due until payment was demanded, and that their dishonor would not be presumed from lapse of time. Authorities are to be found which sustain such a doctrine, but the decisions are not all one way. Many adjudicated cases, as well as text-books, lay down the proposition that a certificate of deposit in the ordinary form, payable on its return duly indorsed, is in legal effect a promissory note, and is due immediately upon its execution, and that suit may be brought thereon without a previous demand, the same as in the case of a promissory note payable on demand. As we construe the certificates sued on in this action we are not now called upon to choose between these conflicting authorities, or to decide whether demand certificates are subject to the same rule which governs and controls demand notes, for these are time certificates. By their terms they are payable three months after their date. Clearly that is the meaning of the words stamped across the face of the instruments. They are capable of no other reasonable construction. The holder could not have lawfully demanded payment before the expiration of the three months, and had suit been instituted before such time had elapsed, it would have been prematurely brought. The words "on the return of this certificate properly indorsed," when read in connection with the other stipulations, do not control the time of payment, nor was it indispensable to a recovery that the certificates should have been previously presented to the maker duly indorsed. To hold that the tender

of a certificate properly indorsed is a condition precedent to maintain an action thereon, would defeat a recovery upon a lost certificate, and would prevent a third person from becoming the owner of a certificate payable to the order of the payee, unless indorsed. Such a rule would be unsound in principle, and contrary to the weight of the decisions: *Cassidy v. First Nat. Bank*, 30 Minn. 86; *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39; 4 Am. St. Rep. 526.

Construing together all the conditions of the instruments in suit, and giving effect to every part, as we must, they are payable three months after their date to the payee, or to the person by him transferred: *Brett v. Ming*, 1 Fla. 447; *Hunt v. Divine*, 37 Ill. 137.

In the case last cited, the certificate was in the following form:—

“BANKING HOUSE OF E. T. HUNT & Co.,  
SYCAMORE, ILL., March 9, 1861.

“C. M. Chase, Esq., has deposited in this bank two hundred and eighty dollars and fifty cents in currency, subject to the order of himself, and payable in like funds on return of this certificate three months after date.

“E. T. HUNT & Co.”

It was held that it was payable absolutely three months after its date, and that a return of the certificate was not a condition precedent to the recovery. The similarity of the certificate in the Illinois case to the ones we are considering, entitles that decision to great weight as a precedent here. When these certificates were purchased by the defendant in error they were five months overdue, and being dishonored, the maker is entitled to all defenses against them, it could have urged had action thereon been brought by the payee: *Britton v. Berry*, 20 Neb. 325, 330; *First Nat. Bank v. Edholm*, 25 Neb. 741.

These certificates of deposit were issued in exchange for the Post & Co. certificate. There was no other consideration. The record discloses that the plaintiff in error used due diligence in presenting for payment the Post & Co. certificate. When presented, the makers had failed. It was immediately protested and notice given to Rose, the payee and indorser, the dishonored certificate tendered to him, and these certificates demanded. Whether the Post & Co. certificate was sold to the First National Bank of Rapid City, or was simply received by it for collection, can make no difference as to the



sufficiency of the defense. If received as a collection, then the proceeds, when collected, were to go to the bank in payment of the certificates in suit issued before the Post & Co. certificate was transmitted. Payment being refused when presented to the makers, the consideration for these certificates failed: *Lindsey v. McClelland*, 18 Wis. 481; 86 Am. Dec. 786; *Fleig v. Sleet*, 43 Ohio St. 53; 54 Am. Rep. 800.

If the plaintiff in error is regarded as the owner of the Post & Co. certificate, then Rose was liable thereon as indorser. Every step was taken to charge him as such, and the First National Bank of Rapid City could maintain an action against Rose on his contract of indorsement. Then under the provisions of our code relating to set-off and counterclaim, it could have been pleaded as a defense if this suit had been brought by Rose; and the certificates in controversy being dishonored when transferred to the Security National Bank, the plaintiff in error can plead and prove any defense which could legally be made by it if Rose were the plaintiff.

In *Edney v. Willis*, 23 Neb. 56, the author of that opinion, after quoting section 31 of the code, says: "This clearly implies that set-off may be allowed against a note transferred after due. In England the indorsee of an overdue note or bill is liable to such equities as attach to it in itself, but only to such, and not to those arising out of collateral matters, nor to any set-off that is not good against his indorser; and so at common law in this country in some states it is held that not all equities which might be set off against the original payee can be set off against a third party who is affected with constructive notice of set-off, but only those attaching to the particular note in suit. . . . The English rule seems to be based upon the doctrine of recoupment, and is not applicable in any state having a statute similar to our own, where independent and collateral claims may be set off against an overdue note in the hands of a payee."

In any view of the case the defense is well grounded, and should have been sustained. The judgment is reversed and the cause remanded for further proceedings.

The other judges concur.

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**BANKS — CERTIFICATES OF DEPOSIT — WHETHER NEGOTIABLE.** — A certificate of deposit payable to the order of the depositor in current funds upon the return of the certificate, is in effect a negotiable promissory note, and as such, is governed by the rules and principles applicable to that class of paper: *Citizen's Nat. Bank v. Brown*, 45 Ohio St. 39; 4 Am. St. Rep. 526,

and note; *Pardee v. Fish*, 60 N. Y. 265; 19 Am. Rep. 176; *Welton v. Adams*, 4 Cal. 37; 60 Am. Dec. 579, and note. *Contra*, see *Lindsey v. McClelland*, 18 Wis. 481; 86 Am. Dec. 786, and note with cases collected; to the same effect see *Huse v. Hamblin*, 29 Iowa, 501; 4 Am. Rep. 244. A certificate of deposit is negotiable where it is made payable to the depositor or his order, at a specified time after date with interest: *Bean v. Briggs*, 1 Iowa, 488; 63 Am. Dec. 464, and note: See notes to *Long v. Straus*, 57 Am. Rep. 97, and *O'Neill v. Bradford*, 42 Am. Dec. 577.

**NEGOTIABLE INSTRUMENTS — EFFECT OF INDORSEMENT WITHOUT RECOURSE.** — For a discussion of this subject, see *Drennan v. Bunn*, 124 Ill. 175; 7 Am. St. Rep. 354, and extended note.

**NEGOTIABLE INSTRUMENTS — CERTIFICATES OF DEPOSIT — TRANSFER WHEN OVERDUE.** — A certificate of deposit payable on return of the certificate properly indorsed is a negotiable note, payable on demand, and is dishonored after the lapse of a reasonable time from its issue, and any person taking it after such reasonable time has elapsed, takes it subject to the equities between the parties to it: *Tripp v. Curteneus*, 36 Mich. 494; 24 Am. Rep. 610, and note.

## STATE v. RUSSELL.

[34 NEBRASKA, 116.]

**ELECTIONS — STATUTES — CONSTRUCTION — MANDATORY AND DIRECTORY PROVISIONS.** — When a statute expressly or by fair implication declares any act to be essential to a valid election or that an act shall be performed in a given manner and no other, such provisions are mandatory and exclusive; but if the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that their performance is essential to the validity of the election they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election.

**ELECTIONS — STATUTES — MANDATORY AND DIRECTORY PROVISIONS.** — Statutory provisions which fix the day and place of the election, and the qualification of the voters are mandatory, while those which relate to the mode of procedure in the election, and to the record and return of the results, are directory merely.

**ELECTIONS — AUSTRALIAN BALLOT SYSTEM — MARK MADE WITH PENCIL.** Under the "Australian ballot system," a provision of a statute that the voting mark shall be made with ink is directory merely, and if the mark is made with pencil the ballot is not thereby rendered void; nor is its validity affected by a further provision of the statute that "no elector shall place any mark upon his ballot by which it may afterwards be identified as the one he voted."

**ELECTIONS — MARKING BALLOTS.** — Under a statute providing that "no elector shall place any mark upon his ballot by which it may afterwards be identified as the one he voted," the mark prohibited is such a one whether letters, figures, or characters in ink or in pencil, as shows an intention on the part of the voter to distinguish his particular ballot from others of its class, and not one that is common to and not distinguishable from others in that class, and the ballot itself must furnish

evidence of an unlawful intention on the part of the voter, such as his initials, or a mark known to be his, or the like.

**ELECTIONS.** — **PEREMPTORY MANDAMUS** will not be issued requiring the judges and clerks of election to count ballots wrongfully rejected by them when such ballots are beyond their control and have been returned to the county clerk.

*C. C. Flansburg*, for the relator.

*R. L. Keester*, for the respondent.

Post, J. At the general election in 1891 the relator and one Cassell were opposing candidates for the office of supervisor of Mullally township, Harlan County, and upon a count thereof each was credited with thirty-two votes. There was cast, in addition thereto, one vote for the relator, otherwise regular, but the mark opposite his name was made with a lead pencil instead of ink. The respondents, who were the judges and clerks of election, rejected said ballot, and relator now seeks a peremptory order from this court requiring them to meet and count said vote in his favor and declare the result. The question presented involves a construction of section 20 of the act approved March 4, 1891, known as the Australian ballot law. The provisions of said section, so far as they are material in this connection, are as follows: —

"Sec. 20. When any duly qualified elector shall present himself at the polling place of his election district or precinct, for the purpose of voting at any election then in progress, he shall receive from a member of the election board a ballot upon the back of which two members of the board shall first write their names in ink; the elector shall then forthwith proceed alone into a compartment, if one be then unoccupied, and shall prepare his ballot by marking in the appropriate margin or place a cross (X) with ink opposite the name of the candidate of his choice for each office to be filled, or by filling in with ink the name of the candidate of his choice in the blank space provided therefor, and marking a cross (X) with ink opposite thereto; and in case of a question submitted to the vote of the people, by marking in the appropriate margin or place a cross (X) with ink against the answer he desires to give."

In the construction of statutes of this character it is important to keep in mind two recognized principles: 1. That the legislative will is the supreme law and the legislature may prescribe the forms to be observed in the conducting of elections and provide that such method shall be exclusive of all

others; 2. Since the first consideration of the state is to give effect to the expressed will of the majority, it is directly interested in having each voter cast a ballot in accordance with the dictates of his individual judgment.

Recognizing the principle first stated the courts have uniformly held that when the statute expressly or by fair implication declares any act to be essential to a valid election, or that an act shall be performed in a given manner and no other, such provisions are mandatory and exclusive. By an application of the second principle, the courts, in order to give effect to the will of the majority and to prevent the disfranchising of legal voters, have quite as uniformly held those provisions to be formal and directory merely, which are not essential to a fair election, unless such provisions are declared to be essential by the statute itself.

Judge McCrary, in the last edition of his excellent work on the Law of Elections, section 190, states the rule as follows: "If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute, must so hold, whether the particular act in question goes to the merits, or affects the results of the election or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done, within a particular time, or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election."

Mr. Paine, in his work on Elections, section 498, expresses the same views in the following language: "In general, those statutory provisions which fix the day and the place of election and the qualifications of the voters are substantial and mandatory, while those which relate to the mode of procedure in the election, and to the record and the return of the results, are formal and directory. Statutory provisions relating to elections are not rendered mandatory as to the people by the circumstance that the officers of the election are subjected to criminal liability for their violation. The rules prescribed by the law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascer-



tain with certainty the result. Generally such rules are directory, not mandatory, and a departure from the mode prescribed will not vitiate an election, if the irregularities do not deprive any legal voter of his vote, or admit an illegal one, or cast uncertainty on the result, and have not been occasioned by the agency of a party seeking to derive a benefit from them."

The view expressed by these authors has the support of the great majority of cases in this country and England. In fact we are not aware that there is to be found in the reports any diversity of opinion on the subject. The following are a few of the many cases in point: *Gass v. State*, 34 Ind. 425; *Piatt v. People*, 29 Ill. 54; *Barnes v. Supervisors*, 51 Miss. 305; *Fry v. Booth*, 19 Ohio St. 25; *Tarbox v. Sughrue*, 36 Kan. 225; *De Berry v. Nicholson*, 102 N. C. 465; 11 Am. St. Rep. 767. In the last case this rule was held to apply to a constitutional provision.

There are other sections of the act which shed light upon the subject, and assist us in determining the intention of the legislature. For instance, it is provided by section 13, "that the ballots shall be supplied by the county or other municipality," and that "ballots other than the official white ballots printed by the respective county or municipal clerks according to the provisions of this act shall not be cast or counted at any election." By section 23 it is provided that, "No judge of election shall deposit in the ballot box any ballot unless it is identified by the signature of two of the judges of election," and that every person violating the foregoing provisions shall be guilty of a misdemeanor. By section 25 it is provided as follows: "Sec. 25. In the canvass of the votes, any ballot which is not indorsed, as provided in this act, by the signature of two (2) judges upon the back thereof, shall be void and shall not be counted, and any ballot or parts of ballot from which it is impossible to determine the elector's choice shall be void, and shall not be counted; provided, that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, that it shall be the duty of the judges of election to count such part."

It may be as contended by respondent's counsel that the proviso in the last section was intended to apply only to ballots otherwise regular, but on which the voter has failed, through negligence, illiteracy, or other cause, to clearly express his intention as to every office named thereon. The

inference is strong, however, from the language of the several sections to which reference has been made, that the legislature, by declaring a limited number of provisions to be mandatory, and a compliance therewith essential to a legal ballot, intended the other provisions as directory only. We are fortunately not altogether without authority on this question.

There have been numerous decisions under the English and Canadian election laws after which ours appears to have been modeled. For instance, in *Grant v. McCallum*, 12 Canadian Law Journal, 113, it is held that under a statute which directs the voting mark to be made with a pencil, a mark with ink does not render the ballot void. Mr. Wigmore, in an appendix to the second edition of his *Treatise on the Australian Ballot System*, page 193, after examining all of the reported cases upon that branch of the subject, concludes in the following language: "Wherever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their requirements as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention; and if in a given case the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials; that is, as objects in themselves, and not merely as means."

It is urged as an objection to this construction of the statute that it will interfere with the secrecy of the ballot. Section No. 29 provides: "No elector shall place any mark upon his ballot by which it may afterward be identified as the one he voted."

It will be noticed that a ballot marked in violation of the foregoing provision is not declared to be void. The force of the objection is apparent, however, if the effect of our construction would be to defeat or interfere with the secrecy of the ballot, since that is one of the primary objects of the law. The construction which we have given the statute will not, however, be attended with any such effect. It is not every mark by means of which a ballot might subsequently be identified which is a violation of the statute. The mark prohibited by law is such a one, whether letters, figures, or characters, as shows an intention on the part of the voter to distinguish his particular ballot from others of its class, and not one that is common to and not distinguishable from others

of a designated class. The fact that a number of ballots are, without any evidence of a fraudulent intention on the part of the voters, distinguishable from others cast at the same polling places, as, for instance, marked with a pencil or with ink of a different color, does not bring them within either the letter or spirit of the statute. The English and Canadian cases are not harmonious on the subject, but according to Wigmore, page 194, the sounder view is that the ballot itself must furnish evidence of an unlawful intention on the part of the voter, such as his initials or a mark known to be his, or the like. Neither can a ballot be said to be marked in violation of law because the voter, by reason of the happening of contingencies or presence of conditions not contemplated at the time, is subsequently able to distinguish it from all others. It is true the ballot in controversy in this case might be distinguished by the voter who marked it, since it is the only one at the polling place marked with a pencil. Yet the same result would follow in every case where a single vote is cast for any one of the several candidates named on the ballot. We are aware that our views on this branch of the subject are not in harmony with the recent cases in the supreme court of Connecticut, viz.: *Talcott v. Philbrick*, 59 Conn. 478, and *Fields v. Osborne*, 60 Conn. 544. In the last case, under a statute substantially like ours, but which authorizes the printing of tickets by the respective political parties, it was held that the name on the tickets of one party of a candidate for judge of probate when said office could not be filled at that election, and on the other of additional words descriptive of one of the offices, were distinguishing marks for which the ballots of both parties should be rejected. To our minds, however, the reasoning of the dissenting judges is the more satisfactory and convincing, and certainly more in accord with the weight of authority. We think, too, that the construction given our statute is most promotive of fairness and purity in elections, and less liable to result in the disfranchising of honest voters through mere omissions or mistakes of their own, or the negligence or design of public officers.

We have not overlooked the case of *People v. Board of Canvassers*, 129 N. Y. 395. The statute of that state provides for official ballots of the different parties and requires the county clerk to see to having them printed and distributed. For the purpose of identifying them as official, they are all re-

quired to be printed in the same way, upon the same kind of paper, and on the back of each ballot must be printed in prescribed type the words "Official Ballot for —," and after the word "for" shall follow the name of the polling district for which it is prepared, and a *fac simile* of the signature of the clerk. It is further provided that there shall be no indorsement on the ballot other than as above. By another section it is provided that no inspector of elections shall deposit in any ballot box any ballot which is not properly indorsed and numbered, and that no ballot which has not the official indorsement shall be counted. By still another section it is provided that all ballots on which the voter or any person with his knowledge has placed any mark with intention that it shall afterward be distinguished, shall be void and shall not be counted. The county clerk in that case, by accident or design, sent to one polling district the ballots prepared for another in the same town and *vice versa*, so that the ballots voted by one party in the first district of the town of C. bore the number of the second district, and those voted by the same party in the latter bore the number of the first district. For this irregularity the ballots in question were all declared illegal and void by the court, on the grounds that the indorsement thereon was not prescribed by law, and was a distinguishing mark within the meaning of the statute. The reasons alleged by the majority of the court for holding the indorsement in question to be a distinguishing mark are not satisfactory to us. It is argued that by means of the erroneous designation thereon, the ballots were readily distinguishable as those of one political party, since the mistake only involved those of one party. This is true, no doubt, yet the ballots deposited in any box, it is assumed, may always be classified politically, from the choice of candidates by the voters. That case affords an excellent illustration of the dangerous consequences of a strict construction of election laws, and the imposing upon innocent voters of penalties for the dereliction of public officers. Ballots to the number of twelve hundred were rejected and the majority of voters of a district disfranchised through no fault of their own, but on account of the act of a public official, in whose integrity and efficiency they had a right to rely. We agree with the views expressed by Judge Peckham in his dissenting opinion in that case, who after stating the facts substantially as above, says:—

"The mere statement of the proposition to reverse the re-



sult of an election under such circumstances and for such a cause is calculated to create in most minds a feeling that, if actually consummated, gross injustice would thereby be done, and that no fair reading of any ballot law would permit its consummation. To utterly disfranchise hundreds of innocent legal voters because the employee or messenger of some public officer made a mistake like the one in question, seems to me to work a burlesque on the ballot act and its construction. Where any particular construction which is given to an act leads to gross injustice or absurdity, it may generally be said that there is fault in the construction, and that such an end was never intended or suspected by the framers of the act. A construction of this kind placed upon the act here under discussion certainly tends to bring the law itself into contempt. The construction of this act by the majority of the court is, as I believe, wholly unnecessary, and (I say it with great respect) unreasonable."

Notwithstanding our conclusion that the ballot in controversy is valid and should have been counted, we must deny the peremptory writ, for the reason that the ballots have all been returned to the county clerk and are not now in the custody or under the control of the respondents. We might have dismissed the relator's action on that ground without construing the statute but have felt constrained, in view of the urgent request of counsel, to examine the more important question presented by the record.

The other judges concur.

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ELECTIONS — STATUTES, WHEN MANDATORY AND WHEN DIRECTORY. — If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts must hold the statute to be mandatory, whether the particular act goes to the merits of the election or not; but if the statute simply provides that certain things shall be done within a particular time or in a particular manner, and does not declare that their performance shall be essential to the validity of the election, they will be regarded as mandatory if they affect the merits of the election, and as directory only if they do not affect its merits: *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254, and note; *Bowers v. Smith*, 111 Mo. 45, ante 491, and note; *State v. Saxon*, 30 Fla. 668; 32 Am. St. Rep. 46, and note.

ELECTIONS. — MARKING BALLOTS: See note to *State v. Saxon*, 32 Am. St. Rep. 66. An elector voting under the Australian system must indicate his choice by stamping one of the squares of his ballot; he cannot stamp it elsewhere and leave the election officers to guess at his intention: *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254. Writing the name of a candidate on a ballot, and erasing the name of his opponent, must be disregarded

where the statute requires the names of all candidates to be printed on each ballot. Such a statute is mandatory: *State v. McElroy*, 44 La. Ann. 796; 32 Am. St. Rep. 355. See *De Walt v. Bartley*, 146 Pa. St. 529; 28 Am. St. Rep. 814, and note.

**MANDAMUS TO ELECTION OFFICERS.** — Where there is enough on the face of a ballot to call for the exercise of judgment by election inspectors, and they, exercising their judgment, decide that the ballot should not be counted, such decision cannot be reviewed or controlled by *mandamus*: *State v. Deane*, 23 Fla. 121; 11 Am. St. Rep. 343, and note.

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## RICHARDSON v. CAMPBELL.

[34 NEBRASKA, 181.]

**INTEREST — HIGHER RATE FOR NONPAYMENT OF DEBT — PENALTY.** — When money is loaned at a specific rate of interest on a note containing a provision that if not paid at maturity the maker shall pay a higher rate of interest thereafter, the higher rate is in the nature of a penalty, and the payee can recover interest after maturity only at the lower rate agreed upon.

**INTEREST — PRINCIPAL AND COUPON NOTES — USURY.** — When the rate of interest agreed upon for the principal of a loan is legal at the time of the execution of a note therefor, and coupon interest notes executed in connection therewith are not to draw interest until the maturity of the principal debt, the contract is not tainted with usury, and the payee is entitled to interest thereafter on both the principal and interest notes at the rate agreed to be paid upon the principal note before maturity, although a statute passed since its execution has reduced the legal rate of interest, and although the parties agreed that both the principal and interest notes should draw a higher rate of interest after the maturity of the principal debt.

*L. C. Chapman*, for the plaintiff in error.

*S. P. Davidson*, for the defendant in error.

**MAXWELL, C. J.** This case was before this court in 1889, and is reported in 27 Nebraska, 644. A rehearing was granted upon the question of the rate of interest to which the plaintiff was entitled, and the case is again submitted to the court. It appears from the record that the original loan was for six hundred dollars due in five years. This loan was made February 29, 1876, and at a rate of ten per cent per annum, with a provision that if not paid at maturity the note should draw interest at twelve per cent. This rate was lawful when the note in question was given. There were also five interest notes of sixty dollars each, payable five years from date, which were attached to the principal note and were, in fact, coupons.

Two questions are presented, viz., 1. Can the plaintiff re-

cover more than ten per cent from the maturity of the six-hundred-dollar note; and 2. Is he entitled to interest on the coupons?

In *Weyrich v. Hobelman*, 14 Neb. 432, the note was to draw ten per cent to time of maturity, and if not paid at that time to draw twenty-four per cent thereafter. The court held that the increased interest was in the nature of penalty, and that the plaintiff could recover interest only at the contract rate, viz., ten per cent: *Conrad v. Gibbon*, 29 Iowa, 120. The plaintiff is entitled, therefore, to but ten per cent interest upon the six-hundred-dollar note after it became due.

2. In *Mathews v. Toogood*, 25 Neb. 99, it was held, in substance, that where the highest rate allowed by law is charged upon the principal note, interest cannot be allowed upon the coupon interest notes, the reason being that the several notes represent but one transaction and one indebtedness; therefore, if, considering the whole transaction, the interest agreed upon would exceed the legal rate, the contract will thereby be in conflict with the statute. If the rate agreed upon is within the statutory limits, this objection will not apply. In the case at bar the interest notes did not draw interest until the principal note became due and the contract was within the provisions of the statute; that is, it was not usurious when made, and may be enforced. The plaintiff is entitled to interest on the coupon notes. The former opinion in this respect will be modified to conform to this opinion.

Judgment accordingly.

The other judges concur.

**INTEREST AFTER MATURITY — WHETHER CONTROLLED BY CONTRACT OR STATUTE.** — A greater sum to be paid on the default of paying a lesser one is a penalty and cannot be recovered; and this applies to a stipulation in a note providing for an increased rate of interest after maturity, both upon principal and interest: *Mason v. Callender*, 2 Minn. 350; 72 Am. Dec. 102, and note. See extended notes to *O'Brien v. Young*, 47 Am. Rep. 70, *Briggs v. Winsmith*, 30 Am. Rep. 47, and *Horn v. Nash*, 63 Am. Dec. 438, in which this subject is very fully treated. A promissory note or other obligation providing for a special rate of interest will after maturity draw interest only at the statutory rate, unless the special rate is expressly agreed to be paid after maturity: *Eaton v. Boissonnault*, 67 Me. 540; 24 Am. Rep. 52, and note. See *Adams v. Hastings*, 6 Cal. 126; 65 Am. Dec. 496.

**INTEREST — EFFECT OF STATUTE CHANGING LEGAL RATE OF.** — Interest follows a contract according to the law in existence at the time and place of the contract, or the performance of it, and a subsequent change in the legal rate does not affect the contract: *Aguirre v. Packard*, 14 Cal. 171; 73 Am. Dec. 645, and note; *Seymour v. Continental etc. Ins. Co.*, 44 Conn. 300; 26

Am. Rep. 469, and note; *North River Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 424; 53 Am. Dec. 258; *Lee v. Davis*, 1 A. K. Marsh. 397; 10 Am. Dec. 746, and note; *Getto v. Friend*, 46 Kan. 24; *Hinman v. Goodyear*, 56 Conn. 210. See extended note to *O'Brien v. Young*, 47 Am. Rep. 70.

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## STATE v. KING.

[34 NEBRASKA, 196.]

**STATUTE OF LIMITATIONS** applies to applications for *mandamus*.

**MANDAMUS** — **STATUTE OF LIMITATIONS**. — A proceeding by *mandamus* to recover public money withheld by a public officer after the expiration of his term of office is barred by the statute of limitations after the expiration of the time named therein from the time when the right of action accrued.

*Hugh J. Dobbs*, for the plaintiff in error.

*Griggs, Rinaker and Bibb*, for the defendant in error.

**NORVAL, J.** The relator on the sixth day of October, 1890, filed its petition in the district court of Gage County for a writ of *mandamus* to compel the respondent to pay into the treasury of said county the sum of \$1,129.50, alleged to be due from the respondent as the former treasurer of said county. The petition alleges, in substance, that the defendant was the duly elected, qualified, and acting treasurer of said county from January 5, 1882, until January 6, 1886; that as such treasurer he collected and retained the above sum in excess of the salary of said office, and in excess of payments made by him for the services of deputies and assistants, and of all payments made by him into the county treasury of said county on account of said office; and that the respondent has at all times refused and neglected, and does now neglect and refuse to pay said sum or any portion thereof into the treasury of said county.

The respondent demurred to the petition on the following grounds: 1. That said petition does not state facts sufficient to constitute a cause of action; 2. That it appears on the face of relator's petition that the alleged causes of action therein set forth did not accrue within four years from the time of the commencement of this action, and are barred by the statute of limitations. The demurrer was sustained, and the relator electing to stand upon the petition, the action was dismissed.

It was the duty of the respondent, immediately upon the expiration of his term of office, to pay over to his successor in office all moneys then in his hands belonging to Gage County,



and upon his failure so to do a cause of action accrued in favor of the county. It will be observed that the petition was filed in the court below more than four years after the expiration of the respondent's term of office and after the accruing of the alleged cause of action. The case, therefore, falls directly within the rule laid down by this court in *State v. School District No. 9*, 30 Neb. 520, 27 Am. St. Rep. 420, where it was held that the statute of limitations applies to the proceeding by *mandamus*, and that such an action is barred at the expiration of four years. Although there are respectable authorities, some of which are cited in the brief of counsel for relator, which support the doctrine that proceedings in *mandamus* are not civil actions, within the meaning of the code, and that the statute of limitations does not apply to applications for *mandamus*, yet we do not see in the cases cited sufficient cause for overruling our own decision in the case above referred to. The question and the authorities bearing thereon were fully considered at that time, and the arguments of the author of that opinion, it seems to us, are unanswerable. The decision is adhered to.

The question whether a demand and refusal to act must precede an application for a writ of *mandamus*, when the relation is on the part of the public to enforce a duty the respondent owes the public, we will not now consider, for the reason no objection is made on that ground to the sufficiency of the petition, nor is the point raised in the brief of counsel for respondent, although the same is discussed in the relator's brief.

As the action is barred by the statute of limitations, the district court did not err in sustaining the demurrer to the petition.

The judgment is affirmed.

The other judges concur.

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MANDAMUS — STATUTE OF LIMITATIONS AGAINST. — A proceeding by *mandamus* is an action at law, and may be barred by the statute of limitations: *State v. School District*, 30 Neb. 520; 27 Am. St. Rep. 420, and note.

# ATCHISON AND NEBRASKA RAILROAD COMPANY v. BOERNER.

[34 NEBRASKA, 240.]

**EMINENT DOMAIN — TOWN LOTS — ELEMENTS OF DAMAGE.** — When part of several contiguous town lots used and treated by the owner as one tract is appropriated by a railroad company for a right of way, the measure of his damages is the value of the strip actually appropriated, and the diminution in the value of the portion remaining resulting from the proper construction and careful operation of the road. He is not limited in his recovery to the land described in the petition of the company, nor the award of the commissioners, but may show the direct effect upon all of his land accompanying or flowing from such appropriation.

**EMINENT DOMAIN — CONCLUSIVENESS OF JUDGMENT FOR DAMAGES.** — A judgment of a court having jurisdiction to award damages in a proceeding to condemn lands for railroad purposes is conclusive upon the parties thereto as to all questions therein actually litigated, as well as all matters necessarily within the issue joined, although not formally litigated.

**EMINENT DOMAIN — INJURY TO EASEMENT IN STREET — DAMAGES TO ADJOINING OWNER.** — An abutting lot owner may, by action at law, recover damages for the interference with his easement in the street by a railroad company, when part of his property has been taken for the right of way; provided such damages are not included in those awarded for such taking, and the part taken is so far distant as to make the interference with the easement in the street a separate and distinct injury.

*T. M. Marquett, J. W. Deweese, and E. W. Thomas, for the plaintiff in error.*

*John Gagnon and C. Gillespie, for the defendant in error.*

**NORVAL, J.** This action was brought in the court below by August Boerner, the defendant in error, to recover damages by reason of the construction of the Atchison and Nebraska railroad near his real estate, in the town of Rulo. There was a trial to a jury, who assessed the damages at fifteen hundred dollars. The defendant's motion for a new trial was overruled, and judgment entered on the verdict, to reverse which the railroad company brings error.

The property in question is lots 5, 6, 7, and 8, in block 2, in Rouleau and Bedard's addition to the town of Rulo. The lots are bounded on the east by Commercial Street, and on the north by Rouleau Street. There is an alley running north and south through the center of the block. Lots 7 and 8 run east, fronting upon Commercial Street, and the rear ends abutting upon the alley. Lots 5 and 6 run north and south, abutting against lot 7 and fronting on Rouleau Street. Lot 6 lies along Commercial Street, and lot 5 adjoins lot 6 on the west. Lot 4 in the same block lies between lot 5 and the alley. On

lot 6 there is a two-story frame brewery building used and operated by the defendant in error. There is also upon the lots a residence, ice house, and outbuildings.

In 1886 the plaintiff in error constructed its line of railroad in the center of said alley, running north and south, extending through the next two blocks south of block 2, thence curving to the east across Commercial Street, making a deep excavation across the street which completely obstructed the travel thereon. A high embankment was constructed through block 2 for the roadbed, and a trestle bridge was built across Rouleau Street, near the northwest corner of Boerner's property, so as not to impede the travel upon the street.

Prior to the location and construction of the railroad, the plaintiff in error caused to be condemned, for right of way purposes, said lot 4 and the west thirty-five feet off the rear ends of said lots 7 and 8, and deposited with the county judge, as provided by law, the amount of damages assessed by the commissioners. From the award an appeal was taken to the district court. The defendant in error was a party to the condemnation proceedings, as was also one Charles Gagnon, who claimed an interest in lot 4. Judgment was rendered in the district court for seven hundred dollars as damages sustained by reason of the appropriation of lot 4, which sum was apportioned between Boerner and Gagnon according to their respective interests in the lot, after deducting the amount of taxes on the lot due the county. Boerner accepted and receipted for his share of the money, and in the arrangement allowed the railroad company \$150 for the dwelling house which stood on lot 4, and he subsequently moved the building therefrom onto lot 7 in question, where he has since resided. The sum of \$100 was assessed for the taking of the portions of lots 7 and 8, the greater amount of which went to the county treasurer in payment of the taxes charged against the lots.

It is contended by the railroad company that the defendant in error is estopped by the adjudication in the condemnation proceedings from prosecuting this action. The soundness of this position depends upon whether the matters now sought to be litigated were directly involved in the former litigation. If they were, this suit cannot be maintained, for the judgment of a court having cognizance of the subject-matter is conclusive upon the parties thereto as to all questions therein actually litigated, as well as all matters necessarily within

the issue joined, although not formally litigated: Wells on Res Adjudicata, secs. 10, 217.

The undisputed testimony discloses that lots 4, 5, 6, 7, and 8 in said block 2 lie contiguous to each other, upon which the defendant in error had resided for nearly a quarter of a century prior to the location of the railroad, and had operated the brewery situated on one of the lots. All the lots at the time of the proceedings to condemn lot 4 and parts of lots 7 and 8 were improved and used as one property. The landowner had the right to have considered the depreciation in value of the portion of his property not taken, resulting from the proper construction and careful operation of the road over his premises, the measure of his damages being the value of the strip actually appropriated and the diminution in value of the portion remaining. Although but a part of the lots are described in the proceedings to condemn, yet neither the commissioners nor the district court on appeal from the award, were confined in their investigation to the damages done to the lots mentioned in the petition for the appointing of commissioners. It was proper for the commissioners and the jury to consider the direct effect of the location of the road upon the entire tract. Any other rule would put it in the power of a railroad company to limit the amount of damages in condemnation proceedings, by describing in the petition to the county court for the appointment of commissioners to condemn its right of way, a portion of the tract over which its road is to be constructed. The rule for which we contend is fully sustained by the authorities.

In *Wilmes v. Minneapolis etc. R'y Co.*, 29 Minn. 242, plaintiff was the owner of 120 acres of land, consisting of three forties in a line from east to west which he occupied and used as a farm, his residence being upon the east forty. The railroad corporation having located the line of its railway across the two westerly forties, commenced proceedings for condemnation, describing in the petition only the two forties through which the road crossed. It was held that the owner was entitled to have considered as an element of damages the effect of the appropriation of the right of way upon the entire 120 acres of land.

In *Sheldon v. Minneapolis etc. R'y Co.*, 29 Minn. 318, the tract of land contained about thirty acres, a part of which had been laid out and platted into village lots, but the owner continued to use the whole tract as one farm. The railroad



company filed its petition to acquire the right of way across the land by condemnation, in which was described only the particular lots, according to the plat through which the line of road was located, and made no mention of the remainder of the tract. It was decided that the landowner was not limited in the damages he was entitled to recover to the lots described in the petition, but was entitled to compensation for damages done to the whole tract out of which the right of way was taken, and that it was not necessary that the landowner should have the description in the petition corrected so as to include the entire tract.

In *Cummins v. Des Moines etc. R'y Co.*, 63 Iowa, 397, proceedings were instituted by the railway company for the condemnation for right of way purposes, one of two contiguous city lots owned and occupied by Cummins as one property. But one lot was described in the proceedings. It was held that he was entitled to compensation for the injury to the property as a whole.

*Port Huron etc. R'y Co. v. Voorheis*, 50 Mich. 506, was a proceeding to condemn, for right of way and depot grounds, one of six lots owned and occupied by Voorheis as a homestead. The lots were divided by an alley. The petition, in describing the land sought to be appropriated, only refers to one lot. It was ruled that the award of damages could not be confined to the portion actually taken, but must cover such actual injury as is done to the entire homestead, including the easement in the alley.

The same principle was recognized by this court in the case of *Northeastern etc. R. R. Co. v. Frazier*, 25 Neb. 42. Maxwell, J., in the opinion says: "The rule is, that where a railway runs through an entire tract, the landowner is entitled to all the damages which result to him from the taking. He is not limited to the lands described in the petition of the railway company, nor the award of the commissioners, but may show the facts and circumstances and direct effect upon his land, accompanying or flowing from such appropriation. . . . In other words, just compensation for real estate taken or damaged entitles the owner of several descriptions used as one farm or body of land to compensation for injury to the whole, although the right of way extends across but one or two of the subdivisions."

To the same effect are *Kansas etc. R. R. Co. v. Merrill*, 25 Kan. 421; *Atchison etc. R. R. Co. v. Gough*, 29 Kan. 94; *Parks*

v. *Wisconsin Cent. R. R. Co.*, 33 Wis. 413; *Hartshorn v. Burlington etc. R. R. Co.*, 52 Iowa, 613.

At the trial the defendant in error was permitted to prove that the company constructed through the block in question, a grade for its roadbed to the height of twenty-three feet; that since its construction the rains have washed the dirt from the grade onto the remaining portion of his lots to the depth of several inches; that the engines throw dust, soot, smoke, and sparks upon the property; that the buildings are in danger of being destroyed by fire from sparks cast from the engine, and by reason thereof he is unable to obtain any insurance. He was also permitted, over defendant's objections, to prove the value of the property before the railroad was built and its value immediately after its construction. This testimony was clearly incompetent.

The evidence shows that the railroad was staked out at the time the condemnation proceedings were commenced, and that the road was subsequently constructed on the line thus located. The assessing of the damages for the appropriation of a portion of Boerner's property covered all damages to the whole property occasioned by the location and construction of the road across the premises: *Chicago etc. R. R. Co. v. Wiebe*, 25 Neb. 542. The legislature has provided a mode for determining the damages where any portion of the owner's property is taken for railroad purposes. In such case the damages are to be appraised by commissioners appointed by the county judge for that purpose, and if either party is dissatisfied with the award, an appeal may be taken to the district court. Boerner was entitled to have all proper elements of damage considered by the commissioners, and, if they failed to do so, he cannot afterwards maintain an action to recover damages thus omitted, which were necessarily involved in the issues in the condemnation proceedings, and which he was bound to present for their consideration therein.

It is contended by counsel for defendant in error that in the condemnation case no compensation was made for damages sustained by reason of the building of the railroad across Rouleau and Commercial Streets and in the alley through said block 2.

The evidence shows that the property was not damaged by the construction of the railroad across Rouleau Street. It was spanned by a bridge which permitted the street to be used by the public the same as before the road was built. It will be

conclusively presumed that the depreciation in value of the property by reason of the building of the road in the alley, if any, was considered and allowed by the commissioners. After the railroad company had appropriated to its use lot 4 and parts of lots 7 and 8, the alley was no longer of any value to defendant in error, for he could not use it for the purpose of ingress to and egress from the remainder of his lots. This fact was doubtless taken into consideration in the condemnation case and proper compensation allowed; therefore, had that portion of the property taken by the railroad company been sold to an individual and the purchaser closed the alley, Boerner could not have recovered damages because he suffered none, and for the same reason he is not entitled to compensation in this case for the building of the road in the alley.

The only remaining point to be considered relates to the obstruction of Commercial Street. That defendant in error was entitled to compensation for the depreciation in the value of his property occasioned by the closing of the street, there is no room for doubt: *Gottschalk v. Chicago etc. R. R. Co.*, 14 Neb. 550; *Hastings etc. R. R. Co. v. Ingalls*, 15 Neb. 123; *Omaha etc. R. R. Co. v. Rogers*, 16 Neb. 117; *Chicago etc. Ry Co. v. Hazels*, 26 Neb. 364.

The question presented is whether an abutting lot owner may, by an action at law, recover damages for the interference with his easement in a street by a railroad company, where a portion of his property abutting thereon has been appropriated by the corporation for purposes of right of way. That such an action may be maintained where no part of the plaintiff's property has been appropriated to the use of the company, but is injured by the permanent interference with his easement in the street upon which his real estate abuts, is no longer an open question. The doctrine is sustained by the decisions of this court: *Burlington etc. R. R. Co. v. Reinhackle*, 15 Neb. 279; 48 Am. Rep. 342; *R. V. R. Co. v. Fellers*, 16 Neb. 169; *Hastings etc. R. R. Co. v. Ingalls*, 15 Neb. 123; *Omaha etc. R. R. Co. v. Janecek*, 30 Neb. 276; 27 Am. St. Rep. 399.

Likewise, it has been held by this court that in condemnation proceedings it is proper to consider, as an element of damages, the depreciation in value of his property, resulting from the construction of a railroad across a public highway adjoining the premises: *Sioux City etc. R. R. Co. v. Weimer*, 16 Neb. 272. That was an appeal from the assessment of

damages returned by commissioners for the location of a railroad across the defendant's land. The railroad track crossed a public road thirty-seven feet below the level of the highway. The defendant, over the objection of the plaintiff, introduced testimony on the trial in the district court, "as to the situation of the land, as to abruptness and descents, in connection with which the necessary cutting down and grading of the bed of the highway would render a portion of the land inaccessible to said highway." This court was asked to reverse the case because of the admission of this testimony. The objection was overruled. In passing upon the question the court in the opinion says: "The railroad company, having acquired the right of way over defendant's land, must be presumed to intend to cut down its roadbed according to the plan and profile as testified to by its engineer; in which case, as I understand the law, it would be its duty to also cut down and grade the highway so as to give it a proper gradient for the passage of vehicles. And if, by reason of the peculiar situation and topography of her land, such cutting down of the highway would be an additional damage to the land, I know of no reason why it should not be allowed to her, but, on the contrary, I think that the provision of the constitution, as well as considerations of justice, would give it to her. Hence, any proper testimony was admissible for the purpose of enabling the jury to ascertain the fact and extent of such damage."

We do not question the soundness of the authority to which we have just referred, but it is not applicable here for the reason that it is predicated upon facts materially different from those disclosed by the record before us. In that case the interference with the highway was immediately in front of the plaintiff's property, which rendered a portion thereof inaccessible to the highway. While in the case we are considering, the point where the street was closed was more than one thousand feet from Boerner's premises, and the injury thereby sustained, if any, was so far separate and distinct from that resulting from the taking of a portion of his lots, as to permit him to bring the action. There is no presumption that such question was litigated in the condemnation case, nor is there anything in the record to warrant an inference that such matter was therein adjudicated. Nor is there any testimony from which it can be determined what damage, if any, defendant in error sustained on account of the closing of Commercial



**Street.** As previously stated, the testimony related to the depreciation in value of the property by reason of the construction and operation of the road over the lots, instead of being confined to the matter closing the street.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

The other judges concur.

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**EMINENT DOMAIN — TOWN LOTS — DAMAGES.** — The mere platting of land into blocks on a map does not divide it into separate tracts so as to limit the owner's damages to the value of a particular block, a small part of which is actually taken under the right of eminent domain. He is entitled to an award of such damages as result to the residue of his tract: *Currie v. Waverly etc. R. R. Co.*, 52 N. J. L. 381; 19 Am. St. Rep. 452, and note. The measure of damages in eminent domain proceedings for railroad purposes, is the difference between the value of the land as a whole before and after the construction of the road: *Wabash etc. R. R. Co. v. McDougall*, 126 Ill. 111; 9 Am. St. Rep. 539, and note; *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515; 88 Am. Dec. 100, and extended note at page 114; *Driver v. Western Union R. R. Co.*, 32 Wis. 569; 14 Am. Rep. 726; *Pennsylvania etc. R. R. Co. v. Cleary*, 125 Pa. St. 442; 11 Am. St. Rep. 913.

**EMINENT DOMAIN — DAMAGES TO ABUTTING OWNERS:** See *Pennsylvania Co. v. Schuylkill etc. R. R. Co.*, 151 Pa. St. 334; 31 Am. St. Rep. 762, and note; *Jones v. Erie etc. R. R. Co.*, 151 Pa. St. 30; 31 Am. St. Rep. 722, and note; *Selden v. Jacksonville*, 28 Fla. 553; 29 Am. St. Rep. 278, and especially note. See also extended note to *Venderlip v. Grand Rapids*, 16 Am. St. Rep. at page 612.

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## FIRST NATIONAL BANK OF PAWNEE CITY v. SPRAGUE.

[34 NEBRASKA, 318.]

**BANKS AND BANKING — COLLECTIONS — LIABILITY FOR DEFAULT OF CORRESPONDENT.** — A bank which receives for collection merely a note or draft payable at a distant point, with an understanding that such collection is for accommodation only, or that it shall receive no compensation beyond the customary exchange, is not liable for the defaults of a suitable and reputable correspondent at the place of payment, to whom it has forwarded such note or draft with proper instructions for the collection and remittance of the proceeds thereof.

**BANKS AND BANKING — COLLECTIONS — LIABILITY OF FORWARDING BANK.** The liability of a bank taking a note or bill for collection, which is payable at a distance, extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions, and the corresponding bank is the agent, not of the transmitting bank, but of the holder, so that such bank is not liable for the default of the correspondent selected with due care.

**BANKS AND BANKING — COLLECTIONS — LIABILITY OF TRANSMITTING BANK.** The exchange usually charged by banks for the transmission of money

to distant points is not sufficient consideration to support an implied promise on the part of the forwarding bank to insure against loss on account of the fraud or insolvency of its correspondent to make collections.

*Story and Story*, for the plaintiff in error.

*J. L. Edwards*, for the defendant in error.

Post, J. On the third day of February, 1888, at Pawnee City, in this state, the defendant in error drew a sight draft on Davis and Wedd, residing at Cañon City, Colorado, of which the following is a copy:—

“85.75.

FIRST NATIONAL BANK,

“PAWNEE CITY, NEB., Feb. 3, 1888.

“Pay to the order of First National Bank of Pawnee City, Neb., eighty-five and  $\frac{75}{100}$  dollars, with exchange and collection charges, value received, and charge the same to account of

“H. W. SPRAGUE.

“To Messrs. Davis and Wedd, Cañon City, Colo.

“No. C 5238.”

The said draft was by the drawer left with the plaintiff in error, at its banking house in Pawnee City, for collection, and by it forwarded for collection to the Exchange Bank of Cañon City, Colorado, and by the latter collected in full from the drawees. The last-named bank failed without having remitted the proceeds of said draft, and no part thereof has been paid either to the plaintiff or the defendant in error. There is no controversy with reference to the facts on this branch of the case. Defendant in error was a customer of the bank, and was in the habit of shipping butter to parties at distant points, and making sight drafts therefor, payable to its order, credit being given him for the proceeds thereof when collected. It further appears that defendant in error was permitted by the bank to overdraw his account by reason of such collections. It does not appear that plaintiff in error was in the habit of making any charge for collecting said drafts. With reference to the transaction in question he testifies as follows:—

Q. Did you expect them to charge you anything for collecting this draft?

A. Not directly; no, I think not. If I had not been doing my banking business with them I would expect to pay them, but as I was doing my business there, and they charged two per cent for overdrafts right along, and I frequently made overdrafts, I supposed they did this as a favor.

There is no pretense that the bank in this case was guilty

of negligence in forwarding the draft, in the selection of its correspondents, or in giving instructions to the latter with reference to the collection or remittance of the money when collected.

The only question for consideration is whether the plaintiff in error, in view of the facts stated, is answerable for the default of the bank at Cañon City.

The court on its own motion gave the following instructions: "The court instructs the jury that when a home bank receives for collection merely a draft drawn upon a person residing in another place, which draft, from the nature of the business and general usage in such cases, will have to be transmitted for collection to some correspondent bank at the place where the debtor resides, and for the collection of which draft the home bank will receive only the customary exchange, in absence of any express agreement between the parties to the contrary, the home bank, if it exercises due and ordinary care in selecting such correspondent bank and transmits such draft for collection to such correspondent bank, will not be liable for the default or failure of such correspondent bank to remit moneys collected by it upon such draft."

If this instruction correctly states the law applicable to the case, the motion for a new trial should have been sustained. The courts, as well as the text writers, differ widely upon the question presented. It is held by the courts of the United States, New York, New Jersey, Ohio, Indiana, Minnesota, and perhaps others following the English cases, that where a note or bill is received for collection by a bank and by it transmitted to a correspondent at a distance for presentment and demand, the latter is the agent of the transmitting bank only, which will be liable for the default of its correspondent. This view is also approved by Mr. Daniel in his work on Negotiable Instruments, vol. 1, 324. The leading case holding thus, is *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289, in which, by a vote of fourteen to ten senators, the opinion of Chancellor Walworth in the same case was overruled, and which has then been followed and approved by the court of appeals in numerous cases. It will be observed, too, that when since this rule was adopted by the supreme court of the United States, *Hoover v. Wise*, 91 U. S. 308, dissenting opinions were filed by Justices Miller, Clifford, and Bradley. Mr. Freeman in a note to *Allen v. Merchants' Bank*, 34 Am. Dec. 315, while expressing a preference for the rule

above stated, says: "The preponderance of authority is against the principal case and in favor of the rule that the liability of a bank, taking a note or bill for collection which is payable at a distance, extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions, and that the corresponding bank is the agent, not of the transmitting bank, but of the holder, so that the transmitting bank is not liable for the default of the correspondent, where due care has been used in selecting such correspondent." The foregoing proposition is sustained by the following cases: *Fabens v. Mercantile Bank*, 23 Pick. 330; 34 Am. Dec. 59; *Dorchester etc. Bank v. New England Bank*, 1 Cush. 177; *Jackson v. Union Bank*, 6 Har. & J. 121; *Citizens' Bank v. Howell*, 8 Md. 530; 63 Am. Dec. 714; *East-Haddam Bank v. Scovil*, 12 Conn. 303; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Milliken v. Shapleigh*, 36 Mo. 596; 88 Am. Dec. 171; *Daly v. Butchers' etc. Bank*, 56 Mo. 94; 17 Am. Rep. 663; *Ætna Ins. Co. v. Alton City Bank*, 25 Ill. 243; 79 Am. Dec. 328; *Bank of Louisville v. First Nat. Bank*, 8 Baxt. 101; 35 Am. Rep. 691; *Guelich v. National St. Bank*, 56 Iowa, 434; 41 Am. Rep. 110; *Stacy v. Dane Co. Bank*, 12 Wis. 629\*; *Tiernan v. Commercial Bank*, 7 How. 648; 40 Am. Dec. 83; *Bowling v. Arthur*, 34 Miss. 41; *Mechanics' Bank v. Earp*, 4 Rawle, 384; *Baldwin v. Bank of La.*, 1 La. Ann. 13; 45 Am. Dec. 72; *Hyde v. Planters' Bank*, 17 La. 560; 36 Am. Dec. 621; *Bank of Lindsborg v. Ober*, 31 Kan. 599. The doctrine of these cases is expressly approved in *Morse on Banking*, 3d ed., c. 17.

A discussion of the reasons which have so often been advanced by courts in support of the opposing views of the question involved will not be profitable in this connection. In our opinion the rule stated in the instruction given by the court and set out above is not only in accord with the weight of authority, but is sustained by reasons sounder in themselves and more in consonance with the principles which underlie and determine the relations of principal and agent.

This is believed to be a typical case and to be fairly illustrative of the method of making collections through the agency of banks in this country at this time. Whatever may have been the reasons, arising out of the business methods existing at the time, *Allen v. Merchants Bank*, 22 Wend. 215, 34 Am. Dec. 289, was decided, for the rule adopted therein, the reason for such a rule is wanting in view of the present changed con-



ditions. Banks, as a general rule, have now no facilities for making collections at distant points not enjoyed by the business public at large. Formerly they may have enjoyed a monopoly of information relative to location, names, and credits of banks at distant or remote points. To-day, however, business men, by means of the information derived from the press and the numerous directories at their command, may collect their bills through the medium of banks at the place of payment as cheaply, safely, and expeditiously as their local banks.

It is more convenient, and therefore more frequent, for customers to deposit drafts and acceptances with their home banks for collection, paying therefor the cost of exchange only. In this case, for instance, the bank not only made the collections for defendants in error without charge, but allowed him to overdraw on account thereof, thus realizing on his paper at once. As said by Chancellor Walworth in *Allen v. Merchants Bank*, 22 Wend. 215, 34 Am. Dec. 289, there is in cases like this no consideration sufficient to support an undertaking by a bank to answer for the default of a correspondent where it has, without fraud or negligence, in proper time, forwarded the paper to a reputable correspondent with proper instructions, and when the loss is not occasioned by the act or omission of any of its immediate agents or servants. The theory of those cases which hold the remitting bank liable is, that the advantage of exchange between different points is a sufficient inducement for banks to assume the liability sought to be imposed. This may be conceded so far as the inconvenience and costs of collection is concerned, but to us it seems wholly inadequate as a consideration for an implied undertaking to insure against loss on account of the fraud or insolvency of a correspondent.

The supreme court of Tennessee, in *Bank of Louisville v. First Nat. Bank*, 8 Baxt. 101, 35 Am. Rep. 691, after a thorough examination of the cases on the subject, summarizes as follows: "The more reasonable and just construction of the undertaking of the bank in which the bill is deposited for collection is that when the bill is payable at another and distant place, the bank so receiving the bill discharges itself of liability by transmitting the same, in due time, to a suitable and reputable bank or other agent at the place of payment; and in such case it is manifest that a subagent must be employed, and the assent of the principal is implied, as it cannot be said

that the receiving bank was expected or bound to send one of its own officers to the distant point of payment for the purpose of personally attending to the collection for the very inadequate compensation usually paid to banks for such service." To the views thus expressed we give our unqualified assent. The motion for a new trial should have been sustained. The judgment of the district court is reversed, and the case remanded for further proceedings in the district court.

The other judges concur.

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**BANKS — LIABILITY OF FOR BILLS TRANSMITTED TO AGENT FOR COLLECTION.** — A bank receiving a bill for collection payable at a distant point is impliedly instructed to send it to a suitable agent at the place of payment for collection, and such agent, when selected by it, becomes the agent of the owner, for whose negligence the bank cannot be held liable: *Bank v. Cummings*, 89 Tenn. 609; 24 Am. St. Rep. 618; *Ætna Ins. Co. v. Alton City Bank*, 25 Ill. 243; 79 Am. Dec. 328; *Daly v. Butchers' etc. Bank*, 56 Mo. 94; 17 Am. Rep. 663, and note; *Guelich v. National State Bank*, 56 Iowa, 434; 41 Am. Rep. 110, and note; *Sahlein v. Bank*, 90 Tenn. 221. There is a great conflict of authorities on this proposition. The contrary doctrine to that maintained by the principal case and those cited above may be found in *Streissguth v. National etc. Bank*, 43 Minn. 50; 19 Am. St. Rep. 213, and note; *German Nat. Bank v. Burns*, 12 Col. 539; 13 Am. St. Rep. 247, and note with the cases showing the conflict of opinion collected; *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26. For a thorough discussion of the subject, see monographic note to *Allen v. Merchant's Bank*, 34 Am. Dec. 307.

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## CASS COUNTY BANK v. BRICKER.

[34 NEBRASKA, 516.]

**COMPOUNDING FELONY — DURESS — WHAT DOES NOT CONSTITUTE.** — When a mortgagor has either stolen or wrongfully removed the mortgaged property, and upon being arrested and imprisoned therefor gives his note with sureties for the payment of the mortgage debt, this alone will not constitute duress or compounding a felony in the execution of the note, and such defenses cannot be relied upon by the surety in an action on the note without other evidence.

**COMPOUNDING FELONY AS DEFENSE.** — The owner of goods stolen or wrongfully taken has a right to receive compensation for the injury sustained, and may take a note signed with sureties therefor; and in such case, unless there is an agreement not to prosecute or to suppress evidence of the crime, the defense of compounding a felony is not available against the note.

*Paul and Templin*, for the plaintiff in error.

*Darnall and Kendall*, for the defendant in error.

MAXWELL, C. J. This action was brought on a promissory note, as follows:—

“\$344.

PLATTSMOUTH, NEB., July 7, 1883.

“One day after date, we jointly and severally promise to pay to the order of the Bank of Cass County three hundred and forty-four dollars, value received, with interest at ten per cent per annum from maturity until paid. Negotiable and payable at the Bank of Cass County.

“WILLIAM R. SHAW.

“ADAM BRICKER.

“W. R. ANTHONY.”

Bricker alone answered the petition, in which he evidently sought to allege the compounding of a felony. In the briefs, however, the defense is claimed to be duress; that is, that the note in question was executed under duress. On the trial of the cause the jury returned a verdict for the defendants, upon which judgment was rendered. It appears from the record that some time prior to the giving of the note in question William R. Shaw had executed a mortgage to a man named Sharp, upon certain personal property possessed by him; that Sharp transferred the mortgage and note accompanying the same to the plaintiff; that the defendant Shaw either sold the property or removed it from the county; the proof on that point is not very clear, nor is it material now.

It also appears that Shaw was arrested on complaint of the plaintiff, and placed in the jail of Cass County, apparently waiting an examination when the defendant, with one Anthony, gave a new note for the amount of the debt and costs, and the former note and mortgage were delivered up. There is some testimony tending to show that they were delivered to the defendant Bricker, but whether so delivered or not cannot affect this case. On the 4th of October, 1884, the defendant paid on the note in question the sum of \$34.40, and October 17, 1887, the sum of \$50. The remainder of the note is unpaid.

Section 177 of the Criminal Code provides: “If any person shall take money, goods, chattels, lands, or other reward, or promise thereof, to compound any criminal offense, such person shall be fined in double the sum or value of the thing agreed for or taken, but no person shall be debarred from taking his goods or property from the thief or felon, or receiving compensation for the private injury occasioned by the commission of any such criminal offense.”

In *School District v. Alderson*, 6 Dak. 145, the defense was that the note was given to compound a felony. The court says: "In defenses of this kind, where it is sought to invalidate a written contract by parol evidence, it should be made to clearly appear that the arrangement was in contravention of public policy. Vague and indefinite statements are not sufficient. The understanding or agreement relied on must be positive and certain, entered into and relied upon by both parties.

"Says Judge Caldwell, in *Swann v. Swann*, 21 Fed. Rep. 299: 'No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state or injurious to the morals of its people. Vague surmises and flippant assertions as to what is the public policy of the state, or what would be shocking to the moral sense of its people, are not to be indulged in.'

"Says the lord chief justice, in *Walsh v. Fussell*, 6 Bing. 163: 'To hold a contract void on the ground of its impolicy or inconvenience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public.'

"In *Malli v. Willett*, 57 Iowa, 705, one witness being asked what the consideration was, said that A wanted to prosecute B for adultery with his wife, and the note was executed so as not to have any fuss with him about it,—to settle up the matter. The court held that the design to compound a criminal prosecution did not clearly appear, and that verdict should have been for the plaintiff. Says the chief justice: 'An agreement is not void on this ground unless it expressly and unquestionably contravenes public policy, and be manifestly injurious to the interest of the state.' Iowa likens it to declaring a law unconstitutional and void.

"Says Judge Cole, in *Richmond v. Dubuque etc. R. R. Co.*, 26 Iowa, 202: 'The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.'

"In *Kellogg v. Larkin*, 3 Pinn. 123, 56 Am. Dec. 164, the court says: 'Before a court should determine a contract which has been entered into in good faith, stipulating for nothing that is *malum in se*, . . . to be void as contravening the



policy of the state, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical. He is the safest magistrate who is more watchful over the rights of the individual than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject than the rights of the state.'

"In *Johnston v. Allen*, 22 Fla. 224, 1 Am. St. Rep. 180, it was held that 'where a valid acceptance is transferred by the payee to a person under arrest for embezzlement, to enable him to effect a compromise, and is given by him to the persons from whom he has embezzled to secure the payment of whatever sum might be due from him, the acceptance is not thereby made invalid, as given to compound a felony, unless, in consideration thereof, the persons from whom he embezzled agreed to abandon the prosecution against him; and even then the liability of the acceptor is not affected if he was not privy to the agreement.'

"In *Barrett v. Weber*, 125 N. Y. 18, it was held that a mortgage given by a married woman to secure the payment of goods stolen by her husband is not void, as given to compound felony, in the absence of any promise on the part of the mortgagees to forbear prosecution for the crime, or to suppress evidence tending to prove it; and in *Schultz v. Catlin*, 78 Wis. 611, where the felony was denied by the defendant, it was held a note given for the debt could not be avoided by the defense that it was given to compound a felony."

In order to establish the defense of compounding a felony it must appear that there was an agreement not to prosecute the case or to suppress evidence tending to prove it. The owner of goods stolen has a right to receive compensation therefor. The person accused may be anxious to make restitution, but be unable to pay at once, and hence must give security, either personally or through his friends, and the mere fact that he is liable to be punished for the crime will not invalidate the obligation. This rule was established in *Mundy v. Whittemore*, 15 Neb. 647, and is believed to be sound law, and this disposes of the question of duress, so strongly urged on behalf of the defendant in error.

There are other reasons why the defendant Bricker is liable. We find the following letters in the record:—

"ST. PAUL, NEB., May 6, 1887.

"Mr. J. M. Patterson, Plattsmouth—Dear Sir: Yours of

the 3d at hand. I don't blame you for writing me a sharp letter. I ought to have wrote long ago. I made a settlement with William Shaw. He swapped his place for cattle, and I took the cattle. I had to allow more for them than I could get for them now. I took them, and am to pay Shaw. Mr. Anthony has got nothing, so I knew I would have the note to pay. I got thirty-three head of yearling calves. I also had to furnish Shaw with one hundred dollars more money, so he owes me one hundred dollars yet. He had a loan on his place, so he has nothing left. It would be almost impossible for me to pay you now, and will pay you as quick as I can. I think can pay you soon, the interest at least. I can hardly ask you to wait any longer, but you know had it not been for me you would never got anything. Of course you have never got much yet, but you will get it, but I don't want you to sue it, for I will pay it as soon as I can, for I can make the money out of the calves after awhile. Hope I can pay you soon.

"Yours truly,

ADAM BRICKER."

"ATLANTA, NEBR., February 21, 1887.

"Mr. J. M. Patterson — Sir: I am trying to settle with Wm. Shaw. I have to take his place, and if I do I will have to ask wait on me till I can sell it. Please let it be till you hear from me. Will write soon.

ADAM BRICKER."

These calves are shown to have been worth at the time of purchase at least eight dollars per head, and so far as we can judge the defendant, in consideration of receiving them, assumed the payment of the note. In no view of the case, therefore, can the judgment be sustained. The judgment is reversed and the cause remanded for further proceedings.

The other judges concur.

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COMPOUNDING FELONY — WHAT DOES NOT CONSTITUTE. — In all cases where parties have suffered injury from the commission of a felony, they may settle their private damages in any way they see fit, provided they do not include in such settlement the stifling of the criminal prosecution for such felony: *Johnston v. Allen*, 22 Fla. 224; 1 Am. St. Rep. 180, and note; *Barrett v. Weber*, 125 N. Y. 18. See extended notes to *Town of Hinesburgh v. Sumner*, 31 Am. Dec. 603, and *Hill v. Freeman*, 49 Am. Rep. 49. An agreement by one who is threatened with a criminal prosecution for bastardy to pay the mother a certain sum for the maintenance of the child is a valid contract, even though it discloses on its face that it is executed to stifle such prosecution: *Rohrheimer v. Winters*, 126 Pa. St. 253. See also *Bibb v. Hitchcock*, 49 Ala. 468; 20 Am. Rep. 288, and note. A promise not to prosecute for a crime is not illegal so as to avoid a contract based thereon, unless it is made for the sake of gain, and not from motives of compassion: *Ward v. Allen*, 2 Met. 53; 35 Am. Dec. 387.

## HUMBOLDT DRIVING PARK ASS'N v. STEVENS.

[34 NEBRASKA, 528.]

**CORPORATIONS — INCREASE OF STOCK — STOCKHOLDER'S RIGHT TO PURCHASE.** — The right to increase in the capital stock of a corporation is intended for the benefit of the joint owners, and can be exercised only by the corporation itself; and in the absence of stipulations in the charter to the contrary, the original stockholders have a right to subscribe for and hold the new stock.

**CORPORATIONS — INJUNCTION AGAINST DIRECTORS.** — Persons illegally elected may be enjoined from acting as directors of a corporation.

*C. Gillespie*, for the plaintiffs in error.

*E. W. Thomas and R. S. Malony*, for the defendants in error.

MAXWELL, C. J. This action was brought in the district court of Richardson County to restrain the defendants from exercising the duties of directors of the plaintiff and taking possession of the property. A demurrer to the petition was overruled in the court below, and the defendants electing to stand on the demurrer, judgment was entered in favor of the plaintiffs as prayed. The only question is, does the petition justify the judgment? It is as follows: —

“The plaintiffs above named represent unto the court that they are all residents of Richardson County, Nebraska, and are now, and have been for several months past, members of and stockholders in the Humboldt Driving Park Association, a corporation incorporated under the laws of Nebraska, with its place of business at Humboldt, in said county of Richardson; the said corporation was incorporated on or about June 29, 1886, at which time F. W. Samuelson, O. A. Cooper, E. K. Kentner, H. F. Hull, R. S. Malony, Jr., and five other persons who were residents of said county of Richardson, associated and incorporated themselves under the name aforesaid, with the place of business at Humboldt, in said county, for the promotion and advancement of the breaking and development of horses, by keeping a driving park and holding horse fairs and race meetings, and other transactions of like nature pertaining to the general business of a driving park association; and the said corporation did then and there adopt articles of incorporation, and had the same recorded in the office of the county clerk of said county; the said articles of incorporation contained, among others, the following provisions, to wit:

"Art. 4. The capital stock of the incorporation shall consist of one thousand dollars, with an authorized capital of five thousand dollars. At least one-fourth of the capital stock shall be paid in by the first day of August, 1886, and the balance at such times and places and in such amounts as the board of directors shall direct.

"Art. 5. The stock shall be divided into shares of five dollars each.

"Art. 8. The business and affairs of said corporation shall be conducted by a board of directors composed of nine stockholders, who shall elect from their number a president, vice president, secretary, treasurer, and such other officers as may be necessary to transact the business of the corporation.

"Art. 9. Each share of the stock shall be entitled to one vote in all elections of directors for said corporation, and such elections shall be by ballot.

"Art. 10. The annual election of directors by the stockholders shall be on the second Friday of August of each year, etc.

"The said articles of incorporation were duly recorded in the office of the said county clerk on August 7, 1886, and said association has been acting as a corporation thereunder ever since that time. At the time said association so commenced business in 1886, by vote of its stockholders, authorized the issuing and sale of stock to the amount of \$1,000, or 200 shares of stock at five dollars each, and it actually issued over half of that number of shares, that is to say, about 115 shares, all of which were duly paid up in full and certificates for that number of shares were issued and delivered to the purchaser thereof. Afterwards, on April 11, 1889, the corporation, by a vote of its stockholders at a meeting held for that purpose, increased its capital stock by authorizing the issuing of an additional number of shares sufficient with the number already issued, as above stated, to raise the capital stock to two thousand five hundred dollars in the aggregate, and no more. Under said authority, about 375 additional shares were issued and sold, and were paid for in full and certificates for that number of shares were issued and delivered to the purchasers thereof. Neither said corporation nor the stockholders thereof have ever issued or authorized any person to issue any other or additional shares of stock besides those above mentioned, and no others have ever been issued legally or by authority. On the second Friday of August, 1889, at a meeting of the stock-



holders, the following named persons were duly elected directors, to wit: R. S. Malony, Jr., who was afterwards elected by said directors as president; P. Y. Hays, afterwards elected in like manner vice president; E. K. Kentner, afterwards elected treasurer; A. H. Fellers, afterwards elected secretary, and also J. L. Linn, Ed. Dorland, W. F. Garver, John Power, and O. A. Cooper, and said directors and officers forthwith entered upon the duties of their offices, and have conducted the same ever since.

"At a meeting of the stockholders held on the second Friday of August, 1890, for the purpose of electing officers for the ensuing year, at which time there had been issued only 460 shares of stock in the aggregate, the following proceedings were had: Some hours before said election commenced, said Pyle, for the purpose of defrauding the stockholders and illegally obtaining control of the corporation and its business against the wishes of its stockholders, fraudulently induced Fellers, the secretary, to receive from him a draft for \$2,400 as in payment of 480 additional shares which had never been authorized by the association, and also fraudulently induced him to keep said transaction concealed from the directors and stockholders so that none of said parties had any knowledge that it was claimed that any such additional shares had been paid for or issued until the matter was suddenly sprung upon them while the election was taking place, and when they were taken by surprise and could not stop the proceedings. Said Pyle fraudulently caused those persons to be chosen tellers at the election, and after voting the 480 fraudulent votes caused the same to be received and counted as if they had been that number of legal and valid votes, said Pyle voted said 480 illegal and fraudulent votes, together with about 23 legal votes he owned, for the defendants to this petition named at the heading thereof, as directors of said association for the ensuing year; of the legal and valid shares and votes of the association only 409 were voted at that election, and a majority of those votes, as your petitioners have reason to believe, and do believe, were cast for the following-named stockholders as directors: Charles Nims, O. A. Cooper, R. S. Malony, Jr., J. E. Kentner, W. O. Quick, P. W. Hayes, Ed. Dorland, W. F. Garver, and J. Collins. Your petitioners are unable to state the number of votes cast for said last-named persons, for the reason that when the counting of the votes cast began after the 480 illegal votes cast by Pyle, together with 23 legal votes

owned by him, and not more than 34 other votes had been counted, a person, acting fraudulently with Pyle and at his instance claiming that said votes then already counted constituted a majority of the stock, moved that no further votes be counted, and that the nine persons so voted for by Pyle and his fraudulent votes be declared elected as directors; said motion was put *viva voce* and not by ballot, and said Pyle and those acting at his instance procured said motion to be declared carried, and no other votes were counted, and no record was made of them. If said fraudulent votes had not been counted and only the legal votes had been counted, then the said persons so voted for said Pyle would have been defeated by a considerable majority and the other ticket, that is to say, the one containing the names above mentioned, as plaintiffs verily believe, would have been elected by a majority; until just previous to the beginning of said election, the stockholders did not know that Pyle claimed to have said fraudulent shares, no money for said fraudulent shares has ever been paid to said corporation or its treasurer, and no certificates of such shares have ever been issued, and said corporation has never increased its capital stock over two thousand five hundred dollars in the aggregate, nor authorized the issuing of such additional shares; of all of the above facts said Pyle and defendants then and there had full notice and knowledge, and he was then and had been since April, 1889, a member of said corporation and the owner of several shares; said association is the owner of a race track at Humboldt, a tract of land containing twenty acres, fenced, and other buildings thereon, suitable for a race course, all worth about three thousand dollars, on which, however, there is a mortgage for seven hundred dollars. The said Pyle and the other defendants have demanded from the secretary and treasurer of the association elected in 1889 the books and records of the corporation, but the delivery thereof has been refused, and they have not got possession of the same. If not enjoined, the defendants will issue certificates for the said 480 illegal and fraudulent shares, and there is great danger that the same may get into the hands of innocent purchasers and become obligations of the corporation. Defendants threaten to tear down a part of the fence around the race track and thereby greatly injure the same. All of the above would be productive of great and irreparable injury to the stockholders and the association. There is also great danger that the defendant, if al-

lowed to take possession of said land and property, will give race meetings and offer large premiums and purses for races, and will thereby involve the association in debt or in expensive litigation, and that they will do other acts which will involve the association in trouble and litigation, thereby causing great and irreparable injury, expense, and trouble.

"Plaintiffs further allege that the said directors elected in August, 1889, as above set forth, are the present officers of the association and that they hold over as such directors, officers in consequence of no valid election having been held in August, 1890. Plaintiffs therefore pray that the defendants be enjoined from taking possession of the said race track, or the books or records, or any other property of the association, and that defendants refrain from interfering with the directors elected in August, 1889, as above stated, in the management of the business of the association; also that the defendants be enjoined from issuing any certificates of stock or from doing any official act as directors of the association; that the court find that the defendants have no legal right to act as directors of the association. Plaintiffs further pray that a preliminary injunction be issued forthwith restraining defendants as above prayed, and that on a final hearing said injunction be made perpetual; that plaintiff may have such other relief as equity and justice may require; that said Pyle be enjoined from negotiating or disposing of any certificate said defendants may have undertaken to issue, and that the same be adjudged fraudulent and void and be ordered delivered up and canceled, and that the said last election be decreed void and a new election ordered."

As the allegation of the petition for the purpose of the trial must be taken as true, it is therefore conceded that the association never authorized the issuing of the 480 shares of stock which Pyle sought to vote, and that in fact such shares were fraudulent and illegal; that a majority of the legal votes were cast against the defendants, and that in fact they were not elected. These facts being conceded, the judgment is right. The increase of capital of a corporation is intended for the benefit of the joint owners and can be exercised only by the corporation itself, and in the absence of stipulations to the contrary in the charter, the original stockholders have a right to subscribe for and hold the new stock.

The rule as stated by Angell and Ames on Corporations, sec. 554, is as follows: "If a part of the authorized capital

stock of a corporation remains untaken at the time of its incorporation, the right to issue the remainder of it is a corporate franchise, held by the corporation in trust for the incorporators, and it is to be disposed of for the benefit of all; and the directors have no right to distribute such shares of stock among those of the stockholders merely who are not in arrears on the shares already taken by them, and exclude those who are in arrears; and a share in the stock of a corporation, when only the least sum mentioned in the charter has been paid in, is a share in the power of increasing it when the trustee (the corporation) determines, or rather when the original shareholders (the *cestuis que trust*) agree upon employing the greater sum mentioned in the charter. The augmentation of the capital to the larger sum is supposed to be intended for the profit of the joint concern; the capacity under the charter to augment it is the virtue of their joint interest. If a corporation, in other words, is created with the privilege of raising a stock not less than one sum, nor exceeding a certain greater sum, and commence business with the smaller capital, and it is afterwards decided by a vote to augment it to the greater, an original subscriber has, as a stockholder, a right to subscribe for and hold the new stock in proportion to his interest in the old stock." The reason is plain. A number of persons relying upon the integrity of each other might be willing to become members of a corporation, while they would not become such members if the stockholders were unknown. This is particularly applicable in case of small corporations like that of a driving park. The judgment of the court below is right and is affirmed.

The other judges concur.

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CORPORATIONS — SHAREHOLDER'S RIGHT TO NEW STOCK. — When a corporation votes to increase its capital stock, those who hold shares in the capital first raised, are entitled to subscribe for and hold the new stock according to their respective shares, and a refusal on the part of the corporation to permit any of them to subscribe to the stock to which he is so entitled renders it liable for damages: *Gray v. Portland Bank*, 3 Mass. 364; 3 Am. Dec. 156, and note. Corporators have a remedy in *assumpsit* against the corporation for injury caused by the act of the directors in disposing unequally among them the shares of the authorized capital stock which remained untaken at the time of the incorporation: *Reese v. Bank*, 31 Pa. St. 78; 72 Am. Dec. 726, and note; but the minority stockholders of a corporation cannot complain of an issue of mortgage bonds to a holder of the majority of the stock, when such issue was made without fraud, and was of great benefit to the corporation, though the issuance was procured to raise money for the majority stockholders: *Gloninger v. Pittsburg etc. R. R. Co.*, 139 Pa. St. 13.



**OFFICER DE FACTO — INJUNCTION AGAINST.** — An injunction does not lie to restrain an officer *de facto* from performing the duties of his office. The remedy in such a case is by *quo warranto* to try the question of title to office: *Hagner v. Heyberger*, 7 Watts & S. 104; 42 Am. Dec. 220, and note. Where certain persons are irregularly elected officers of a corporation, until removed they are to be regarded as officers *de facto*, and their acts are binding on the corporation: *Miller v. Ewer*, 27 Me. 599; 46 Am. Dec. 619, and note.

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## WILSON v. SHIPMAN.

[34 NEBRASKA, 573.]

**PROCESS — SUMMONS — CONTRADICTION OF RETURN.** — An officer's return on a summons, showing that he has personally served a copy thereof on the defendant, may be contradicted by the latter, but unless it clearly appears from the evidence that the return is false, it will be sustained by the court.

**JUDGMENT — INJUNCTION AGAINST.** — A judgment will not be enjoined in the absence of proof of a defense on the merits, or that it is contrary to equity or good conscience.

*Calkins and Pratt*, for the plaintiff in error.

*R. A. Moore*, for the defendant in error.

MAXWELL, C. J. This is an action to enjoin a judgment of a justice of the peace. The court below found that there had been no personal service on the defendant and enjoined the judgment. It appears from the record that in December, 1888, Moore and Shipman were engaged in business on North Sixteenth Street in the city of Omaha; that this store was in charge of Miss Allen; that on the eighth of that month a bill for merchandise for the sum of \$227.59, furnished by O. R. Tennis & Co., was presented to Moore and Shipman at their place of business; that no objection was made to the bill itself, but it was claimed by Mr. Moore that time had been given for a part of the claim, and therefore, he refused to pay the same. He then drew a check in the name of Moore and Shipman in favor of himself for the sum of \$69.85, and with a Mr. Robertson, who had the claim for collection, went to the bank and drew that sum and paid the same; that Mr. Robertson notified Moore and Shipman that he understood the entire claim to be due and that he would bring suit for the remainder. There seems to have been an agreement that they would accept service. Mr. Robertson thereupon began an action for the balance of the account and took the summons to the store of Moore and Shipman and began to write an acceptance of service on the summons, when in consequence of some state-

ment of Mr. Moore he was induced to call an officer to serve the summons. He found a constable at the door of the store and handed him the summons to serve, both Moore and Shipman being then in the store. The constable testifies that he went immediately into the store and served the summons, and his return on the same is in due form. On the return day of the summons Moore and Shipman failed to appear, and the justice rendered judgment against them for the sum of \$158 and costs. A transcript of the judgment was then filed in the district court and an execution issued thereon, which was levied upon certain real estate of Shipman, who thereupon brought this action to enjoin the judgment upon the sole ground that he had not been served with summons. It may be conceded that the jurisdictional facts alleged in the record of a judgment of a court of inferior jurisdiction may be controverted: *First Nat. Bank v. Balcom*, 35 Conn. 351; *Culver's Appeal*, 48 Conn. 165; *Cooper v. Sutherland*, 3 Iowa, 114; 66 Am. Dec. 52; *Salladay v. Bainhill*, 29 Iowa, 555; *Mastin v. Gray*, 19 Kan. 458; 27 Am. Rep. 149; *Harlow v. Pike*, 3 Greenl. 438; *Ainge v. Corby*, 70 Mo. 257; *Bigelow v. Stearns*, 19 Johns. 39; 10 Am. Dec. 189; *People v. Cassells*, 5 Hill, 164; *Barber v. Winslow*, 12 Wend. 102; *Relyea v. Ramsay*, 2 Wend. 602; *Porter v. Bronson*, 29 How. Pr. 292; *Adams v. Saratoga etc. R. R. Co.*, 10 N. Y. 328; 12 Am. & Eng. Ency. of Law, 148c.

In a proper case a judgment will be enjoined where it was rendered against a defendant without service of process: 10 Am. & Eng. Ency. of Law, 902. In the case at bar, however, the evidence of want of service is not sufficient to overcome the return of the officer, corroborated as it is, by circumstances. Thus it is clearly shown that both of the parties were in the store when the officer entered, and thus the opportunity of service was had, and the return of service made with a charge presumably for two copies of the summons. The officer also was a witness and testified in this case that he served the summons upon both defendants. To offset this we have the testimony of Shipman, that service was not made, and of Moore, that it was not made in his presence. Upon this testimony, considering all the circumstances, we do not think sufficient is shown to justify the court in holding that there was no service.

But there is another reason why the judgment should be reversed. The principal object of vacating a judgment is to permit an opportunity for a full examination of the matters in

controversy; therefore, if the defendant ask to have a judgment against him set aside, he must allege, and if necessary prove, that he has a valid defense to the action. In *Gerrish v. Hunt*, 66 Iowa, 682, it is said: "This relief (by injunction) will not be granted if it appear that the party holding such void judgment has a valid claim whereon it was rendered, to which there is no defense. The general principle underlying the jurisdiction is that it must be against conscience to execute the judgment sought to be enjoined. Therefore, if there is no evidence of a defense on the merits, or that the judgment is contrary to equity and good conscience, it will not be enjoined": High on Injunctions, sec. 86; *Ableman v. Roth*, 12 Wis. 90. No defense is either alleged or proved in this case. The judgment is therefore reversed and the action dismissed. The other judges concur.

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**INJUNCTIONS AGAINST JUDGMENTS.** — A judgment will not be enjoined unless it appears to be inequitable as between the parties no matter how irregular were the proceedings under which it was rendered: *Hartford etc. Ins. Co. v. Meyer*, 30 Neb. 135; 27 Am. St. Rep. 334, and note with cases collected; see also *Hamblin v. Knight*, 81 Tex. 351; 26 Am. St. Rep. 818, and especially note; and *Grand Rapids etc. Furniture Co. v. Haney etc. Furniture Co.*, 92 Mich. 558; 31 Am. St. Rep. 611, and note.

**PROCESS — OFFICER'S RETURN — CONCLUSIVENESS OF.** — An officer's return may be contradicted and avoided in a subsequent action: *Stewart v. Duncan*, 47 Minn. 235; 23 Am. St. Rep. 367, and note with the cases discussing this subject collected; *Johnson v. Gregory*, 4 Wash. 109; 31 Am. St. Rep. 907, and note. An officer's return to a writ is *prima facie* evidence, even in his own favor: *State v. Deritt*, 107 Mo. 573; 23 Am. St. Rep. 440, and note. See extended note to *Taylor v. Lewis*, 19 Am. Dec. 137. An officer's return may be impeached when the matters stated therein are not presumptively within his personal knowledge: *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204.

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## TALCOTT v. FIELD.

[34 NEBRASKA, 611.]

**INSURANCE — WHEN NOT SUBJECT TO DEBTS OF INSURED.** — When a reasonable amount of insurance is effected upon the life of a husband, the sole object being to provide a fund for the support of his wife in case of his death such fund will not ordinarily be liable for his debts.

**INSURANCE — ENDOWMENT POLICY — RIGHTS OF CREDITORS.** — When an insolvent debtor takes out and pays the premiums on an endowment insurance policy on his life, in favor of his wife, and she receives such endowment from the insurer during the lifetime of the insured, she takes it, or the property in which it is invested in her name, subject to the claims of the husband's creditors.

*J. E. Cobbey*, for the plaintiff in error.

*A. H. Babcock and A. D. McCandless*, for the defendants in error.

MAXWELL, C. J. This action was brought by the plaintiff against the defendants, in the district court of Gage County, to subject certain property to the payment of his judgment. The court below found the issues in favor of the defendants and dismissed the action. The only testimony in the case bearing upon the questions in controversy is that of Field and wife, and is far from satisfactory. It appears that several years ago Field and Brother were conducting a notion store in Rock Island, and seem to have been in business for many years; that the stock was worth about \$20,000; that an uncle of the partners had sold them the stock some fourteen years before, taking a chattel mortgage thereon which he had kept alive; that he had indorsed for the partners and signed notes with them (these transactions are neither fully nor clearly set out); that Field possessed a dwelling house of about the value of \$1,500, upon which were two mortgages, in the aggregate about \$2,500; that the uncle took possession of the store under his mortgage and seems to have been paid in full; that a compromise was effected with a number of other creditors at thirty-two and one-half cents on the dollar, but the plaintiff refused to accept this amount, and recovered judgment on his debt, which seems to have been incurred just before the failure of Field and Brother; that in 1889 he brought an action in this state on the judgment and recovered judgment thereon for the sum of \$3,016.39, upon which an execution was issued and returned unsatisfied. It also appears that the mortgages on the dwelling house in Rock Island were foreclosed and the property purchased by the mortgagee, the mother of Mrs. Field, and by her conveyed to the latter; that this house was afterwards sold for \$4,250, and the money invested in the land in controversy. It also appears that the husband had taken out a fifteen-year endowment policy on his life in favor of his wife; that he paid the premiums, and at the expiration of the fifteen years she received \$2,040, which it is claimed was invested in live stock, to be referred to presently. The husband is also engaged in the coal business at Beatrice in his wife's name.

In the fourth paragraph of her answer the wife alleges: "This defendant further admits that at the commencement



of this action she owned the following real and personal property: The north half of section 21, in township 1 north, of range 5, and the southwest quarter of the southeast quarter of section 16, in said township and range, of the value of about \$6,000, upon which real estate there is a mortgage of \$3,500 unpaid and not yet due, drawing interest at seven and one-half per cent per annum; and the following personal property, viz., about 33 head of horses and colts worth about \$1,300; about 77 head of cattle worth about \$1,500; about 50 head of hogs worth about \$200. This defendant alleges that the said defendant James R. C. Field has no right, title, or interest in said property, or any part thereof, at the commencement of this action or any time since, and that this defendant did not at said date, or at any other time since, hold the title to the property in the petition described in trust for the defendant James R. C. Field in whole or in part, and denies that said property, or any part hereof, is kept in her name for the purpose of defrauding the plaintiff in the collection of his judgment, but on the contrary alleges that all property in her name and held by her and described in plaintiff's petition is her own separate estate, owned by her by absolute title, and not acquired from her said husband by gift, grant, sale, or otherwise.

It also appears that the husband has had full and absolute control of the business of his wife, and without compensation or an agreement therefor has given her the benefit of his time and labor. The effect has been that the wife has prospered while the creditors of the husband have been compelled to look on at a distance.

A policy of life insurance is a contract in consideration of certain payments to the insurer, for which it undertakes to pay a certain sum upon the death of the person whose life is insured: 3 Kent's Com. 366. Under the endowment plan, however, the insurer undertakes, upon the payment of a certain amount, to pay the insured, or such person as he may designate, a certain specified sum in a given number of years. It is more like an investment than insurance, the latter being a mere incident and not the main purpose of the transaction. Now it may be conceded that where a reasonable amount of insurance is effected upon the life of a husband, the sole object being to provide a fund for the support of a beneficiary in case of the death of the insured, that such fund will not ordinarily be liable for his debts. Where, however, the money, or a con-

siderable portion of it, is to be repaid in his lifetime, the transaction partakes more of the character of a loan. On principle, the insured might deposit the premiums in a bank on time certificates drawing interest, and at the end of fifteen years draw the same with accrued interest. Such funds remain the property of the debtor. So in case of an endowment policy. The transaction is simply one of contract, in which the insurer promises, after a certain date, to repay the insured the amount agreed upon. Now suppose the money so invested belongs to the debtor, and which should be applied to the payment of his debts, the mere act of filtering it through the insurance company will not transmute it so that it becomes the property of the beneficiary free from the claims of creditors. If so, it would afford an easy mode of evading the law, and no stronger illustration is required than the case under consideration. If a debtor's property may be given to his wife in the way proposed, free from the claims of creditors, then our attachment and other laws for the collection of debts are wholly deficient and ineffectual to protect the rights of creditors. But the laws spoken of are not defective, nor is the property in question free from their claims. It is very clear that the money derived from the insurance company, with which the live stock in question was purchased, was the property of the husband and not of the wife, and is liable for his debts. In *May on Insurance*, section 458, it is said: "An endowment policy, however, is a part of his estate and subject to his debts": *White v. Smith*, 2 Tex. App. Civ. Cas. 400, 401. It is very clear also that the increase in value of the real estate has been very largely brought about by the labor of the husband, and while, as to her own property, she may protect her rights therein, she cannot, as against creditors, claim the added value thereof which has resulted from the labor of her husband thereon: *Glidden v. Taylor*, 16 Ohio St. 510; 91 Am. Dec. 98. Honesty and fair dealing lie at the foundation of all commercial prosperity, and it is the duty of courts to require, as far as possible, the application of a debtor's property to the payment of his debts. If he is unfortunate, — as he may be, and still be honest, — the law throws its protection around him by exempting his homestead and a certain amount of personal property, and this law is liberally construed by the courts; but it is not intended, nor will the courts sanction, the concealment of a debtor's property in the name of another and thereby prevent its application to the payment of his

debts. The judgment of the district court is reversed, and the cause remanded for further proceedings.

The other judges concur.

**INSURANCE MONEY — EXEMPTION OF.** — By virtue of statute in Pennsylvania one took out a policy of insurance on his life in the name and for the benefit of his family or those dependent on him, the title vested in them, notwithstanding the claims of the creditors of the deceased: *McCutcheon's Appeal*, 99 Pa. St. 133. At common law a husband could effect an insurance upon his life for the benefit of his wife and her heirs: *Goodrich v. Treat*, 3 Col. 403.

## KLOPP, BARTLETT AND COMPANY v. CRESTON CITY GUARANTEE WATERWORKS COMPANY.

[34 NEBRASKA, 808.]

**JURISDICTION — SERVICE OF PROCESS ON FOREIGN CORPORATION.** — When a corporation organized and doing business under the law of one state contracts a debt through its authorized agent in another state, he is so far its managing agent there, that service of summons upon him for the debt while he is temporarily within the state will bind the corporation.

**JURISDICTION — SERVICE OF PROCESS ON FOREIGN CORPORATION.** — When a corporation contracts a debt outside of its own state, service of process in an action to recover such debt, made upon its managing agent while he is temporarily stopping at the place where the debt was contracted, will bind the corporation.

*John W. Lytle*, for the plaintiff in error.

*Charles Offutt*, for the defendant in error.

MAXWELL, C. J. The plaintiff brought an action against the defendant in the county court of Douglas County upon the following account: —

“OMAHA, NEB., Dec. 5, 1890.

“CRESTON CITY GUARANTEE WATERWORKS CO.,

CRESTON, IA.,

“To KLOPP, BARTLETT & Co., Dr.

February 18, to ptg. 100 coupon bonds. . . . .	\$81 00
February 18, to ptg. one book stock certificate . . . . .	21 00
February 18, to ptg. one engraved heading for certificate . . . . .	16 00
February 18, to ptg. engraved bond . . . . .	20 00
February 18, to engraving and making 5 autographs. . . . .	3 50
February 18, to one tint block 9x12 in. . . . .	7 00
February 18, to one tint block 6x12 in. . . . .	3 00
February 18, to one tint block 2x2 in. . . . .	3 00
February 18, to one tint block 2x9 in. . . . .	1 75

February 18, to one tint block 4x9 in.....	\$2 00
February 18, to one application blanks .....	5 00
February 18, to 300 cards.....	3 50
March 12, to 100 cards .....	1 50
	<hr/>
	\$168 25
May 14, Cr. by cash .....	20 00

Balance due.....\$148 25

A summons was duly issued which was served in Douglas County on David Soper, vice president of the defendant. The action was brought December 9, 1890, the return day being the 15th of that month. On that day Soper asked and obtained a continuance of the cause until the 14th of January, 1891. On the latter date the plaintiff sought and obtained a continuance until the next day. On January 15, 1891, the defendant filed a motion as follows:—

“Comes now the defendant, the Creston City Guarantee Waterworks Company, and appearing specially herein for the sole and only purpose of objecting to the jurisdiction of this court over the person of it, the said Creston City Guarantee Waterworks Company, moves that this court refuse to proceed further herein as against said company for the reason as follows, to wit:—

“1. That said Creston City Guarantee Waterworks Company is a foreign corporation organized and existing under the laws of the state of Iowa.

“2. That it, the said defendant company, had no office of any kind, nor any property, nor any managing or other agent in the state of Nebraska at the time of the institution of this action, and has not since had and has no such office, no property, no managing or other agent in the state of Nebraska at this time.

“3. That the said David Soper, who appears upon the return of the summons herein to have been served with the said summons as the vice president of this defendant company, was at said time, as he ever since has been and now is, a resident and a citizen of the state of Illinois and a nonresident of the state of Nebraska, and was but temporarily in and passing through the county of Douglas at the time of the service of a copy of said summons upon him.”

This motion was supported by an affidavit in the following words:—



"STATE OF NEBRASKA, }  
 County of Douglas. } ss.

"The affiant, David Soper, having been first duly sworn, deposes and says that he is now, and for more than a year last past has been, a resident and citizen of the state of Illinois, and during all of said time has been a nonresident of the State of Nebraska; that the defendant, the Creston City Guarantee Waterworks Company, is a corporation organized and existing under the laws of the state of Iowa, and that said defendant corporation has not had any office in the state of Nebraska at any time, nor has it had any property in said state of Nebraska, and that said company has not had, nor has it now, any managing agent in the state of Nebraska, and did not have any agent of any kind in the state of Nebraska at the time of the institution of this action, nor has it ever had any place of business in the state of Nebraska; and this affiant further says that at the time of the service of the summons against said defendant company upon this affiant, as shown by the return on said summons, this affiant was but transiently and temporarily passing through the county of Douglas, and that no part of said defendant company's business is transacted in the state of Nebraska; and further defendant saith not.

DAVID SOPER.

"Subscribed in my presence and sworn to before me, by David Soper, this 17th day of January, 1891.

"[Seal.]

WILL H. THOMPSON,

"Notary Public."

Upon the showing thus made the county court overruled the special appearance of the defendant. Witnesses were called and judgment rendered in favor of the plaintiff for the amount claimed. The case was taken on error to the district court, where the judgment of the county court was reversed and, on motion of the defendant, dismissed, and these are the errors complained of.

Section 912 of the Code provides: "A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer, or if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of the corporation with the person having charge thereof.

"Sec. 914. When the defendant is a foreign corporation

having a managing agent in this state the service may be upon such agent."

In *Porter v. Chicago etc. R'y Co.*, 1 Neb. 14, the agent resided at Council Bluffs, but appeared in Omaha a few hours each day for the transaction of business. The railway company that he represented had no property in this state, but the agent transacted all the business of the company at Omaha, and it was held that he was a managing agent upon whom service might be made. This decision was cited and approved in *Chicago etc. R. R. Co. v. Manning*, 23 Neb. 558. Now, suppose a foreign corporation comes into this state and purchases goods to be paid for here, must the seller go into another state or perhaps to a foreign country to recover for the same? This is true if service cannot be had upon the corporation in the state, then the seller must bring his action where service can be had. But a person who has authority to contract a debt for the corporation within this state, is so far the managing agent within the state, that service may be had upon him for that debt, that will bind the corporation. The agent is commissioned to contract the debt, and the corporation thereby secures the benefit of his services. It must also take the burden of being liable to an action therefor. It will be observed that neither the motion nor the affidavit negative the fact that the debt was contracted here, or that Soper was the managing agent in this state. It is probable that the motion to dismiss is too broad, and is a general appearance, but we need not decide that question. The judgment of the district court is reversed, and that of the county court reinstated, and the cause is remanded to the district court for further proceedings.

The other judges concur.

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PROCESS ON FOREIGN CORPORATIONS — AGENT TEMPORARILY IN STATE.  
It is not necessary under the Michigan statute that the agent of a foreign corporation, upon whom service is made while in the state, should be in the state upon official business for his corporation: *Slickle etc. Iron Co. v. S. L. Wiley etc. Co.*, 61 Mich. 226; 1 Am. St. Rep. 571, and note. But in the absence of statute, process served on an officer of a foreign corporation which only exists and does business in one state, is not binding upon the corporation where such officer was temporarily visiting another state, and the action was a transitory one arising in the state where the corporation exists: *Phillips v. Burlington Library Co.*, 141 Pa. St. 462; 23 Am. St. Rep. 304, and especially note where the cases discussing this subject are collected: *Lattimer v. Union Pac. R'y*, 43 Mo. 105; 97 Am. Dec. 378.

**CASES**  
**IN THE**  
**COURT OF ERRORS AND APPEALS**  
**OF**  
**NEW JERSEY.**

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**DOTY v. TELLER.**

[54 NEW JERSEY LAW, 163.]

**ESTATES TAIL — DEVISE — CONSTRUCTION OF.** — A devise of land to the testator's wife for life and after her death to a devisee named, "and to his heirs entail the same forever," vests an estate for life only in such devisee, and upon his death the fee simple in his children. This by virtue of the New Jersey act of June 13, 1820: New Jersey Revision 299, section 11, abolishing estates tail.

**EJECTMENT.** Daniel Wade, after executing the will in question, died seised of the land in dispute and after the death of his wife Abigail, Daniel Wade Teller entered into possession of such land devised to him. He afterwards executed a deed thereof to one Smith, purporting to convey in fee with covenants of seisen and warranty. Doty, the plaintiff, claims under the conveyance to Smith, while the defendants in error claim as the heirs of said Teller.

*Gilbert Collins*, for the plaintiff in error.

*John T. Dunn*, for the defendants in error.

**THE CHANCELLOR.** A single question is presented by the error assigned in this case. It is, whether Daniel Wade Teller took a fee or merely an estate for life under the will of Daniel Wade. That will devises the land in question, after the death of the testator's wife, "to him and to his heirs entail the same forever." Its construction must depend upon the force or effect which is to be accorded to the words "entail the same." Without those words the devisees would clearly take the lands devised in fee. Their natural import, in the con-

nection in which they are used, is to condition or qualify the fee that is given. The effect designed by them is expressed by the word "entail," the well recognized import of which is to restrain the fee to heirs of the body of the donee to the exclusion of collateral heirs, and to imply a condition that if the donee dies without lineal heirs the land shall revert to the donor. After the enactment of the statute of Westminster II., 13 Edw. I., commonly called *de donis conditionalibus*, the conditional fee was by judicial construction resolved into a particular estate known as a fee tail: *Den v. Spachius*, 16 N. J. L. 172.

Lands held by that estate were commonly said to be entailed. As the word "heirs" is necessary to the creation of the fee simple by deed, so the additional word "body," or some other word of procreation, was necessary to create a fee tail by such an instrument. But in wills, where the cardinal rule of construction is that the testator's manifest intention shall prevail over all forms of expression, these correct and technical words have never been considered essential. Any expressions in the will denoting an intention to give the devisee an estate of inheritance descendible to his, or some of his, lineal, but not collateral, heirs, have always been regarded as a sufficient devise of a fee tail: 3 Jarman on Wills, R. & T. ed., 89; 1 Washburn on Real Property, 109; 2 Bla. Com., 115; *Den v. Fogg*, 3 N. J. L. 819; *Den v. Pierson*, 16 N. J. L. 181; *Den v. Cox*, 9 N. J. L. 10; *Den v. Smith*, 10 N. J. L. 39; *Weart v. Cruser*, 49 N. J. L. 475.

In the devise in question the purpose of the testator is very plainly manifested. He meant to create an estate tail. Being at a loss for the correct and technical language to express it, instead of saying, "to Teller and the heirs of his body forever," he said, "to Teller and his heirs, entail the same, forever," specifying the result he wished to reach as plainly as though in giving a fee simple he had so said, in place of using the word "heirs." It is not perceived how any other conclusion as to his intention can be reached without rejecting the words "entail the same" as meaningless surplusage. Nothing in the context of the will justifies such a rejection. All other expressions in the instrument are plainly pertinent to the subject matter dealt with and necessary to signify the testamentary purpose, exhibiting a capacity in the testator to clearly and concisely express his intentions.

When the will was drawn estates tail existed in this state,



recognized and regulated by the statute of August 26, 1784: P. L., p. 53, explained by the act of March 23, 1786: P. L., p. 78. They could be created by devise, to exist during the life of the devisee and to descend at his death to his heirs according to the rules of descent at the common law. But the instant the first descent was cast, that instant the estate was enlarged into a fee simple: *Den v. Fogg*, 3 N. J. L. 819; *Den v. Smith*, 10 N. J. L. 39; *Den v. Spachius*, 16 N. J. L. 172; *Den v. Baldwin*, 21 N. J. L. 395.

By statute of the 13th of June, 1820, P. L., p. 178, estates tail were abolished, and it was provided that a devise which, under the statute 13 Edw. I., would be held to create an estate tail, should vest an estate for life only in the devisee and a fee simple in his children, equally, as tenants in common, the children of a deceased child taking their parent's interest: Rev. p. 299, sec. 11. At the death of Daniel Wade, after the latter statute went into effect, the will in question first spake, and hence Daniel Wade Teller took only an estate for life. At his death the defendants in error became entitled to recover possession of the *locus in quo*.

We find no error, and therefore affirm the judgment below.

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ESTATES — TAIL — THEIR GENERAL NATURE, HOW CREATED — IN WHAT STATES THEY MAY BE CREATED AND HOW BARRED: See *Outland v. Bowen*, 115 Ind. 150; 7 Am. St. Rep. 420, and extended note.

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## LEATHERBURY v. CONNOR.

[54 NEW JERSEY LAW, 172.]

**SALES — WAIVER OF RIGHT TO DISAFFIRM.** — Delivery of goods sold upon condition that they shall be paid for on delivery raises a presumption that the sale is absolute, and if payment is not made as agreed upon, the vendor must proceed to recover the goods with all reasonable diligence under the circumstances. Failure to pursue this right while others buy the goods as the property of the vendee who is clothed with apparent title, will constitute a waiver on the part of the vendor of his right to retake or recover them.

*John W. Wartman*, for the plaintiffs in error.

*Alfred Hugg*, for the defendants in error.

The CHANCELLOR. On the seventh day of March, 1889, at Philadelphia, the defendants in error bargained by letter with the Vangazelle Valve and Manufacturing Company to deliver

at Atlantic City, in this state, a vertical engine, with fittings, for the price of \$690, to be paid by a note at three months from the date of the contract, secured by a chattel mortgage upon the machinery of the company in its shops, and also to deliver a smokestack, to be paid for in cash. When the contract was made, the company delivered its note according to the terms of the agreement, and its president stated to the vendors that the chattel mortgage would be executed on the following Monday, when a meeting of the directors would be held, at which time he desired a delivery of the chattels so that the engine might then be set up. On the following Saturday, two days after the contract was made, the chattels were shipped by rail to Atlantic City, and there received by the purchaser, but the chattel mortgage was never executed. By divers excuses its nonexecution was delayed from time to time for upwards of a month when the company became insolvent, and a receiver was appointed for it who afterwards, in May, 1889, sold and delivered the chattels in question, with other property, to the plaintiffs in error. It does not appear either that the chattels were demanded from the receiver, or that he was informed of the claim to them, or that other effort was made to take them from his possession or prevent his sale of them as assets of the insolvent company. After the chattels were sold and delivered to the plaintiffs by the receiver, the defendant instituted an action of replevin to recover possession of them. At the trial the facts above stated being proved, the circuit judge refused to nonsuit the plaintiffs. It is upon such refusal that error is assigned.

There can be no question under the contract as it was entered into through the correspondence between the parties, that the delivery of the chattels sold and the payment for them in the manner specified were intended to be concurrent conditions. The subsequent parol understanding appears to have been rather an arrangement of the details of the execution of the agreement than a modification of it. The agreement did not contemplate an absolute sale without condition; it considered that the vendee would act honestly and presently furnish the mortgage, which was the condition of the sale. The delivery did not make the sale absolute: 2 Kent's Commentaries, 497; *Smith v. Dennie*, 6 Pick. 262; 17 Am. Dec. 368; *Smith v. Lynes*, 5 N. Y. 41; *Farlow v. Ellis*, 15 Gray, 229; *Parker v. Baxter*, 86 N. Y. 586; but as the *indicia* of title raised a presumption that it was absolute: 2 Schouler on Per-

sonal Property, sec. 304; *Smith v. Lynes*, 5 N. Y. 41; *Parker v. Baxter*, 86 N. Y. 586; *Farlow v. Ellis*, 15 Gray, 229; *Whitney v. Eaton*, 15 Gray, 225; *Scudder v. Bradbury*, 106 Mass. 422; and when the mortgage was not forthcoming, it became the duty of the vendors to pursue their right to recover possession of the chattels with all the reasonable diligence that the circumstances surrounding them would permit, following the buyer at once, and without suffering their vigilance to abate. Failure to thus pursue their right, while others bought their chattels as the property of the corporation which they had clothed with apparent title, constituted a waiver of the concurrent condition that they should have the mortgage and of any right they had to retake the property in the hands of an innocent third person. It was their duty at the trial, situated as they were, not only to show that the condition entered into the contract, but also that they pursued their right to retake the property with all possible vigilance. In fact, they made no attempt to excuse their failure to claim the chattels replevied from the receiver of the Vangazelle Valve Manufacturing Company. Their proofs, on the contrary, made it appear that for fully a month, and until third parties had apparently in good faith purchased from him, they acquiesced in his possession of those chattels as the property of the insolvent corporation. Their proofs disclosed his possession and their apparent acquiescence in it, making evidence of waiver against them, which they did not even attempt to rebut. The motion to nonsuit should have been granted.

Let the judgment below be reversed.

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**SALES ON CONDITION — WAIVER OF VENDOR'S RIGHTS.** — A voluntary delivery of goods sold on condition, without reference to the condition, followed by no demand for the performance of the condition until the goods are attached by creditors of the vendee, will be a waiver of the condition as regards such creditors: *Smith v. Dennie*, 6 Pick. 262; 17 Am. Dec. 368, and note. When goods are sold for cash on delivery, and payment is made by check, such payment is only conditional, and the delivery is conditional, and if the check is dishonored the vendor may retake the goods from an innocent subvendee, unless the original vendor has been guilty of such fraud or laches as will create an estoppel against him: *National Bank v. Chicago &c. R. R. Co.*, 44 Minn. 224; 20 Am. St. Rep. 566. The rights of a vendor in a conditional sale will be made subservient to those of an innocent purchaser from the vendee where the circumstances were such that the original vendor must have known or contemplated that the property would be sold by his vendee: *Jenks v. Colwell*, 66 Mich. 420; 11 Am. St. Rep. 502, and note. Where one sells goods to be paid for in cash, a delivery of the goods without such payment passes the property, as the vendor might have refused

to part with the goods until payment was made: *Chapman v. Lathrop*, 6 Cow. 110; 16 Am. Dec. 433, and note with cases collected. A delivery and acceptance of goods before the day of payment passes the legal title to the vendee: *Ford v. Sproule*, 2 A. K. Marsh. 528; 12 Am. Dec. 439. See extended note to *Velsian v. Lewis*, 3 Am. St. Rep. 198.

## REEVE v. FIRST NATIONAL BANK OF GLASSBORO.

[54 NEW JERSEY LAW, 208.]

**PRINCIPAL AND AGENT — CORPORATE LIABILITY ON NOTE.** — When nothing appears in the body of a note to indicate the maker, and it is signed by a corporate name, under which name appears the name of an officer of the corporation with his corporate official title affixed, the note is taken conclusively to be that of the corporation, although it is in form "we promise to pay."

**PRINCIPAL AND AGENT — LIABILITY ON CORPORATE NOTE — PRESUMPTION — EVIDENCE.** — When nothing appears in the body of a note to indicate the maker, and it is signed by the name of an officer of a corporation to which name is affixed his official corporate title, the note is *prima facie* that of the person signing and not of the corporation; but this is a rebuttable presumption, and upon the ground of an existing ambiguity concerning the maker, evidence is admissible to show that it was intended or was not intended to be the note of the corporation.

*John J. Crandall*, for the plaintiff in error.

*Lewis Starr*, for the defendant in error.

REED, J. This cause was tried at the Gloucester Circuit. The action was brought upon certain promissory notes, of which the following is a copy:—

"\$97.<sup>70</sup>/<sub>100</sub>."

GLASSBORO, N. J., Dec. 18, 1890.

"Three months after date we promise to pay to the order of Thos. Reeve, at the First National Bank of Glassboro, ninety-seven and <sup>70</sup>/<sub>100</sub> dollars without defalcation, value received.

WARRICK GLASS WORKS,

"J. PRICE WARRICK, Prest."

Two additional notes, one for \$90.80 and another for \$140.10, were in the same form; each was indorsed by the payee and held for value by the First National Bank of Glassboro.

At maturity a demand of payment was made at the bank upon the Warrick Glass Works, payment refused, and notice of protest duly given to Reeve, the payee and indorser.

The defense interposed by the defendant's counsel was that the note was signed by the Warrick Glass Works and by J. Price Warrick as joint makers; that demand of payment



should have been made upon each of the joint makers, and therefore it was insisted that the failure to make a demand upon Warrick relieved the indorser from liability.

The only facts proved in the case bearing upon the question mooted were, that the note was given by the corporation for feed furnished, and that J. Price Warrick was the president of the company.

At the conclusion of the plaintiff's case a motion to nonsuit was made and overruled. This action of the trial court was the subject of the only material exception.

We are of opinion that the refusal to nonsuit was correct.

The note was that of the Warrick Glass Works alone. The demand of payment was properly made upon the corporation only. The cases in which the liability of parties to paper similar to this are not uniform in their results. Indeed, great contrariety of views can be found in the decisions upon this question. A detailed examination of those cases would not result in much profit.

The result of the best considered decisions is this: Where nothing appears in the body of a note to indicate the maker, and the note is signed by a corporate name, under which name appears the name of an officer of the company, with his corporate official title affixed thereto, in such case the note is taken conclusively to be that of the corporation; where, however, a note drawn in a similar form, except as to the signatures, is subscribed by the name of an officer of a corporation, to which name is affixed his title as an officer of a particular corporation, the result is not the same. In respect to notes drawn in the last-mentioned form, the courts in most of the states hold that there is an ambiguity arising out of this manner of coupling the names of the natural person and of the corporation.

It is therefore open to the parties to introduce extrinsic testimony to disclose facts, from which it can be concluded which of the parties should be regarded as the maker.

In this state the rule is that a note drawn in this form is *prima facie* the note of the person signing, and not the note of the corporation; but this is only a disputable presumption, and upon the ground of an existing ambiguity concerning the maker, evidence is admissible to show that it was intended to be the note of the corporation, which evidence can, of course, be met with counter evidence of the same character.

This rule was definitely settled in the case of *Kean v. Davis*,

21 N. J. L. 683; 47 Am. Dec. 182. In this case a note was signed, "John Kean, Prest. F. & S. S. R. R. Co."

It was held to be *prima facie* the note of Kean, but it was held that parol evidence might be introduced to show whether it really was the personal note of the officer or was the note of the railroad company.

If, therefore, the present notes had been signed J. Price Warrick, President of the Warrick Glass Works, it, in the absence of parol testimony to show a contrary intention, would be regarded as the note of Warrick.

As the notes are signed with the name of the corporation, followed by the words J. Price Warrick, President, they are taken to be corporation paper. This conclusion seems to rest upon rational ground. The name of the corporation signed first stands as a principal and that of the officer as agent.

The name of a corporation so placed raises the implication of a corporate liability. To so place it requires the hand of an agent. The name of an officer of such corporation, to which name the official title is appended, put beneath the corporate name, implies the relation of principal and agent. It means that inasmuch as every corporate act must be done by a natural person, this person is the agent by whose hand the corporation did the particular act.

This form of signature is just as significant in respect to the notes in question as if the name "The Warrick Glass Works" had been written "per Warrick, agent."

The following are cases in which notes similar in form to those now in suit have been held to be solely the notes of the corporation whose name first appeared, followed by the name of an officer: *Bean v. Pioneer Min. Co.*, 66 Cal. 451; 56 Am. Rep. 106; *Atkins v. Brown*, 59 Me. 90; *Castle v. Belfast Foundry Co.*, 72 Me. 167; *Miller v. Roach*, 150 Mass. 140; *Draper v. Massachusetts Steam Heating Co.*, 5 Allen, 338; *Liebscher v. Kraus*, 74 Wis. 387; 17 Am. St. Rep. 171.

I do not perceive any significance in the use of the words "we promise to pay" instead of "the company promises to pay." The contention was that the use of these words raised an implication that it was the joint note of the corporation and of Warrick. But, as has been remarked in more than one of the cases cited in which the notes contained a promise in like form, the word "we" is often used by a corporation aggregate: *Draper v. Massachusetts Steam Heating Co.*, 5 Allen,

338; *Bean v. Pioneer Min. Co.*, 66 Cal. 451; 56 Am. Rep. 106; Randolph on Commercial Paper.

Our conclusion is that demand was made upon the only maker, and therefore the refusal of the trial judge to nonsuit was right.

Judgment affirmed. —

**NEGOTIABLE INSTRUMENTS MADE BY OFFICERS OR AGENTS OF CORPORATIONS — WHEN BIND CORPORATION.** — A promissory note commencing with "we promise to pay," and signed with the corporate name and the name of its president attached, is the note of the company only: *Liebscher v. Kraus*, 74 Wis. 387; 17 Am. St. Rep. 171, and note; *Miller v. Roach*, 150 Mass. 140; *Bean v. Pioneer Min. Co.*, 66 Cal. 451; 56 Am. Rep. 106; *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; 84 Am. Dec. 298, and note. The contrary doctrine to that held in the preceding cases is maintained in *McCandless v. Belle Plaine Canning Co.*, 78 Iowa, 161, 16 Am. St. Rep. 429, in which it was held that all the parties signing such an instrument, including the corporation, would be jointly liable where there was no clause showing the capacity in which the parties signed. A note by which "the subscribers for Carmel Cheese Manufacturing Company promise to pay," and signed by the directors of the company, without official description, is an obligation of the company: *Simpson v. Garland*, 72 Me. 40; 39 Am. Rep. 297, and extended note; *New Market Sav. Bank v. Gillet*, 100 Ill. 254; 39 Am. Rep. 39, and note. Compare *Shoe etc. Nat. Bank v. Dix*, 123 Mass. 148; 25 Am. Rep. 49, and note; and *Yowell v. Dodd*, 3 Bush, 581; 96 Am. Dec. 256, and note. See also note to *Sharpe v. Bellis*, 100 Am. Dec. 621.

## DISBROW v. DURAND.

[54 NEW JERSEY LAW, 343.]

### CONTRACTS FOR COMPENSATION FOR SERVICES RENDERED BY RELATIVES —

**KINDRED, WHO DEEMED TO BE.** — When services are rendered to each other by the members of a family, or by remote kindred, or by those who stand in the place of kindred living together as one household, the law does not imply a promise to pay on the part of the recipient from the mere voluntary rendition and acceptance of such services. In order to recover, the plaintiff must affirmatively show either that an express contract for remuneration existed, or that the circumstances under which the services were rendered were such as indicate a reasonable expectation that there would be compensation.

**RELATIVES — WHO DEEMED TO BE WHEN SERVICES ARE VOLUNTARILY RENDERED.** — A promise to pay for services to each other voluntarily rendered by the members of a family living together as one household is not implied from the mere rendition and acceptance of such services, even though such parties are only remote kindred, or though not related by blood they stand in the relation of kindred to each other.

**ACTION** to recover compensation for services rendered as housekeeper for six years. The action was brought by the

plaintiff, Sarah H. Disbrow, against the administrator of her deceased brother's estate. The plaintiff, the decedent, and their mother resided on a farm as one family until the mother died, and thereafter such brother and sister continued so to live until the brother's death. The brother tilled the farm and the sister kept the house, having no other means of support except to work for strangers. No express contract existed upon the part of the brother to remunerate the sister for her services in the household, nor was the subject of compensation ever discussed or contemplated by either of them. Judgment of nonsuit against plaintiff, and she appealed.

*Benjamin A. Vail*, for the plaintiff in error.

*Thomas H. Shafer*, for the defendant in error.

THE CHANCELLOR. Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay them; but where the services are rendered by members of a family, living as one household, to each other, there will be no such implication from the mere rendition and acceptance of the services. In order to recover for the services, the plaintiff must affirmatively show, either that an express contract for the remuneration existed, or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation. The reason of this exception to the ordinary rule is, that the household family relationship is presumed to abound in reciprocal acts of kindness and goodwill, which tend to the mutual comfort and convenience of the members of the family, and are gratuitously performed; and where that relationship appears, the ordinary implication of a promise to pay for services does not arise, because the presumption, which supports such implication, is nullified by the presumption that between members of a household services are gratuitously rendered. The proof of the services, and as well of the family relation, leaves the case in equipoise from which the plaintiff must remove it, or fail.

The great majority of cases in which this exception to the ordinary rule has been given effect, have been between children and their parents, or the representatives of the parents' estate, and that fact appears to have led the courts of some of our sister states to speak of it as restricted to cases where such a relationship in blood existed; but it is not perceived how, within the reason for the exception, it is to be limited by



mere propinquity of kindred. It rests upon the idea of the mutual dependence of those who are members of one immediate family, and such a family may exist though composed of remote relations, and even of persons between whom there is no tie of blood.

To this time, in this state, the cases which have treated of this subject have dealt only with the relation of parent and child, or the case where one party stands *in loco parentis*: *Ridgway v. English*, 22 N. J. L. 409; *Updike v. Titus*, 13 N. J. Eq. 151; *Smith v. Smith*, 28 N. J. L. 208; 78 Am. Dec. 49; *Coley v. Coley*, 14 N. J. Eq. 350; *Updike v. Ten Broeck*, 32 N. J. L. 105; *Horner v. Webster*, 33 N. J. L. 387, 411; *Prickett v. Prickett*, 20 N. J. Eq. 478; *Gardner v. Schooley*, 25 N. J. Eq. 150; *Miller v. Sauerbier*, 30 N. J. Eq. 71; *Smith v. Smith*, 30 N. J. Eq. 564; *De Camp v. Wilson*, 31 N. J. Eq. 656; *Kendall v. Kendall*, 36 N. J. Eq. 91, 99; *Stone v. Todd*, 49 N. J. L. 274, 280; but they have not limited the exception to that relation; on the contrary, in *Updike v. Titus*, 13 N. J. Eq. 151, Chancellor Green expressed the opinion that it contemplates "children, parents, grandparents, brothers, stepchildren, and other relations"; and in this court, in *Horner v. Webster*, 33 N. J. L. 387, 411, Mr. Justice Depue approvingly referred to the exception as applicable to all cases where the parties stand "in relation to each other of support on one side and services on the other." Without this state, also, I find most reliable authority extending the exception beyond parent and child, where close family relationship has been shown to exist. For instance, it was given effect in *Robinson v. Cushman*, 2 Denio, 152; *Scully v. Scully*, 28 Iowa, 548; *Keegan v. Malone*, 62 Iowa, 208; and *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559, in each of which cases the relation was brother and sister, and in *Bundy v. Hyde*, 50 N. H. 116, where the relation was brother-in-law and sister-in-law.

In the two Iowa cases cited, the exception was stated in this language: "Where it is shown that the person rendering the services is a member of the family of the person served and receiving support therein, either as a child, or relative, or a visitor, a presumption of law arises that such services were gratuitous, and in such case, before the person rendering the services can recover, the express promises of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in the

expectation by one receiving and by the other making compensation therefor."

I have not pretended to examine the many cases upon this subject in the several states. That would be a tedious, exhaustive, and indeed, profitless task. The exception stands upon a reason which logically and properly must extend it to all members of a household, however remote their relationship may be, and indeed, even to those who, though not of kin, stand in the situation of kindred in one household.

The proofs offered at the trial in the present case exhibited the existence of a family relationship for a quarter of a century from which the brother and sister each derived substantial benefit in the services of the other, and that the services rendered by each were natural and appropriate acts in their respective spheres, looking to the maintenance of the common home. It did not appear that in that long period of time either of them entertained the thought of demanding or having compensation from the other.

It is deemed that the case is well within the exception to the ordinary rule, which has been pointed out. There was no error in granting the nonsuit.

The judgment will be affirmed.

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**SERVICES — IMPLIED PROMISE TO PAY FOR AMONG MEMBERS OF SAME FAMILY.** — There is no implied promise to pay for services rendered between members of the same family: *Williams v. Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 301, and extended note; *Hall v. Finch*, 29 Wis. 278; 9 Am. Rep. 559; *Dodson v. McAdams*, 96 N. C. 149; 60 Am. Rep. 408; *Weir v. Weir*, 3 B. Mon. 645; 39 Am. Dec. 487. When a child seeks to recover for services rendered an aged parent, such as filial duty would require of him, he must prove an express contract: *Zimmerman v. Zimmerman*, 129 Pa. St. 229; 15 Am. St. Rep. 720; *Wright v. Senn*, 85 Mich. 191. Where adult children work for parents the law implies no promise on the part of the parent to pay for the services: *Poorman v. Kilgore*, 26 Pa. St. 365; 67 Am. Dec. 425, and note; *Ex parte Aycock*, 34 S. C. 255; *Stock v. Stoltz*, 137 Ill. 349. See also *Magarrell v. Magarrell*, 74 Iowa, 378. While persons live together as man and wife, no implied promise can arise that one will pay for work done by the other: *Cooper v. Cooper*, 147 Mass. 370; 9 Am. St. Rep. 721, and note.

# LAING v. UNITED NEW JERSEY RAILROAD AND CANAL COMPANY.

[54 NEW JERSEY LAW, 576.]

**WITNESSES — EXPERT WHO IS.** — To render the opinion of a witness admissible as expert evidence, he must appear to have special knowledge of the subject under inquiry.

**WITNESSES — EXPERT EVIDENCE — VALUE OF TITLE AND DAMAGES TO LAND.** An ordinary real estate agent is not competent to give his opinion as an expert as to the value of the private title in a strip of land forming part of the public highway, nor as to the amount of damage done to an abutting owner by appropriating such strip of land to railroad purposes in the absence of any showing that he has special knowledge on these particular subjects.

**HIGHWAYS — EXTINGUISHMENT OF EASEMENT.** — ADVERSE USER of a public highway for railroad purposes will not extinguish nor destroy the public easement therein.

**EMINENT DOMAIN — STREET OCCUPIED BY RAILROAD — ELEMENTS OF DAMAGE.** — In estimating damages arising to an adjoining owner from the occupation of a street by a railroad, not only the narrowing of the street, but the greater risk of fire, and the increased noise, dust, and smoke occasioned by the nearer approach of passing trains, are matters to be considered in view both of the use then made of the property, and its probable future uses.

**EMINENT DOMAIN — DAMAGES FOR LAND TAKEN BY RAILROAD — EVIDENCE OF VALUE.** — Evidence of the price paid on sales of other land in the neighborhood, is competent on an inquiry as to the value of land taken for railroad purposes only when there is a substantial similarity between the properties. The rule does not apply when the conditions are so dissimilar as not easily to admit of reasonable comparison, and much must be left to the discretion of the trial court in the determination of the preliminary question as to whether the conditions are fairly comparable or not.

*Benjamin A. Vail*, for the plaintiff in error.

*William S. Gummere*, for the defendant in error.

DIXON, J. The United New Jersey Railroad and Canal Company having taken steps to condemn for its use a strip of land about 11 and a half feet wide and about 110 feet long, lying towards the middle of Railroad Avenue, in the city of Rahway, and about 30 feet from the side of the street, an issue was framed in the circuit court of Union County to try: 1. What was the value of the land so taken by the company from the plaintiff in error, who owned the fee of the same subject to the public use; and 2. What were the damages which, by reason of the taking, he sustained as owner of the adjoining premises on the corner of Milton and Railroad Avenues.

The object of the present writ of error is to determine the correctness of the rulings of the trial court upon questions of evidence.

By these rulings the opinion of an ordinary real estate agent as to the value of the land taken and as to the damage done to the residue of the plaintiff's property was excluded, and testimony as to what the company had paid for land and damages to other owners in the neighborhood was also excluded.

First, we will consider the rejection of the witness's opinion. The principle upon which the opinion of a witness is received as evidence is well stated by the chief justice in *Pennsylvania etc. R. R. Co. v. Root*, 53 N. J. L. 253. The witness must be an expert on the subject of inquiry, "and his opinions have no place in the judicial investigation except by reason of such *status*. Within the sphere of his special knowledge he is competent to express his opinion; beyond that reach he is not competent. Such is, beyond question, the general rule; none but experts on the given subject can, in any course of law, express their estimate of the value of anything real or personal."

Now, the subjects of inquiry at the trial below were: 1. The value of the private title in the strip of land forming part of the public highway; and 2. The damage done to the plaintiff's property by appropriating that strip to railroad purposes.

On neither of these points had the witness any special knowledge. He was specially conversant with the value of land in the possession of private owners, because his usual business brought inquiries and negotiations for the sale of such lands under his frequent observation; but it is safe to say that he had never known of a transaction for the sale of the private estate in a separate piece of land lying in a public street; certainly he did not claim experience in dealings of that character. Such an estate can have but little value, except as the land may be available for vaults, awnings, etc., in connection with the private land adjoining it: *Hoboken Land and Improvement Co v. Mayor etc.*, 36 N. J. L. 540, 551; *Sullivan v. North Hudson Co. R. R. Co.*, 51 N. J. L. 518, 543. Situate as this strip was, about thirty feet from the plaintiff's private land, it had in itself no elements of utility. Evidently the witness could not have acquired from experience any peculiar knowledge of its market value: *Boston etc. R. R. Co. v. Old Colony etc. R. R. Co.*, 3 Allen, 142.



But it is urged by counsel for the plaintiff in error that in other states a more liberal rule is applied respecting the opinions of witnesses as to the value of real estate, under which the estimates of any persons who are acquainted with the property, its location and surroundings, are admissible evidence. The cases cited do not support this contention, and if they did they should not be followed. The worthlessness of such testimony is hardly a stronger reason for its rejection than the practically limitless amount of it that might be produced.

Counsel further insists that the real question at the trial was, not the value of the fee subject to the public easement, but the value of the absolute fee simple, the public easement being extinguished by the appropriation of the land to railroad purposes. The difficulty with this suggestion is that no such extinguishment is shown. It only appears that the company is condemning the right, as against the plaintiff, to use the land for its railroad. The acquisition of that right will not bar the public right; and though the public should remain quiescent, leaving the company to take exclusive possession of the land, the public right would not be extinguished, for adverse user will not destroy the public easement in a highway: *Mayor etc. v. Morris Canal etc. Co.*, 12 N. J. Eq. 547; *Cross v. Mayor etc.*, 18 N. J. Eq. 305; *Hoboken Land and Improvement Co. v. Mayor etc.*, 36 N. J. L. 540. The real question, therefore, at the trial was, as we have treated it, the value of the private title subject to the public servitude.

With regard to the damage resulting to the plaintiff's property from the conversion of this strip into a railroad bed, the witness was equally inexperienced. It depended upon circumstances which in great measure were peculiar to that property, and which, when laid before the jury, could be appreciated by them as accurately as by the witness. Not only the narrowing of the street, but the greater risk of fire and the increased noise, dust, and smoke occasioned by the nearer approach of passing trains, were matters to be considered in view both of the use then made of the property and the probable future uses. On such subjects, said the chief justice in the case first cited, "No person can claim to be an expert. . . . All men stand on the same footing, for each case that arises must necessarily be differently conditioned." To the same purport is the language of Mr. Justice Knapp in

*Thompson v. Pennsylvania R. R. Co.*, 51 N. J. L. 42. The opinions of the witness were rightly overruled.

Testimony as to the price paid by the company to other owners for land and damages was inadmissible for reasons suggested by what has been already said.

If the land so purchased was situated as this was, its value was small, and the sum paid must have been principally for damages. As the damages chiefly result from conditions which are peculiar to each piece of property, what was paid in one case would ordinarily throw no light on what ought to be paid in another.

Generally in this and other states (Lewis on Eminent Domain, sec. 443) evidence of sales of land in the neighborhood is competent on an inquiry as to the value of land, and if the purchases or sales were made by the party against whom the evidence was offered it might stand as an admission: *Wyman v. Lexington etc. R. R. Co.*, 13 Met. 316; but such testimony is received only upon the idea that there is substantial similarity between the properties. The practice does not extend, and the rule should not be applied, to cases where the conditions are so dissimilar as not easily to admit of reasonable comparison, and much must be left to the discretion of the trial judge in the determination of the preliminary question whether the conditions are fairly comparable: *Chandler v. Jamaica Pond etc Co.*, 122 Mass. 305. In the present case the trial judge had no reason to think that the compensation paid by the company to other owners formed a rational standard for the adjustment of the plaintiff's claim.

The judgment should be affirmed.

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WITNESSES — RULES OF ADMISSION OF EXPERT EVIDENCE. — Expert evidence should be restricted to those cases where its use is well-nigh indispensable, because questions of science or skill are involved, in which a special or peculiar knowledge is desired, in order to arrive at exact truth: *McNally v. Colwell*, 91 Mich. 527; 30 Am. St. Rep. 494; *Ridum v. Capital Microbe etc. Co.*, 81 Tex. 122; 26 Am. St. Rep. 783, and note. See extended note to *Hammond v. Woodman*, 66 Am. Dec. 228-246.

EMINENT DOMAIN — VALUE OF LAND — HOW DETERMINED: See *Jones v. Erie etc. R. R. Co.*, 151 Pa. St. 30; 31 Am. St. Rep. 722, and note with cases collected discussing this subject; also *Gallagher v. Kemmerer*, 144 Pa. St. 509; 27 Am. St. Rep. 673, and note.

RAILROADS — DAMAGES FOR OCCUPATION OF STREET BY: See *Jones v. Erie etc. R. R. Co.*, 151 Pa. St. 30; 31 Am. St. Rep. 722, and note with cases collected.

HIGHWAYS — EXTINGUISHMENT BY ADVERSE USER. — No title can be acquired in the public streets or highways by adverse possession. Public

rights are not destroyed by long-continued encroachments or permissive trespasses: *Commonwealth v. Moorehead*, 118 Pa. St. 344; 4 Am. St. Rep. 599, and note; but see *Orr v. O'Brien*, 77 Iowa, 253; 14 Am. St. Rep. 277, and extended note at page 279.

## CITY OF CAMDEN v. GREEN.

[54 NEW JERSEY LAW, 591.]

**VOLUNTARY PAYMENTS — RIGHT TO RECOVER.** — When a person without mistake of fact or fraud, duress, coercion, or extortion, pays money on a demand which is not enforceable against him, the payment is deemed voluntary, and cannot be recalled. This rule applies to one who pays a greater sum for a license than is demandable of right.

**VOLUNTARY PAYMENTS — LICENSE FEE — RIGHT TO RECOVER BACK.** — When a municipality in good faith, but under a misapprehension of law, demands a greater sum than it is legally entitled to for a license to carry on a particular business, a person who, with knowledge of the facts, pays the sum demanded, cannot recover the excess.

*J. Willard Morgan and David J. Pancoast*, for the plaintiff in error.

*John J. Crandall*, for the defendant in error.

DIXON, J. In accordance with the provisions of "An act to establish an excise department in cities of this state," passed April 8, 1884, and its supplements (Rev. Sup. 695), a board of excise commissioners was organized in the city of Camden, and thereby became vested with the power to make, establish, amend, or repeal ordinances and by-laws to license, regulate, or prohibit inns and taverns, restaurants and beer saloons within the city, but the fees for licenses granted by the board were to go into the city treasury.

By ordinance passed April 9, 1890, the board fixed the fee for a license to sell spirituous, vinous, malt, or brewed liquors in quantities less than one quart, at five hundred dollars, and, on July 2, 1891, the board granted a license for such purposes to the plaintiff, who thereupon paid said fee to the city clerk, who turned it over to the city treasurer.

Forthwith the plaintiff brought suit against the city of Camden to recover the sum of two hundred dollars, on the ground that, under "An act to create county boards of license commissioners and to define their powers and duties," approved March 20, 1891 (P. L., p. 221), a county board of license commissioners had been appointed for Camden County, and before July 2, 1891, had reduced the fee for liquor li-

censes in the city of Camden to the sum of three hundred dollars.

At the trial of the suit the plaintiff proved the creation of the city board, its ordinance fixing the fee at five hundred dollars, the issuance of the license to himself, his payment of the fee, the administration of an oath of office to three persons claiming to be members of a county board of license commissioners, and the receipt, on July 1, 1891, by the city board, of a communication, which purported to come from the county board and to contain a resolution of the latter board dated June 29, 1891, reducing the fee to three hundred dollars.

Upon this proof the trial judge directed a verdict for the plaintiff for two hundred dollars, and an exception to this direction presents the error now assigned.

Counsel for the city urged the unconstitutionality of the act of 1891 as his main reason for reversal, but that point need not be considered, for, upon other grounds, the direction was clearly erroneous.

In the first place, there was no legal evidence that the alleged county board had taken any action to reduce the fee. No proof was offered of the authenticity of the communication received by the city board, and it was not of a character to prove itself.

But in the second place, if such action had been lawfully taken and lawfully proved, the payment by the plaintiff was voluntary and hence could not be recalled.

There is nothing in the case to indicate that the plaintiff was ignorant of the fact of reduction, if it existed, and no suggestion of fraud was made. The case, then, could have been only this: The city board, claiming the legal fee to be five hundred dollars, although the county board had ordered that it be reduced to three hundred dollars, and being willing to issue a license to the plaintiff on payment of what it considered the legal fee, the plaintiff, with full knowledge of the facts, paid five hundred dollars, and received the license.

In such a transaction there is nothing to take the case out of the general principle, that where a party, without mistake of fact or fraud, duress or extortion, voluntarily pays money on a demand which is not enforceable against him, he cannot recover it back: *Flower v. Lance*, 59 N. Y. 603; *Schwarzenbach v. Odorless Excavating Co.*, 65 Md. 34; 57 Am. Rep. 301; *Sowles v. Soule*, 59 Vt. 131. A refusal to issue the license



without payment of more than the legal fee would not constitute duress: *Sooy v. State*, 38 N. J. L. 324; *Wright v. Remington*, 41 N. J. L. 48; 32 Am. Rep. 180; 43 N. J. L. 451. Nor would it constitute extortion; for a license was not demandable by the plaintiff as a right, and the city board, under its authority, conferred by the act of 1884, to license, regulate, or prohibit, could lawfully have refused to issue a license upon any terms. Although the language of the act of 1891 would empower the county board, under certain circumstances, to reduce the license fee fixed by the city board, yet it did not attempt to impose upon the latter board the duty of issuing a license at the reduced rate, but merely entitled the applicant, on refusal of a license from the city board, to apply therefor to the county board. Consequently, by refusing to license the plaintiff unless he paid the city five hundred dollars, which the city board deemed the lawful fee or tax, that board was not withholding from him anything which it was its duty to concede. The board's purpose to do what it had a legal right to do, if the plaintiff would not comply with its demand, did not render its demand extortionate: *Sooy v. State*, 38 N. J. L. 324; 41 N. J. L. 394. The privilege which it offered, the plaintiff was at perfect liberty to accept or decline, and his acceptance and compliance with the conditions of the offer were purely voluntary.

There is considerable authority for the proposition that where a municipality, in good faith but under a misapprehension of the law, demands a greater sum than it is legally entitled to, for a license to carry on a particular business, a person who, with knowledge of the facts, pays the sum demanded, cannot recover back the excess. Thus in *Cook v. City of Boston*, 9 Allen, 393, ten dollars were demanded and paid for a wagoner's license, when it was averred only one dollar was legal; in *Emery v. City of Lowell*, 127 Mass. 138, one thousand dollars were demanded and paid for a liquor license, when it was averred the legal charge was two hundred dollars; in *Town of Ligonier v. Ackerman*, 46 Ind. 552, 15 Am. Rep. 323, a tax was demanded and paid for a liquor license, although the ordinance imposing it was void; in *Custin v. City of Viroqua*, 67 Wis. 314, a tax of five hundred dollars was demanded and paid for a liquor license, although the statute of the state forbade the collection of more than two hundred dollars; in all these cases the courts decided that, as the licensee paid the tax without mistake of fact, and without any fraud or

coercion on the part of the corporate authorities, the payment was voluntary, and the money could not be recovered back.

The impolicy of permitting contestable demands, made on behalf of municipalities by their boards and agents, to be acquiesced in and paid, without a final relinquishment of the right to contest the same, is pointed out by the chief justice in *Davenport v. City of Elizabeth*, 41 N. J. L. 362, and should bar suits under conditions like those in the present case.

If the claim of five hundred dollars was one to be resisted, the time for resistance was before payment, and the plaintiff then either should have appealed to the courts to compel the city board to consider his application upon the footing of a three hundred dollar license tax, or he should have applied to the county board for its license. His payment of the sum demanded closed the controversy.

The judgment below must be reversed.

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**VOLUNTARY PAYMENTS—RIGHT TO RECOVER.**—One who voluntarily pays money with full knowledge or means of knowledge of the facts, without any fraud having been practiced upon him, cannot recover it by reason of the payment having been made in ignorance of the law: *Gould v. McFall*, 118 Pa. St. 455; 4 Am. St. Rep. 606, and note; note to *Hirshfield v. Fort Worth Nat. Bank*, 29 Am. St. Rep. 669; note to *Cook v. Chicago etc. R'y Co.*, 25 Am. St. Rep. 520; extended notes to *Detroit v. Martin*, 22 Am. Rep. 519, and *Mayor v. Lefferman*, 45 Am. Dec. 153; also notes to *Benson v. Monroe*, 54 Am. Dec. 719; *Feenster v. Markham*, 19 Am. Dec. 135. and *Waite v. Leggett*, 18 Am. Dec. 443.

AM. ST. REP., VOL. XXXIII.—44

CASES  
IN THE  
COURT OF APPEALS  
OF  
NEW YORK.

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GIBNEY v. STATE.

[137 NEW YORK, 1.]

**NEGLIGENCE — PROXIMATE CAUSE.** — If a child falls into a canal through the culpable negligence or tort of the state, and its father thereupon plunges into the canal in an attempt to rescue his child and both are drowned, the death of both is a consequence of the negligence of the state, and hence it is answerable for the death of the father as well as of the child.

**APPEAL** from an award made by the court of claims in favor of a wife for injuries sustained by the death of her husband.

*S. W. Rosendale, attorney-general, for the appellant.*

*Edwin C. Angle, for the respondent.*

ANDREWS, C. J. We have decided on the appeal brought from the award of damages for the death of the infant son of the plaintiff, that the evidence authorized a finding of negligence on the part of the state authorities in permitting the opening in the bridge, through which the boy fell into the canal, to remain unguarded, and also the further finding that there was no contributory negligence on the part of the parents of the child, and we therefore affirmed the award. The present appeal is from an award made for damages sustained by the widow and next of kin, arising from the drowning of the plaintiff's husband and the father of the child, in an attempt to rescue the child from the canal, into which the child had fallen.

The material facts are undisputed. The plaintiff with her husband and child, in an evening in August, while crossing

the bridge met an acquaintance and the parents stopped to talk with him. The child remained within a few feet of them and suddenly fell through the opening in the railing of the bridge into the canal below. The father, as soon as he discovered that the boy was gone, plunged into the canal to recover the child and both father and son were drowned.

It is contended by the attorney-general that the negligence of the state in permitting the bridge to remain in an unsafe condition, while it may have been the cause of the death of the boy, cannot be regarded as the cause of the death of the father, although it occurred in an attempt to save the life of the child. It is doubtless true that except for the peril of the child, occasioned by his falling through the bridge into the canal, there would have been no connection between the negligence of the state and the drowning of the father. But the peril to which the child was exposed was, as has been found, the result of the negligence of the state, and the peril to which the father exposed himself was the natural consequence of the situation. It would have been in contradiction of the most common facts in human experience if the father had not plunged into the canal to save his child. But while the immediate cause of the peril to which the father exposed himself was the peril of the child, for the purpose of administering legal remedies, the cause of the peril in both cases may be attributed to the culpable negligence of the state in leaving the bridge in a dangerous condition. There is great difficulty in many cases in fixing the responsible cause of an injury. When there is a break in the chain of causes by the intervention of a new agency, and then an injury happens, is it to be attributed to the new element, and is this to be treated as the originating cause to the exclusion of the antecedent one, without which no occasion would have arisen for the introduction of a new element? It is impossible to formulate a rule on the subject capable of definite and easy application.

The general rule is that only the natural and proximate results of a wrong are those of which the law can take notice. But where a consequence is to be deemed proximate within the rule is the point of difficulty. In this case these elements are present; culpable negligence on the part of the state; the falling of the child into the canal through the opening which the state negligently left in the bridge; the natural and instinctive act of the father in plunging into the canal to rescue the child; the drowning of both; the fact that such an acci-



dent as that which befell the child might reasonably have been anticipated as the result of the condition of the bridge, and the further consideration that a parent or other person seeing the child in the water would incur every reasonable hazard for its rescue. We think it may be justly said that the death both of the child and parent was the consequence of the negligence of the state, and that the unsafe bridge was in a legal and juridical sense the cause of the drowning of both.

We can perceive no sound distinction between this case and the case of *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502, 3 Am. Rep. 721. In that case the railroad train was being propelled at a dangerous speed. The negligence was active. In this case it consisted of an omission, that is, in the failure to originally construct the bridge properly, or permitting it to become dangerous. We do not perceive how the difference in the circumstances of the negligence affects the question of proximate cause between the cause and the result so as to distinguish in this respect the two cases.

The case of *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234, and the case of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, give support to our conclusion.

The judgment should be affirmed.

All concur, except MAYNARD, J., not sitting.

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**NEGLIGENCE — PROXIMATE CAUSE.** — The proximate cause is not necessarily the last act or nearest act to the injury, but it may be such an act wanting in care as actively aids in producing the injury, as a direct and existing cause. It need not be the sole cause, but it must be a concurring cause such as might reasonably have been contemplated as involving the result under the attending circumstances: *Gonzales v. Galveston*, 84 Tex. 3; 31 Am. St. Rep. 17, and note with the cases discussing proximate cause collected. See also *Vallo v. United States Express Co.*, 147 Pa. St. 404; 30 Am. St. Rep. 741.

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## ENGEL v. EUREKA CLUB.

[137 NEW YORK, 100.]

**NEGLIGENCE — WHO ANSWERABLE FOR.** — It is a general rule that a party injured by the negligence of another must seek his remedy against the person whose actual negligence it was which caused the injury, and that such person alone is liable. An apparent exception to this rule exists in the cases of principal and agent and master and servant. In these cases, however, the principal or master is liable because the negligence of the servant or agent is in law chargeable to the master or principal.

**NEGLIGENCE OF AN INDEPENDENT CONTRACTOR** is not ordinarily chargeable to his employer. An exception to this rule exists in the case of statu-

tory duties imposed on individuals or corporations from which they cannot acquire exemption by delegating performance to another, and of contracts for the performance of unlawful acts, or acts which will create a nuisance, or are necessarily attended with danger to others, however skillfully performed.

**NEGLIGENCE. — A CONTRACTOR AND NOT HIS EMPLOYER** is answerable for injuries resulting from the doing of acts which may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons are likely to result, provided it was the duty of the contractor under the contract to exercise such care.

**NEGLIGENCE — CONTRACTOR AND EMPLOYER. —** If a contractor is employed to take down a wall, and the doing of the work is not intrinsically dangerous, but injuries result to third persons from the negligent manner in which the work is done, the contractor alone is liable, though the wall had become weakened by age and decay, if it was safe as it stood, and would not have fallen or occasioned any injury but for the negligent mode in which the contractor undertook to perform his contract.

**ACTION** to recover for injuries sustained by the death of plaintiff's intestate occasioned by the falling upon her of a wall on the property of the defendant, and which a contractor employed by him had left in a dangerous condition. Judgment of nonsuit was entered in the trial court, but the general term granted a new trial, and thereupon the defendant appealed.

*Thomas Raines*, for the appellant.

*Martin W. Cooke*, for the respondent.

ANDREWS, C. J. We are of opinion that the motion for a new trial should have been denied.

The defendant had purchased the premises in March, 1892, for its uses as a social club. It made a contract with a competent builder to alter the building thereon in accordance with a plan adopted. The builder was to furnish the new materials necessary and do the work for a fixed price. The improvement contemplated the taking down of a brick wall, sixteen feet high, on the north line of the premises, adjoining premises owned by one Ihrig, occupied in part by plaintiff as a tenant. The wall formed one side of a driveway on defendant's premises, and was roofed over. The roof was formed by rafters extending from the main building to the brick wall, and fastened to and resting upon a plate on the top of the wall, secured by bolts, and was covered with boards and shingled. The wall had been erected thirty or forty years, and was eight inches thick, and rested on a stone foundation. It had been worn away next to the driveway by contact with wagons, and the bricks had been broken along the line of

contact to the depth of three or four inches. The wall on the Ihrig side was also in places decayed and the mortar had fallen out. The defendant had never occupied the premises, and when the contract for repairs was made, the keys of the house were given to the contractor. The contractor commenced the work of taking down the wall by removing the roof which covered it, and taking down the rafters, which left the wall wholly unsupported, and the day after the roof was removed the wall fell over towards the Ihrig lot, and the wife of the plaintiff, with her child, who were in the yard near the wall, were killed.

The evidence tends to show culpable negligence in the manner of taking down the wall. It was shown that in consequence of its weakened condition, by reason of age and the decay spoken of, common prudence required that precautions should have been taken to prevent its falling, either by shoring it up, or by removing the roof and the wall in sections. The evidence is undisputed that this was the common and usual proceeding under similar circumstances. The officers of the defendant had no actual knowledge of the condition of the wall, either before or during its removal, or how the work was being done, and they did not in any way interfere or direct in respect to the manner of doing the work.

It is the general rule that a party injured by the negligence of another must seek his remedy against the person whose actual negligence it was which caused the injury, and that such person alone is liable: *King v. New York Cent. etc. R. R.*, 36 N. Y. 182; 23 Am. Rep. 37. The case of master and servant is an exception, and the negligence of the latter is imputable to the master where the servant, in doing the act which occasions the injury, is acting within the scope of his employment. This exception rests upon most satisfactory reason, because the servant in the case supposed is acting in place of the master, and by his appointment, and the master who selects and controls the servant makes the servant his representative in his business.

But the exigencies of affairs frequently require that persons exercising independent employments should be intrusted by owners of property with its improvement, and in various relations and under varying conditions they are employed, not as servants, but as independent contractors to execute contracts which the person who secures their services is unable to execute himself, or the execution of which he prefers to

commit to another. The duty which the contractor owes is defined by the contract or implied therefrom. In such cases the maxim, *Qui facit per alium, facit per se*, has no appropriate application, and there is no reason founded upon public policy, or the relations between the parties to the contract, which should subject one party to the contract to liability to third persons for the negligence of the other. The principle that no liability on the part of the innocent party in such case exists has become the settled doctrine of our law. It leaves an adequate remedy to the party injured against the real author of the wrong. There are well-understood exceptions to this rule of exemption. Cases of statutory duty imposed upon individuals or corporations; of contracts which are unlawful, or which provide for the doing of acts which, when performed, will create a nuisance, are exceptions. In cases of the first-mentioned class the power and duty imposed cannot be delegated so as to exempt the person who accepts the duty imposed from responsibility, and in those of the second class exemption from liability would be manifestly contrary to public policy, since it would shield the one who directed the commission of the wrong: *Storrs v. Utica*, 17 N. Y. 104; 72 Am. Dec. 437; *Lowell v. Boston etc. R. R. Co.*, 23 Pick. 24; 34 Am. Dec. 33; *Hole v. Sittingbourne etc. R'y Co.*, 6 Hurl. & N. 488; *Butler v. Hunter*, 7 Hurl. & N. 826. There are cases of still another class, where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, or, in the language of Judge Dillon, is "intrinsically dangerous," in which case it is held that the party who lets the contract to do the act cannot thereby escape from responsibility for any injury resulting from its execution, although the act to be performed may be lawful: 2 Dillon on Municipal Corporations, sec. 1029, and cases cited. But if the act to be done may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise such care: *McCafferty v. Spuyten Duyvil R. R. Co.*, 61 N. Y. 178; 19 Am. Rep. 267; *Connors v. Hennessey*, 112 Mass. 96; *Butler v. Hunter*, 7 Hurl. & N. 826.

The application of these principles to this case exonerates the defendant from liability. The taking down of the wall was not intrinsically dangerous. The only danger to be apprehended was in doing it carelessly or unskillfully. It



was in the manner of doing it, and not in the thing itself. The danger of leaving the wall without support was obvious, and could have been easily avoided, and the usual method required that precautions should be taken. It was the duty of the contractor to take such precautions, because it was implied in his contract that he should take down the wall in a careful and proper manner: *Butler v. Hunter*, 7 Hurl. & N. 826. It does not change the situation of the defendant that the wall had become weakened by age and decay. It is the general duty of the owner of premises to keep the walls of his building in a safe condition, so that they will not endanger his neighbor by falling; and if he negligently omits its performance, and his neighbor is injured, the injury is actionable: *Mullen v. St. John*, 57 N. Y. 567; 15 Am. Rep. 530; but the evidence is undisputed that the wall was safe, and would not have fallen if it had been left as it was when the contract was made, supported by the roof. It was not a menace in its existing condition. It became dangerous only in consequence of the manner in which the contractor proceeded to take it down. It would probably have been less liable to fall, although deprived of the support of the roof, if the wall had been in perfect repair when the contractor entered upon the work; but we perceive no causal connection between the neglect to repair and the injury to the plaintiff's intestate. The sole cause in a legal sense was the negligence of the contractor in omitting to do what he was bound to do. The performance of his duty would have prevented the injury. The exceptions to the admission or rejection of evidence present no material error. The order of the general term should be reversed, and judgment of nonsuit should be entered, with costs to defendant.

All concur.

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**NEGLIGENCE OF INDEPENDENT CONTRACTOR — WHO LIABLE FOR. —** One who employs a fit and proper person as an independent contractor to do work not in itself unlawful or a nuisance or necessarily attended with danger to others, is not responsible for such contractor's negligence: *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161; 27 Am. St. Rep. 231, and note; *Powell v. Construction Co.*, 88 Tenn. 692; 17 Am. St. Rep. 925, and note; extended note to *Stone v. Cheshire R. R. Corp.*, 51 Am. Dec. 200. An employer is not liable for the wrongful acts of a contractor or his servants, when they are only collateral to the work contracted for: *Davie v. Levy*, 39 La. Ann. 551; 4 Am. St. Rep. 225; note to *Tissot v. Great Southern Tel. Co.*, 4 Am. St. Rep. 256; but see *Williams v. Fresno Canal Co.*, 96 Cal. 14; 31 Am. St. Rep. 172, and note in which the employer's liability is discussed.

## WESTON v. STODDARD.

[187 NEW YORK, 119.]

**PARTITION.** — AN ADVERSE POSSESSION BY A COTENANT for a period less than the time prescribed by law to bar a possessory action is not a good defense to a suit for partition, if the statutes of the state in which the suit is pending authorize the litigation therein of all questions of title which arise upon the pleadings between the tenants in common and their privies who may be parties to the action. The fact that one section of the statute declares that a suit for partition may be brought where two or more persons hold and are in possession of the real property as tenants in common does not inhibit an action by a cotenant out of possession, if he has a present right of possession.

Suit for partition in which the defendant pleaded adverse possession. This plea was overruled by the trial court, and a partition made, and thereafter an appeal was prosecuted from the final judgment.

*Charles S. Lester*, for the appellants.

*Winsor B. French and Richard L. Hand*, for the respondents.

MAYNARD, J. The important question presented by this appeal relates to the defense of adverse possession. The appellants have title to an undivided three-fourths, and they allege in their answer that they have been in the actual and exclusive possession of the premises sought to be partitioned, and of every part thereof, claiming to own the same, and holding the same in hostility to the plaintiff and all other persons for more than twenty years before the commencement of this action, and that the plaintiff had actual notice of their exclusive and hostile possession; and that they were, when this suit was brought, the absolute owners of the premises and of every part thereof. Proof was given tending to support this plea. The trial court found that the appellants were in possession at the time the action was begun, holding adversely to the plaintiff, but that such adverse possession did not commence until after 1880. The appellants thus failed to establish title to the undivided one-fourth of the premises claimed by the plaintiff and their codefendants; but they insist, nevertheless, that the fact of adverse possession found was sufficient to defeat this action, although it had not continued for such a length of time as to afford the presumption of a grant of the title to the entire property.

There is some question made as to the sufficiency of the

finding of adverse possession, and it must be admitted that there is some confusion in the record upon this point. There is the usual formal finding that the premises described in the complaint are owned by and in the possession of the plaintiff and the defendants as tenants in common as alleged, and there is the corresponding conclusion of law. At the appellants' request, the trial court also found that their possession was adverse, but qualified it with a statement that such adverse possession did not begin until after the year 1880, or less than nine years before the commencement of the action.

The record also states that the defendants moved for a nonsuit and a dismissal of the complaint upon this ground, and that thereupon the court held that the fact that the defendants are in possession of the premises claiming to hold the same adversely is no bar to the maintenance of an action for partition unless the adverse possession is continued for a length of time sufficient to ripen into a title, or over twenty years, and that plaintiff was entitled to judgment, and denied the motion. The trial judge filed a memorandum which was exclusively devoted to the support of the proposition that under the Code of Civil Procedure continuous adverse possession for less than twenty years did not bar the action; and a more elaborate opinion was subsequently filed, in which the question was considered in the light of the authorities and the same conclusion reached. The general term regarded the question as involved in the case and held that under section 1543 of the code, an adverse holding, which was not of sufficient duration to afford the presumption of a grant, could not defeat the action, saying, "under the present code, it is what a party to the action rightfully holds, and not what he may wrongfully claim, that determines the nature of the relief to be awarded respecting him." Under these circumstances we think it would be a technical and unjust interpretation of this record to hold that the question was not fairly presented, whether an adverse possession of a cotenant of the title for a period less than the time prescribed by law to bar a possessory action, is now a good defense to an action of partition; and whether upon proof of such possession the plaintiff's complaint should be dismissed or his proceedings stayed, and he be required to recover possession of his undivided share in an action of ejectment, before he can have any relief in the partition suit. Full effect can be given to the finding that the plaintiff was the owner and in possession with the appellants as tenants in

common by limiting it to the constructive possession which is deemed to follow the legal title, and which, if not rebutted, was always regarded as sufficient to support the action: *Wainman v. Hampton*, 110 N. Y. 429. A conflict in the findings is in this way avoided, but if the two are irreconcilable, the special finding made at the request of the appellants must prevail.

Both at common law and under the revised statutes it was the well-settled rule of practice in actions for partition to withhold relief, if it appeared that the title or the right of possession of the plaintiff was disputed, or that he had been actually ousted by his cotenants. It was not always clear what conduct would be considered in law sufficient to effect an ouster, but the current of authority in this state prior to 1880 was uniform and unbroken that when a disseisin had been established, although for a period less than that required to extinguish his title, a tenant in common of real property must wait until he had regained possession in an action or proceeding at law before he could insist upon a division of the property between himself and his cotenants. The two remedies could not be enforced in the same action. There was but one exception to the rule, and that was that where the original jurisdiction of the action was purely equitable, and it had once rightfully attached, it should be made effectual for complete relief, even if it did require the determination of questions of title to real property and of conflicting claims to its possession: *Hosford v. Merwin*, 5 Barb. 62; *Scott v. Guernsey*, 60 Barb. 178. The existence of this rule was not due to the indisposition of courts of equity to determine issues which were peculiarly within the province of courts of law. It was rather the result of the exceptional character of the method of procedure in partition cases, and had its origin in the practice of the common-law tribunals, which for a long time had exclusive jurisdiction in this class of actions. The writ of partition was a common-law process, and was an available remedy, at least, between coparceners for over three hundred years before courts of chancery assumed jurisdiction of the subject-matter. It was returnable before judges or commissioners, specially appointed to hear the cause, and if, upon the return of the writ, it was shown that the plaintiff's title was contested, or that the lands were held adversely, the proceedings were dismissed, or suspended, until the question of title had been otherwise determined. This course was rendered necessary because a trial by jury of an issue involv-



ing the title to real property was a matter of common right of which the citizen could not be deprived by the institution of a proceeding in which that form of trial was not permissible.

The same want of power to try such issues inhered in the procedure of the court of chancery, and when it extended its judicial authority so as to include the hearing of suits in partition it followed the established rules of practice in courts of law in this respect, and required the suitor to show an actual holding and possession in common with his cotenants before it would accord to him the shelter of its jurisdiction.

When, by a change of the fundamental law of the state, the supreme court was empowered to administer both legal and equitable remedies, the necessity for the existence of this rule was but partially obviated. The essential nature of actions was unchanged. Partition suits were still regarded as cases of purely equitable cognizance, upon the trial of which a jury could not be demanded as a right, and, if permitted to be present, their verdict did not conclude the judgment of the court upon the issues submitted to them. As the constitution secured inviolate the right of trial by jury in all cases where it had theretofore been enjoyed, it was apparent that questions of title could not be tried in these cases without some enabling legislation. The Code of 1848, sec. 448, provided that actions in partition brought under the revised statutes should be regulated by the provisions of that code, and it was held by this court in *Hewlett v. Wood*, 62 N. Y. 75, that by virtue of this change in the practice a trial by jury could be insisted upon as a right in a partition suit, and was no longer discretionary with the court. But the rule which debarred the court from a trial of issues of title in these actions was too firmly entrenched to yield to any effort to change it short of an express statutory enactment. The drift of judicial authority in other states had meanwhile been strongly in the direction of a relaxation or abrogation of the rule. The supreme court of the United States, in *Parker v. Kane*, 22 How. 17, a partition suit arising in Wisconsin, where disputed questions of title had been adjudicated, say: "In Great Britain a chancellor might have considered this as a case in which to take the opinion of a court of law, or to stay proceedings in the partition and cross suits until an action at law had been tried to determine the legal title. But such a proceeding could not be expected in a state where the powers of the courts of law and equity are exercised by the same persons."

In many of the states it has always been held that a dis-seised cotenant may maintain compulsory partition: *Call v. Barker*, 12 Me. 325; *Marshall v. Crehore*, 13 Met. 464; *Miller v. Dennett*, 6 N. H. 109; *Tabler v. Wiseman*, 2 Ohio St. 207; *Godfrey v. Godfrey*, 17 Ind. 9; 79 Am. Dec. 448; *Cook v. Webb*, 19 Minn. 170; *Howey v. Goings*, 13 Ill. 108; 54 Am. Dec. 427; *Scarborough v. Smith*, 18 Kan. 399; *Martin v. Walker*, 58 Cal. 590; *Cuyler v. Ferrill*, 1 Abb. C. C. 182.

The learned author of a work on partition (Freeman, sec. 450) in commenting upon this condition of the authorities, says: "In truth, the limitations attending proceedings in partition are constantly weakening and the tendency to do full and complete justice to the parties in one action is becoming irresistible. Wherever the question has recently arisen as a new question, the answer to which the courts were free to give without consulting decisions made at an early day when the common-law rules were more potent than at present, it has been resolved in favor of taking jurisdiction whenever the complainant shows himself seised of the requisite title whether the lands sought to be partitioned are held adversely to him or not." The legislature we think recognized the force of this tendency in the adoption of article 2, of title 1, of chapter 14 of the Code of Civil Procedure; the provisions of which, when construed according to their evident intent, plainly authorize the litigation in an action of partition of all questions of title which arise upon the pleadings between the cotenants and their privies, who may be parties to the action. Section 1543 expressly provides that the title or interest of the plaintiff as stated in the complaint may be controverted by the answer; and the title or interest of any defendant as so stated may be controverted by his answer, or the answer of any other defendant and the title or interest of any defendant as stated in his answer may be controverted by the answer of any other defendant; and it is declared that the issues thus joined must be tried and determined in the action. Sections 1557 and 1577 provide that the judgment shall be binding and conclusive upon all the parties to the action who have been duly served and in case of a sale effectually bars each of them from all right, title, and interest in the property sold.

We think that section 1543 was intended to confer upon the court, in which an action for partition may be brought, authority to try and determine all disputes which may arise

between the plaintiff and his cotenants involving their respective titles and rights of possession to the property. Therefore nothing could be tried, if the bare fact of the common holding or tenancy was disputed. The commissioners, who framed this part of the code, state in a preliminary note to the article that such was the radical change which they designed to effect in the existing law, and after its adoption the same purpose was asserted by one of the commissioners in a foot note to the section. The appellants contend that because section 1537 specifically provides that a party out of possession may maintain the action where he claims by reason of heirship and the lands are in possession of a devisee under a devise alleged to be void, it is equivalent to a legislative declaration that in no other case can a plaintiff, who is out of possession, bring the action. But the commissioners say that they intended to extend the principle embodied in section 1537 to all cases by the provisions of section 1543. We apprehend that the reason for the enactment of section 1537 was quite different from that suggested by counsel. Where a devisee is in possession under a devise in a probated will, he has an exclusive title to the property, which is presumptively valid against the heir and all persons claiming through the testator, and without an enabling statute the heir could not maintain partition, because, upon the face of the record, he is not a cotenant of the title at all. Before he can bring himself into such a relation with the occupant, he must procure the judgment of the court declaring the devise void for some sufficient cause, after which he may insist upon partition between himself and the other heirs, and the purpose of the statute was to enable him to secure this twofold relief in one action, and it had no special reference to the removal of any common-law disability of a tenant out of possession.

We cannot find that the question has arisen in this court since the second part of the code went into effect. In *Wainman v. Hampton*, 110 N. Y. 429, the action was begun under the revised statutes, and Judge Earl calls attention specially to that fact, and states that it is to be governed by the statute and not by the code, and thus impliedly recognizes that substantial changes in the practice may have been introduced by the latter. The decisions in the supreme court have been conflicting: *Shannon v. Pickell*, 2 N. Y. St. Rep. 160; *Hulse v. Hulse*, 5 N. Y. Supp. 749; *Jones v. Jones*, 6 N. Y. St. Rep. 736; *Greene v. Greene*, 7 N. Y. Supp. 30; *Gedney v. Prall*, 6 N. Y.

Supp. 165; *Knapp v. Burton*, 7 Civ. Pro. Rep. 448. In recent works on practice of high authority section 1543 has been construed as abrogating the rule which prevented a recovery by a disseised cotenant, and providing for the trial and determination in the partition action of all issues involving the title and right of possession of any of the parties: 3 Rumsey's Practice, 31, 41; Fiero on Specific Action, 91, 92. We perceive no good reason for questioning the soundness of this construction. Circuity of procedure and a multiplicity of suits are thereby avoided, and these were the primary objects which the code system of practice had in view. This scheme of the law is rendered complete by section 1544, which is entirely new, and which provides that an issue of fact joined in an action of partition is triable by a jury, and such a mode of trial thus becomes demandable as a right and preserves unbroken the constitutional guaranty.

We have not overlooked section 1532, which provided that the action may be brought where two or more persons hold and are in possession of real property as tenants in common. What is here meant is not a strict *pedis possessio*, but a present right to the possession, as distinguished from the cases in the next section, where, under certain circumstances, the remainderman may bring the action. The section must be read as a part of the article to which it pertains, and cannot be construed so literally as to render nugatory the plain purpose of the provisions with which it is associated.

The other exceptions argued were, we think, correctly disposed of in the court below. They relate to matters which, in the form in which they were presented, rested largely in the discretion of the trial court. There was no determination of them adverse to the appellant which will in any way conclude her in any action she may bring for the foreclosure of her mortgage. All her substantial rights as mortgagee have been preserved and securely guarded, and the opinion of the general term, upon this branch of the case, is so exhaustive and satisfactory that further consideration of these exceptions would not be profitable.

The judgment and order should be affirmed, with costs.

All concur.

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PARTITION—ADVERSE POSSESSION AS A DEFENSE.—A bill in chancery lies for partition, notwithstanding adverse possession, unless it has been continued sufficiently long to bar a recovery under the statute of limitations: *Howey v. Goings*, 13 Ill. 95; 54 Am. Dec. 427, and note. In a suit for parti-



tion, the defense of limitation is competent to show an adverse claim and holding against right or title in the plaintiffs: *Portis v. Hill*, 14 Tex. 69; 65 Am. Dec. 99, and note. See extended note to *Nichols v. Nichols*, 67 Am. Dec. at page 707. An action for partition is not one for possession, and the statutory five years' limitation is not available to one resisting it: *Bowen v. Swander*, 121 Ind. 164.

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## RICHARDS v. DAY.

[137 NEW YORK, 183.]

**WRITING EXECUTED IN BLANK.** — One who signs a blank piece of paper cannot be bound by the obligation subsequently written therein unless it can be shown that he gave the person who wrote it authority to do so.

**BOND EXECUTED IN BLANK.** — If a bond is executed in blank before a justice of the peace, who is told what he shall afterwards insert in the blanks, and who, disregarding his instructions, inserts different conditions, the bond as thus filled out is not the bond of the person thus signing it.

**PLEADING.** — UNDER A PLEA THAT THE DEFENDANT DID NOT SEAL, EXECUTE, NOR DELIVER THE BOND as set forth, he may show that it was executed in blank before a justice of the peace who was authorized to insert certain agreements in the blanks, and, disregarding his instructions, inserted an entirely different agreement.

**ACTION upon a claim against the estate of a decedent.** Defendant pleaded as a counterclaim, that plaintiff had executed a certain bond in favor of the defendant's intestate, and demanded judgment for the amount due by such bond. In response to the counterclaim, the plaintiff denied "that he sealed, executed, and delivered the bond set forth in the counterclaim." A judgment of nonsuit upon the counterclaim having been entered, the defendant appealed.

*George F. Yeomans*, for the appellant.

*Cassius C. Davy*, for the respondent.

**EARL, J.** Neither party upon the trial asked to have the evidence as to the counterclaim submitted to the jury, and there is really no dispute about it. Mrs. Richards, the wife of the plaintiff was the daughter of Mrs. Davis, the testatrix, and a paper now appearing as the bond set up in the counterclaim was signed by her and the plaintiff, in pursuance of a family arrangement by which Mrs. Davis distributed property among her children and agreed to take from them bonds to secure her support. The plaintiff and his wife and the testatrix went to a justice of the peace for the purpose of having a bond prepared and executed. It was agreed between them that the testatrix should have the interest on the amount of

the bond if she needed it; that if she did not need it, it was not to be called for, and that nothing should be due or payable upon the bond after her death; and that such an agreement should be inserted in the conditions of the bond. When the parties called upon the justice he was not prepared to write the bond, and he produced a blank bond and told the plaintiff and his wife to sign it and that he would subsequently fill it up according to the agreement which was stated to him in the presence of all the parties, and that he would deliver the bond. With that understanding the plaintiff and his wife signed the blank bond, and left it with the justice of the peace. He thereafter filled it up as it now appears, binding the obligors absolutely to make the payments on the bond as therein specified during the life of Mrs. Davis. The claim of the defendant is that the plaintiff could not under his reply simply denying that he sealed, executed, and delivered the bond, show by parol evidence what the true agreement between the parties was, nor what instructions were given to the justice of the peace in reference to filling up and completing the bond; and that the only remedy of the plaintiff, if the bond was not filled up as agreed, was to have it reformed so as to make it conform to the agreement; and the general term upheld this claim, holding that under the issue formed by the reply the parol evidence was inadmissible to contradict or vary the bond, and that if it did not express the true agreement between the parties, the plaintiff should have interposed a reply asking for its reformation.

We think the learned general term fell into error. If this had been a complete bond when the plaintiff signed it, although by mistake or fraud it did not express the true agreement between the parties, his sole remedy would have been to procure its reformation, and when an effort was made to enforce the bond against him, he could not contradict the terms thereof by parol evidence, except by proper allegations in his pleading asking for its reformation. But here the plaintiff did not sign any bond. He signed a blank piece of paper, and it would have been sufficient for him on the trial to prove that he simply signed a blank piece of paper, and then it would have been necessary for the defendant to show that he authorized the blank to be filled up, and how and under what circumstances the authority was given and what the authority was. A party who signs a blank piece of paper cannot be bound to the obligation written therein, unless it can be shown

that he gave the person who wrote it authority: *Chauncey v. Arnold*, 24 N. Y. 330; *Dutchess etc. R. R. Co. v. Mabbett*, 58 N. Y. 397; *Drury v. Foster*, 2 Wall. 24. There might be cases of an estoppel where one who signed a paper in that way would be bound by it. But in this case no estoppel arises, as the action is between one of the original parties and the representative of the other party. So the defendant is not in a position to complain if the bond is given effect according to the true agreement between the parties. Suppose the justice of the peace, instead of inserting payments in this bond as agreed, had inserted therein a conveyance of real estate, or a bond for the absolute payment of the principal of a large sum of money; or suppose the plaintiff had signed this blank bond without authorizing any one to fill it up, and some unauthorized person had afterward filled it up as it now appears; in either of these cases would the bond thus filled up and completed in form have been the bond of the plaintiff? Certainly in neither case could it have been said that the plaintiff executed such a bond.

Here, so far as the bond departed from the agreement of the parties, it was not the bond of the plaintiff. The only authority the justice of the peace had was to insert in this bond the precise agreement of the parties as directed. As he did not do that, this is not, in the form it now appears, the bond of the plaintiff, and under a denial that he executed the bond he may show the circumstances under which he signed his name and what the agreement at the time he signed it was.

We are, therefore, of opinion that the order of the general term should be reversed, and the judgment of the trial term affirmed, with costs.

All concur.

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**FILLING IN BLANKS.** — A bond delivered with a blank for insertion of the amount is not the deed of the party signing, nor will it become so unless there is a redelivery after the blanks have been filled by one properly authorized; *Williams v. Crutcher*, 5 How. 71; 35 Am. Dec. 422, and note. A holder of an instrument signed in blank cannot make a material alteration in it without the consent of the maker: *English v. Breneman*, 5 Ark. 377; 41 Am. Dec. 96, and note. Signing an instrument in blank and delivering it to some one to be filled in limits the latter to the instructions given him with regard to the manner in which it should be filled: *Johnson v. Blunsdale*, 1 Smedes & M. 17; 40 Am. Dec. 85, and note; *Bank v. Penick*, 2 T. B. Mon. 98; 15 Am. Dec. 136; *Cronkhite v. Nebeker*, 81 Ind. 319; 42 Am. Rep. 127, and note; *Toomer v. Rutland*, 57 Ala. 379; 29 Am. Rep. 722. See extended note to *Stahl v. Berger*, 13 Am. Dec. 669; also note to *Spitler v. James*, 2 Am. Rep.

340. For an extended discussion of the subject of instruments executed in blank and wrongfully filled up see note to *Bedell v. Herring*, 11 Am. St. Rep. 316; note to *Fordyce v. Kosminski*, 4 Am. St. Rep. 25; *Burrows v. Klunk*, 70 Md. 451; 14 Am. St. Rep. 371, and note. A bond given on attachment which is taken by the magistrate, signed in blank, and afterwards filled in by him is void: *Perminter v. McDaniel*, 1 Hill, 267; 26 Am. Dec. 179, and note; but see *Wiley v. Moor*, 17 Serg. & R. 438; 17 Am. Dec. 696.

When authority is given to fill in blanks in a sealed instrument and the agent exceeds his authority in filling the blanks and negotiates the instrument to an innocent third person, the principal will be bound: *Nelson v. McDonald*, 80 Wis. 605; 27 Am. St. Rep. 71, and note; *White v. Duggan*, 140 Mass. 18; 54 Am. Rep. 437, to the same effect; and see also extended note to the same case.

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## WADD v. HAZELTON.

[137 NEW YORK, 215.]

**TRUSTS—IMPERFECT GIFTS.**—If the intention to give absolutely is evidenced by a writing which does not take effect because of its non-delivery, the court cannot give effect to the intended gift by construing it to be a declaration of trust and therefore valid without delivery.

**TRUSTS—GIFTS.**—NEITHER A GIFT NOR A DECLARATION OF TRUST in favor of the donee is established by proof that the testator expressed an intention to give her an amount then specified; that he afterwards directed an assignment to be drawn of a bond and mortgage to the donee; that when the draft of such assignment was presented to him he did not then execute it, but retained it among his papers; that afterwards, while in his last illness, he gave the assignment, then signed, and other papers to the person who had drafted it with directions to deposit it and them in the bank, and that they were so deposited and there remained until after the testator's death.

ACTION to compel the defendant as executor of Albert Hill to deliver a bond and mortgage to the plaintiff. The decedent in January, 1884, expressed to his counsel an intention to make a further provision for the plaintiff of about two thousand dollars. In June of the same year the testator requested C. J. Hill to draw an assignment of the bond and mortgage to plaintiff. The request was complied with, but when the draft of the assignment was presented to him, the decedent retained it without then executing it. About August 20th of the same year he was taken ill, and on the second day of his illness gave to C. J. Hill certain papers, among which was the assignment then signed, and directed him to deposit them in bank, which was done; and soon afterwards, the testator died without taking any other measures towards perfecting the assignment. The referee found that "at the time of the execution of said assignment said Albert Hill intended to make a gift to or



settlement upon plaintiff of the said bond and mortgage, and such intention was never changed or such assignment revoked," and further that "by the execution of the assignment by said Albert Hill and his retention of it in his possession, he constituted himself the trustee thereof for the benefit of the plaintiff, and could not divest himself or his representatives of that character without the knowledge or consent of the plaintiff." Judgment was therefore entered in favor of the plaintiff, and the defendants appealed.

*E. A. Washburn*, for the appellants.

*Myron H. Peck*, for the respondent.

PECKHAM, J. Whether the plaintiff claims the bond and mortgage by virtue of an absolute gift to her from the testator, evidenced by the assignment, or whether she claims through the assignment as a declaration of trust, is somewhat difficult to determine from her complaint. The referee has taken the latter position and has found that the testator constituted himself a trustee by reason of his execution and retention of the assignment. We think there is no foundation in the evidence for the claim of an absolute gift.

There is no proof of a delivery or of any executed intention to make a gift, and the papers themselves are found among those of the testator at the time of his decease. The cases upon the subject of what constitutes a valid gift have been examined in this court in *Beaver v. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 531, and it is unnecessary to again go over them.

We are also of the opinion that no trust was proved.

While it is true that no particular form of words is necessary to create a trust of this nature, and while it may be created by parol or in writing, and may be implied from the acts or words of the person creating it, yet it is also true that there must be evidence of such acts done or words used on the part of the creator of the alleged trust, that the intention to create it arises as a necessary inference therefrom and is unequivocal; the implication arising from the evidence must be that the person holds the property as trustee for another. The acts must be of that character which will admit of no other interpretation than that such legal rights as the settler retains are held by him as trustee for the donee; the settler must either transfer the property to a trustee or declare that he holds it himself in trust. An intention to give,

evidenced by a writing, may be most satisfactorily established and yet the intended gift may fail because no delivery is proved. And where an intention to give absolutely is evidenced by a writing which fails because of its nondelivery, the court will not and cannot give effect to an intended absolute gift by construing it to be a declaration of trust and valid, therefore, without a delivery. These principles have been decided in this court and must be regarded as settled: *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446; *Young v. Young*, 80 N. Y. 423; 36 Am. Rep. 634; *Matter of Crawford*, 113 N. Y. 560; *Beaver v. Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531. It is true that in *Richardson v. Richardson*, L. R. 3 Eq. 686, Vice-Chancellor W. Page-Wood does say, in speaking of *Ex parte Pye*, 18 Ves. 140, that the holding in that case amounted to a decision that an instrument executed as a present and complete assignment, not being a mere covenant to assign on a future day, is equivalent to a declaration of trust. The expression was unfavorably criticised by Jessel, M. R., in *Richards v. Delbridge*, L. R. 18 Eq. 11, while in *Baddeley v. Baddeley*, L. R. 9 Ch. Div. 113, Vice-Chancellor Malins says he is not disposed to disagree with *Richardson v. Richardson*, L. R. 3 Eq. 686, notwithstanding the remarks of Sir George Jessel in *Richards v. Delbridge*, L. R. 18 Eq. 11.

In this court, however, and in the case already cited of *Young v. Young*, 80 N. Y. 423, 36 Am. Rep. 634, this doctrine is substantially repudiated. We are of opinion that no such rule obtains or ought to obtain in this state. An intended absolute gift by way of a written assignment, which cannot take effect because of the absence of delivery, ought not to be enforced as a declaration of trust when there is no such declaration and when there is no evidence of an intention to create a trust: *Milroy v. Lord*, 4 De Gex, F. & J. 264.

Although it may be sometimes a question of intention on the part of the creator of the alleged trust whether in fact he did or did not create it, yet a finding of fact that he did so intend must be based upon some evidence thereof and there must be some evidence that such an intention was carried out. In this case we think there is no evidence upon which to found either proposition, even if all the circumstances proved and mentioned by counsel for respondent in his brief are considered.

The declaration of the testator some months before his death and while in conversation with his lawyer is evidence

that the testator then had an intention to give absolutely to the plaintiff an amount of about two thousand dollars, in addition to the provision already made for her by his will. It is evidence of nothing more. There is no claim that any paper was then signed or request made for the drawing of any paper for the testator to subsequently sign in order to carry out his intention. From that time to the day (June 30, 1884) when Charles Hill drew the absolute assignment to plaintiff of the bond and mortgage and delivered it unsigned to the testator, there is no proof of act done or word said upon the subject by the testator.

When he asked Charles to draw the assignment he said something about his intention to give Libby that, but Charles draws it and gives it and the bond and mortgage back to the testator, who does not then execute the assignment, but receives all the papers back, retains them and says nothing. There is no gift in this state of the case and no declaration of trust either by oral or written communications or by acts; on the contrary there is an entire absence of all three possible modes of creating or declaring a trust. The assignment is as yet not even signed. Things remain in this condition until the second day of testator's illness (about 20th or 21st of August), when he gives to Charles the assignment with other papers belonging to the testator (the assignment then having been signed by the testator) with directions to deposit the papers in the bank. The assignment was not acknowledged or recorded. There was no direction to Charles to take the assignment as a delivery in favor of the plaintiff, no direction to deliver it to her, but he is directed to deposit the papers in the bank, and he does so. There were other papers than the assignment and the direction as to deposit includes them all. There is no declaration of a trust, and there is no act of the testator which is not entirely consistent with an intention to retain possession of the papers until something shall happen which shall cause different action on his part. More than that, the legal result of this request made by the testator to deposit the papers in the bank, and their deposit accordingly, is that a deposit under such circumstances makes the bank the agent of the testator and its possession of the papers is his possession.

The purpose of the deposit in the bank, it is said, is left to inference only. No inference can be drawn that would in any way authorize or warrant a finding that the testator

delivered the papers to Charles Hill for the purpose of having the assignment then take effect as a gift by delivery to him as plaintiff's agent, nor could an inference be properly drawn from all the circumstances that it was delivered to him as a trustee for the plaintiff, or as a declaration of trust in her favor. The acts must be such as will admit of no other interpretation than that the testator retained no legal rights over the paper, and upon the question as to the creation of a trust, the inference arising from the acts must be plain, that either the testator constituted Charles the trustee of the plaintiff, or else that the testator held the paper himself as trustee for her. The evidence is far from establishing that kind of act on the testator's part, and as has been seen, the assignment itself is not a declaration of trust.

The finding of the referee that at the time of the making of the assignment the testator intended to make a gift to or a settlement upon the plaintiff of the bond and mortgage, and that such intention was never changed nor such assignment revoked, is not material. He may have had one or the other of such intentions, but the evidence is that he fully executed neither. They are antagonistic and inconsistent intentions, and he could not have had both at the same time, and the referee does not find which he did have. The testator upon this proof carried neither intention into effect.

It may be assumed that Charles Hill knew that the testator intended to make a gift of the bond and mortgage to the plaintiff, for he drew the absolute assignment at the request of the testator, and delivered it to him, and the testator kept it for a month thereafter in his own possession, and only parted with it to be deposited in the bank. When thus deposited it was subject to his own order as the legal owner thereof.

The only confidential relationship occupied by Charles Hill when he took the papers, including the assignment, was that which obliged him to carry out the explicit directions of the testator, and deposit all the papers in the bank as directed. This he did.

To assume a relationship of trustee on the part of testator or by Charles Hill towards the plaintiff, based upon such facts, is to draw an inference which is not supported by the evidence.

The judgment of the general term and that entered upon the report of the referee must therefore be reversed, and a new trial granted, with costs to abide the event.

All concur.



**TRUSTS — IMPERFECT GIFTS.** — Where one deposits money in a bank in the name of another, but subject to his own order and without notice to the other party, and retains the pass book, this is not a gift *inter vivos*, nor can it be construed into a trust: *Marcy v. Amazeen*, 61 N. H. 131; 60 Am. Rep. 320; *Pope v. Burlington Sav. Bank*, 56 Vt. 284; 48 Am. Rep. 781, and note; *Robinson v. Ring*, 72 Me. 140; 39 Am. Rep. 308, and note; note to *Martin v. Funk*, 31 Am. Rep. 453. See also *Curry v. Powers*, 70 N. Y. 212; 26 Am. Rep. 577.

In order to create an express trust there must be either an express declaration of trust, or circumstances which show beyond a reasonable doubt that a trust was intended to be created: *Beaver v. Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531, and note; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137, and note. No trust will be implied merely from words indicating the motive inducing a gift: *Randall v. Randall*, 135 Ill. 398; 25 Am. St. Rep. 373.

## FIFTH AVENUE BANK v. FORTY-SECOND STREET ETC. RAILWAY COMPANY.

[137 NEW YORK, 231.]

**STOCKS, BONA FIDE HOLDER OF FORGED, WHO IS.** — If one to whom an application for a loan is made, for which a certificate of stock is offered as collateral security, applies at the office of the corporation to the person in charge thereof, and who is its secretary and treasurer, and inquires whether it is genuine and all right, and receives an answer in the affirmative, whereupon the loan is made and the stock taken as collateral, the receiver of such security is entitled to protection as a *bona fide* holder; nor does he lose the right to be treated as such holder by selling the stock and applying the proceeds to the payment of his loan, and thereafter, upon discovering that the certificate had been forged, taking an assignment thereof from the purchasers and repaying them the amount paid by them at the sale.

**CORPORATIONS — STOCKS, LIABILITY OF HOLDER OF FORGED.** — If a holder of forged stocks, held as collateral security, makes a sale thereof, he impliedly guarantees that they are genuine, and he is liable to the purchasers for the consideration paid by them.

**CORPORATIONS. — CERTIFICATES OF STOCK WITH TRANSFERS THEREOF SIGNED IN BLANK** become in effect, so far as the public is concerned, as if they had been issued to bearer.

**CORPORATIONS — LIABILITY FOR FORGED CERTIFICATES OF STOCK.** — If a secretary of a corporation acts as its transfer agent, and has authority to countersign certificates of stock, when signed by the president and treasurer, and to seal them with the seal of the corporation, such countersigning and sealing constitute an affirmation on the part of the corporation that the stock has been lawfully issued, and that all conditions precedent, upon which the right to issue depends, have been duly observed. Therefore if such secretary makes out in due and regular form a certificate of stock purporting to be signed by the president and treasurer, and countersigned by the secretary, and to which the corporate seal is affixed, and the names of the other officers are forged, and the issuing of the certificate unauthorized, the corporation is answerable to

one acquiring such certificate in good faith and for value, believing it to be genuine, and who has made all the inquiries regarding it which can be expected of a prudent purchaser.

**DEFINITION.** — To COUNTERSIGN AN INSTRUMENT is to sign what has already been signed by a superior,— to authenticate by an additional signature,— and usually has reference to the signature of a subordinate in addition to that of his superior by way of authentication of the execution of a writing to which it is affixed, and it denotes the complete execution of the paper.

**A PRINCIPAL IS LIABLE TO THIRD PERSONS IN A CIVIL SUIT FOR THE FRAUDS, DECEITS, CONCEALMENTS, MISREPRESENTATIONS, TORTS, NEGLIGENCES, AND OTHER MALFEASANCES OR MISFEASANCES** and omissions of duty of his agent in the course of his employment, although the principal did not authorize, justify, or participate in, or know of such misconduct, or even forbade or disapproved of it.

**A CORPORATION IS ANSWERABLE** for loss sustained by a third person from the negligent or wrongful exercise by its officers of the general powers conferred upon them.

**ACTION** to recover damages of the defendant corporation for its refusal to receive as genuine two certificates of stock. Judgment in favor of the plaintiff. Defendant appealed.

*Freling H. Smith*, for the appellant.

*Edward C. James*, for the respondent.

MAYNARD, J. In September, 1885, the plaintiff, a domestic banking corporation, loaned one Hofele \$15,000 upon his individual note, payable in three months, and secured by the pledge of an instrument which, upon its face, purported to be a certificate for 160 shares of stock of the defendant, a domestic railroad corporation, having its office and principal place of business in the same city with the plaintiff. It was subsequently discovered that this certificate was spurious, and that the signature thereto of the defendant's president had been forged by one Eben S. Allen, its secretary, who was also its treasurer and transfer agent, and who had in these capacities signed and countersigned the certificate, and delivered it to Hofele, who was his partner in business, for the purpose of raising money upon it, to be used in the firm undertaking.

We are required upon this appeal to determine how far the defendant company is liable for the loss sustained by the plaintiff in consequence of this fraudulent and criminal act of one of its principal officers.

The good faith of the plaintiff in the transaction, by means of which it became possessed of the forged certificate, seems to be satisfactorily established. Hofele was a stranger to the

officers of the bank, and they had no knowledge of his business relations with Allen, or that the latter was in any way interested in the proposed loan. Before acting upon Hofele's application for a discount, the plaintiff's president sent its confidential clerk to the office of the defendant with the certificate, who, pursuant to instructions, showed it to the person in charge of the office, who was then unknown to the clerk, but who proved to be Allen, its secretary and treasurer, and who was asked if it was genuine and all right, and if Hofele was a stockholder of the company, to which an affirmative reply was given, and a description of Hofele, from which the bank might identify him as the person who had presented the certificate, and sought the loan upon the strength of it. The clerk reported the result of the interview to the plaintiff's officers, who thereupon discounted Hofele's note for the sum named payable in three months, and accepted the certificate as collateral security in the usual form for its payment, and for all other present or future demands of the bank against him. The note was renewed from time to time, and increased in amount, and some smaller notes given, until his indebtedness amounted to thirty-five thousand dollars and upwards. Meanwhile the plaintiff had taken as additional security a like certificate for fifty shares, to which the signature of the defendant's president had also been forged, and which was first received as security for a loan of five thousand dollars. This loan was afterwards consolidated with the other loans, and became a part of the total indebtedness for which both certificates were held as security. Upon the pledge of the fifty-share certificate, the plaintiff made no inquiries of the defendant or of any of its officers with reference to its genuineness.

In July, 1889, Hofele ordered the plaintiff to sell the two certificates, and signed the usual blank transfer or power of attorney for that purpose upon the back of them. When they were first hypothecated, he had executed a separate power of attorney authorizing plaintiff to sell and transfer them in case of default in the payment of the loans. The certificates were sold by plaintiff's brokers, and the net sum of \$43,890 received and placed to Hofele's credit, and his indebtedness charged to his account, leaving an apparent balance due him of \$8,479.

When the certificates were presented by the purchasers at the office of defendant for transfer, it was refused upon the

ground that they were forged and spurious, and the treasurer and transfer agent wrote across their face in red ink the words, "No good," and added their official signatures to the statement. The plaintiff then refunded to the purchasers the amount paid upon the sale of the certificates, and took an assignment from them of all rights of action which they had against the defendant; and upon the refusal of the defendant to recognize the certificates as valid evidences of title to its shares of stock, this action was brought, in which the plaintiff has recovered for its loss on account of the invalidity of the 160-share certificate, and the defendant alone has appealed.

With respect to this certificate, we fail to discover any omission on the part of the plaintiff which would impeach its character as a *bona fide* holder. It made inquiry at the office of the defendant, where its books and records were kept, and of the officer in charge, whose duty it was to furnish correct information upon the subject, and it had no reason to suspect that the assurances it received were misleading or false, or that the officers of the defendant had entered into a conspiracy with Hofele to defraud the public.

It resorted to the only source of verification of the truth of Hofele's statements which was readily accessible; and it exercised all the care and vigilance which a prudent man would be expected to exhibit in the ordinary course of the business in which it was engaged. There was no circumstance proven which required a display of greater diligence. Nor were the rights of the plaintiff affected by the sale of the certificates and their redelivery to the plaintiff upon a refund of the proceeds of the sale to the purchasers. Though nominally sold on the account of Hofele, the plaintiff was the real party in interest in the transaction. There was an implied guaranty of the genuineness of the certificates, which the vendor might be required to make good, and as the plaintiff had received the fruits of the transaction, the consideration of which had failed, it could not lawfully withhold them from the purchasers when restoration was demanded. The purchasers were also *bona fide* holders of the certificates, and the plaintiff by their assignment acquired the right to the enforcement of whatever remedies they might have in that capacity against the defendant, although it was then aware of their fraudulent issue. While certificates of stock in railroad and other business corporations do not possess the qualities of commercial



paper in the full sense of the term, yet as evidences of title, when the transfer indorsed thereon is signed in blank by the shareholder, they become, in effect, so far as the public is concerned, as if they had been issued to bearer. They are then readily transferable by delivery, and have an element of negotiability which renders them an important factor in the financial and commercial transactions of the country. They may be and are frequently listed upon the stock exchanges, and their sales represent a large proportion of the daily business of these bodies.

The plaintiff must, therefore, be accorded whatever advantage belongs to a holder in good faith of a chose in action of this character, and we have only to consider how far the defendant is responsible for the acts and representations of the officers, by means of which Hofele was enabled to obtain the plaintiff's money upon the faith of paper apparently valid, but in fact worthless.

The defendant was incorporated under the general railroad law, originally with a capital of six hundred thousand dollars, afterwards increased to seven hundred and fifty thousand dollars, all of which had been issued, excepting twenty shares, before 1870. Its books relating to the issue and transfer of stock consisted of a certificate book, a transfer book and a stock ledger, which were all kept by the secretary, and were in his immediate custody; but in his official capacity and work, he was subject to the supervision of the president, and all the officers were under the general control and management of a board of directors. It is apparent from the evidence that the secretary was, *ex officio*, the transfer agent of the company. At least, from 1868 to the present time the secretary had acted as such agent, and there is no provision in the by-laws for the separate appointment of a transfer agent, and the only reference to such an officer is in a single paragraph in section fifteen, where it is provided that "all certificates shall be issued and signed by the president and treasurer and countersigned by the transfer agent, under such other regulations as the board of directors or finance committee may from time to time prescribe." Whether the secretary was by virtue of his office transfer agent is not material, but the fact remains that so far as the evidence discloses anything upon the subject, he always discharged the duties of that office, and in the performance of the work was fitly characterized as the transfer agent of the company. When stock was issued, either in pay-

ment of an original subscription or upon its transfer from one person to another, the engraved certificate was taken from the certificate book and filled up by the secretary, presented to the president and treasurer, who signed it, and it was then countersigned by the secretary as transfer agent and sealed by him with the seal of the corporation and delivered to the stockholder or transferee named in it. The secretary at the same time inserted the proper data in the stub remaining in the certificate book, and made the necessary entries in the transfer book and the stock ledger. The certificate received by plaintiff from Hofele had been taken from the certificate book. It appeared upon its face to be perfect and regular in every respect. It had the name of the president and treasurer signed to it, was countersigned by the transfer agent, and bore the impress of the corporate seal. It recited that Hofele was the owner of one hundred and sixty shares of one hundred dollars each of the capital stock of the company, contained the usual provisions in regard to the mode of transfer, and declared that no certificate should bind the company unless signed by the president and countersigned by its treasurer and transfer agent. The *in testimonium* clause asserted that the defendant had caused that particular certificate to be signed by its president and countersigned by its treasurer and transfer agent and sealed with its corporate seal February 6, 1885. It is very clear that under the regulations adopted by the defendant, and pursuing the mode of procedure which it had prescribed, the final act in the issue of a certificate of stock was performed by its secretary and transfer agent, and that when he countersigned it and affixed the corporate seal and delivered it with the intent that it might be negotiated, it must be regarded, so long as it remained outstanding, as a continuing affirmation by the defendant that it had been lawfully issued, and that all the conditions precedent upon which the right to issue it depended had been duly observed. Such is the effect necessarily implied in the act of countersigning. This word has a well defined meaning both in the law and in the lexicon. To countersign an instrument is to sign what has already been signed by a superior, to authenticate by an additional signature, and usually has reference to the signature of a subordinate in addition to that of his superior by way of authentication of the execution of the writing to which it is affixed, and it denotes the complete execution of the paper: Worcester's Dictionary. When, therefore, the defend-

ant's secretary and transfer agent countersigned and sealed this certificate and put it in circulation he declared in the most formal manner that it had been properly executed by the defendant, and that every essential requirement of law and of the by-laws had been performed to make it the binding act of the company. The defendant's by-laws elsewhere illustrate the application of the term when used with reference to the signatures of its officers. In section 10 it is provided that all moneys received by the treasurer should be deposited in bank to the joint credit of the president and treasurer, to be drawn out only by the check of the treasurer, countersigned by the president. If the president should forge the name of the treasurer to a check and countersign it and put it in circulation and use the proceeds for his individual benefit, we apprehend it would not be doubted that this would be regarded as a certificate of the due execution of the check, so far as to render the company responsible to any person who innocently and in good faith became the holder of it.

This result follows from the application of the fundamental rules which determine the obligations of a principal for the acts of his agent. They are embraced in the comprehensive statement of Story in his work on Agency, 9th ed., sec. 452, that the principal is to be "held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of, such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies *respondeat superior*, and is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency." It is true that the secretary and transfer agent had no authority to issue a certificate of stock except upon the surrender and cancellation of a previously existing valid certificate, and the signature of the president and treasurer first obtained to the certificate to be issued; but these were facts necessarily and peculiarly within the knowledge of the secretary, and the

issue of the certificate in due form was a representation by the secretary and transfer agent that these conditions had been complied with, and that the facts existed upon which his right to act depended. It was a certificate apparently made in the course of his employment as the agent of the company and within the scope of the general authority conferred upon him, and the defendant is under an implied obligation to make indemnity to the plaintiff for the loss sustained by the negligent or wrongful exercise by its officers of the general powers conferred upon them: *Griswold v. Haven*, 25 N. Y. 599; 82 Am. Dec. 380; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Titus v. President etc.*, 61 N. Y. 237; *Bank of Batavia v. New York etc. R. R. Co.*, 106 N. Y. 199; 60 Am. Rep. 440. The learned counsel for the defendant seeks to distinguish this case from the authorities cited, because the signature of the president to the certificate was not genuine; but we cannot see how the forgery of the name of the president can relieve the defendant from liability for the fraudulent acts of its secretary, treasurer, and transfer agent. They were officers to whom it had intrusted the authority to make the final declaration as to the validity of the shares of stock it might issue, and where their acts, in the apparent exercise of this power, are accompanied with all the *indicia* of genuineness, it is essential to the public welfare that the principal should be responsible to all persons who receive the certificates in good faith, and for a valuable consideration, and in the ordinary course of business, whether the *indicia* are true or not: 2 Beach on Private Corporations, 790; *North River Bank v. Aymar*, 3 Hill, 262; *Jarvis v. Manhattan Beach Co.*, 53 Hun, 362; *Tome v. Parkersburg Branch R. R. Co.*, 39 Md. 36; 17 Am. Rep. 540; *Baltimore etc. R. R. Co. v. Wilkens*, 44 Md. 28; 22 Am. Rep. 26; *Western Md. R. R. Co. v. Franklin Bank*, 60 Md. 36; *Commonwealth v. Reading Sav. Bank*, 137 Mass. 431; *Holden v. Phelps*, 141 Mass. 456; *Manhattan Beach Co. v. Harned*, 27 Fed. Rep. 486; *Shaw v. Port Phillip etc. Co.*, 13 Q. B. Div. 103.

The rule is, we think, correctly stated in Beach on Private Corporations, vol. 2, sec. 448, p. 791: "When certificates of stock contain apparently all the essentials of genuineness, a *bona fide* holder thereof has a claim to recognition as a stockholder, if such stock can legally be issued, or to indemnity if this cannot be done. The fact of forgery does not extinguish his right when it has been perpetrated by or at the instance



of an officer placed in authority by the corporation, and intrusted with the custody of its stock books, and held out by the company as the source of information upon the subject."

Having reached the conclusion that the defendant is liable for the representations of its officers appearing upon the face of its certificate, over their official signature, and under the seal of the corporation, we do not deem it necessary to consider the effect of the oral representations made at the office of the company to the plaintiff's clerk, except so far as they bear upon the question of the good faith of the plaintiff in the acquisition of the certificate.

The judgment and order must be affirmed with costs.

All concur.

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**AGENCY — LIABILITY OF PRINCIPAL.** — The principal is liable for all the acts of the agent done within the scope of his authority: *Busch v. Wilcox*, 82 Mich. 336; 21 Am. St. Rep. 563, and note; *Kircher v. Conrad*, 9 Mont. 191; 18 Am. St. Rep. 731, and note; *Cannon v. Henry*, 78 Wis. 167; 23 Am. St. Rep. 399, and note. The principal is liable for the agent's fraud and false representations: *Haskell v. Starbird*, 152 Mass. 117; 23 Am. St. Rep. 809, and note; *Griswold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878, and note; note to *Wachter v. Phoenix Ass. Co.*, 19 Am. St. Rep. 604; *St. Louis etc. Gutter Co. v. Vinton etc. Machine Co.*, 79 Iowa, 239; 18 Am. St. Rep. 366, and note; *Cleveland etc. R'y Co. v. Closser*, 126 Ind. 348; 22 Am. St. Rep. 593; and for his negligence: *Nesbit v. Town of Garner*, 75 Iowa, 314; 9 Am. St. Rep. 486.

**CORPORATIONS — LIABILITY FOR WRONGS OF AGENTS OR OFFICERS.** — A corporation is liable for the acts of its agents acting within the scope of their authority the same as individuals are: *Pennsylvania R. R. Co. v. Vandiver*, 42 Pa. St. 365; 82 Am. Dec. 520, and note; *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312, and note. Corporations are liable therefore for the tortious acts of their agents: *Moore v. Fitchburg R. R. Corp.*, 4 Gray, 465; 64 Am. Dec. 83, and note; and for his fraudulent conduct: *Van Hook v. Somerville Mfg. Co.*, 5 N. J. Eq. 633; 45 Am. Dec. 401, and note; *Ware v. Barataria etc. Canal Co.*, 15 La. 169; 35 Am. Dec. 189, and note; note to *Commercial Bank v. Kortright*, 34 Am. Dec. 329.

**CORPORATIONS — LIABILITY FOR FRAUDULENT ISSUE OF STOCK.** — Fraudulent stock certificates give no rights of their own force, but the act of the corporation in issuing them estops it from denying their validity when they have been accepted in good faith by others: *Appeal of Kisterbock*, 127 Pa. St. 601; 14 Am. St. Rep. 868, and note. A corporation is liable in damages to the purchaser for value and in good faith of a certificate of its stock which was fraudulently issued by its treasurer: *Allen v. South Boston R. R. Co.*, 150 Mass. 200; 15 Am. St. Rep. 185, and note; see also *Farrington v. South Boston R. R. Co.*, 150 Mass. 406; 15 Am. St. Rep. 222, and note.

## DEAN v. DRIGGS.

[137 NEW YORK, 274.]

**WAREHOUSE RECEIPTS — WARRANTY IMPLIED BY AS TO NATURE OF ARTICLES.**

If a warehouseman issues a receipt purporting to be for a specified number of barrels of Portland cement, all that he asserts thereby is that he has received merchandise in barrels bearing the same outward appearance as do barrels in which are packed merchandise of the character described in the receipt, and that there is nothing unusual or out of the ordinary way of business in the marks, appearance, signs, labels, or character of the barrels from that in which the goods of the character described in the receipt are usually transported, and that they have been represented to him and that he believes them to be as described.

**WAREHOUSE RECEIPTS. — REPRESENTATIONS OF A WAREHOUSE RECEIPT OR BILL OF LADING WHICH SHOULD BE HELD TO BE WARRANTIES,** should be confined usually to those which the warehouseman or carrier may ordinarily be assumed to have knowledge of or which he or his agents ought to know.

**WAREHOUSEMAN — LIABILITY OF. —** A statute prohibiting a warehouseman from issuing receipts for any goods unless actually received in his store or upon his premises, does not transform him from a mere depositary to an insurer of the kind and quality of goods deposited with him; nor does it make him answerable for packages receipted for as containing a certain article and found upon examination to be spurious.

**ACTION** by transferees of warehouse receipts to recover damages resulting to them from property described in such receipts as Portland cement being a spurious article. The receipts issued by defendants were in the following form:—

“M. S. DRIGGS & Co.’s WAREHOUSE.

“NEW YORK, March 28, 1885.

“Received from Max Von Angern, ex-Grimaldo, in store 278–80 South Street, to be held by us on storage, and to be delivered to his order on return of this receipt and payment of storage and charges, fifteen hundred barrels Portland cement.

Negotiable. No. 1394. Marked  
  
 Duty paid.

1,500 Bbls.

Storage per month 4.

Labor.

“M. S. DRIGGS & CO.”

The plaintiffs loaned money, taking the warehouse receipts as collateral, believing the property described in them Portland cement. It was not cement at all but was a worthless substance packed in barrels in the same manner as Portland cement.

The defendant requested the court to charge the jury that plaintiffs could not recover unless he knew the barrels did

not contain Portland cement, and willfully issued his receipts knowing that fact, and that a warehouseman incurs no liability for issuing a receipt in which he describes goods according to their outward appearance, marks, and description, unless he has reason to believe such description to be false. The court denied the defendant's request and, on the contrary, informed the jury that the plaintiff should recover unless the article in the barrels was Portland cement.

Verdict and judgment for plaintiffs. Defendant appealed.

*John Berry*, for the appellant.

*L. E. Warren*, for the respondent.

PECKHAM, J. The question in this case is as to the meaning of the receipt issued by the defendant. Does it mean that the warehouseman acknowledges and asserts the fact that the merchandise delivered to him and consisting of twenty-five hundred barrels does in truth contain the genuine article, Portland cement, or does it mean that the warehouseman has received that number of barrels bearing the usual appearance of barrels in which Portland cement is packed and with the usual marks and signs thereon, and represented to him to be Portland cement, and which he in good faith supposes to be that article?

The defendant, at the time he received this merchandise, was a warehouseman, and in connection with his business he had a bonded warehouse under license from the United States government, and in it he received on storage imported, dutiable merchandise which could not be delivered until the duty was paid. The goods in question came to the defendant from the vessels named in the two receipts, which vessels came from Marseilles, France, from which place Portland cement is imported. The barrels came on trucks licensed to transport bonded merchandise, and when they came in the duty had not been paid. They were stored in the bonded warehouse under the joint custody of the defendant and a government officer. The duty was subsequently paid. The defendant testified that the warehouseman had no authority to open goods stored in a bonded warehouse without permission of the government.

These barrels the defendant testified were in character, appearance, and style, the same as those in which Portland cement was imported. The brand on the barrel heads was "Wil, Neight & Co., Portland Cement, Trade-Mark." There

was also a label on each barrel to the same effect, and also some other signs and letters, all of them consistent with the idea that the barrels contained genuine Portland cement, and in brief the whole external appearance of the barrel was that of one in which Portland cement was usually imported. Upon these facts, the court charged as above stated.

We think the language of the receipts is merely descriptive of the barrels which defendant received.

It is meant to describe their outside appearance and that they were in truth marked and represented to be Portland cement. It cannot be that the language properly construed could mean that the warehouseman warranted such contents. If that were the meaning to be attributed to such a statement, the warehouseman could be safe only after he had examined critically and cautiously the contents of each box or barrel which he received. To do so would consume a great deal of time, and frequently necessitate the employment of experts who dealt in or were judges of the particular article claimed to be delivered, and they would have to make such an examination of the article as its nature demanded before an opinion could be arrived at.

Any one at all familiar with the business of a warehouseman knows that he could not transact business if he were first to examine the contents of each package, barrel, or box of merchandise which was delivered to him and so packed as to cover and conceal the real nature of the goods delivered. The warehouseman cannot be supposed to know the contents of barrels or boxes so delivered to him. All he can be fairly charged with asserting by the mere acknowledgment of the receipt of merchandise thus described is that the box or barrel in which it is packed bears the same outward appearance as does the box or barrel in which merchandise of the character described is usually carried, and that there is nothing unusual or out of the ordinary way of business in the marks, appearance, signs, labels or character of the barrel or box from that in which goods of the character described are usually transported, and that the articles have been represented to him and that he believes them to be as described.

It has been urged that a warehouseman may easily protect himself from any liability by signing a receipt which in so many words acknowledges the receipt of barrels or boxes said to contain certain described merchandise, but the contents of which are unknown by the warehouseman, and which, therefore, he



does not warrant. This is true, but it does not answer the objection to a warranty which arises out of the transaction itself. In its very nature it seems to me plain that no warranty as to contents can reasonably be implied under these circumstances from the use of such language as these receipts contain. Representations in a bill of lading or warehouse receipt which should be held to be warranties should be confined usually to those which the carrier or warehouseman may ordinarily be assumed to have knowledge of, or which he or his agents ought to know. As was said by Mr. Justice Hoar in *Sears v. Wingate*, 3 Allen, 103, at 107, when speaking of a bill of lading, the master is estopped to deny the truth of the statements to which he has given credit by his signature, so far as those statements relate to matters which are or ought to be within his knowledge.

It is known and understood that the business of a warehouseman is not that of an inspector of property delivered to him, nor is he an insurer of the contents of packages. It is no part of the duty of the defendant as a warehouseman to have property inspected or its quality warranted, and no proceedings are supposed to take place to enable a warehouseman to become acquainted with the contents of packages for the very reason that in his business it is unimportant what such contents are. The general object of giving a description of the property in the receipt, is for purposes of identification only, so that the identical property delivered to the warehouseman may be delivered back by him upon the return of the warehouse receipt, and for such purpose it is sufficient to describe the property as it by its external appearance seems to be. Such a description is not calculated to mislead anyone in regard to the actual contents of the package. When the warehouseman described in this case the outward appearance and marks and the numbers on the barrels, he did warrant the correctness of his description so far as to say that the numbers stated were in reality delivered and that they were marked as stated, and also that there was nothing unusual in the appearance of the barrels or in the direction, marks, or labels upon the merchandise which would reasonably lead to any suspicion that the contents were not what they were represented to be.

A warehouse receipt does not differ in this respect from a bill of lading. In the one case the warehouseman agrees to keep, and in the other case the carrier agrees to transport the

goods which he receives, but the acknowledgment of delivery either to the warehousman or to the carrier is essentially the same and the same rules govern in the interpretation of the receipt. In *Hastings v. Pepper*, 11 Pick. 41, Shaw, Ch. J., said that the acknowledging to have received the goods in question in good order and well conditioned would be *prima facie* evidence that as to all circumstances which were open to inspection and visible, the goods were in good order, but the carrier could show that a loss did in fact proceed from a cause existing at the time of the execution of the bill of lading, if it were not then open and apparent, and if he showed that fact it would be a defense. This statement is approved in *Nelson v. Woodruff*, 1 Black, 156 at 160.

In *Warden v. Greer*, 6 Watts, 424, Huston, J., in delivering the opinion of the Pennsylvania supreme court, held that generally a bill of lading could not be contradicted, but that if a captain were innocently to receive a barrel of corn instead of a barrel of coffee, or a barrel of cider instead of Madeira wine, or a package of cotton linen instead of flaxen linen; it would seem that his bill of lading would not and ought not to exclude him from proving this, as the captain does not open or otherwise examine the casks.

We think the rule is clearly expressed in *Hale v. Milwaukee Dock Co.*, 23 Wis. 276, 99 Am. Dec. 169, on second appeal, 29 Wis. 482, 9 Am. Rep. 603. It is there stated (29 Wis. at 489) that the warehouseman or carrier in regard to packages which are so covered as to conceal their contents, receipts them upon the representation of the bailor and upon the external appearance corresponding therewith as to contents. He is not supposed to have any actual knowledge of their contents and the language of the receipt is not to be so understood. It is a warranty that the barrels are so represented and so appear to him to the extent of his knowledge or means of information on the subject, and as they are represented and appear to him, so he represents or describes them in his receipt.

In the Wisconsin case here alluded to, the warehouseman receipted for fifty-four barrels of mess pork. The supreme court held the defendant at liberty to show its readiness to redeliver the identical property delivered to it and that the barrels when the defendant took them and unknown to it really contained nothing but salt. A verdict for the plaintiff (who was a *bona fide* holder for value) was, therefore, set aside and a new trial granted.

It was stated upon the argument here that a different doctrine prevails in this state, and counsel cited as authority for such claim, Jones on Pledges, sec. 252. The learned author does so remark, and the cases of *Meyer v. Peck*, 28 N. Y. 590, *Armour v. Michigan Cent. R. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603, and *Miller v. Hannibal etc. R. R. Co.*, 24 Hun, 607, are cited as authority for such alleged difference.

In *Meyer v. Peck*, 28 N. Y. 590, the question did not really arise. The facts showed the draft was paid by the defendant because drawn upon him by his own agent, and without the least reference to the bill of lading. Chief Judge Denio referred to the principle as well understood, that a bona fide indorsee for value of a bill of lading could claim the benefit of an estoppel in his favor as against the carrier, and he said that such indorsee could rely upon the quantity of the merchandise acknowledged in the bill, and might compel the carrier to account for the same, whether it was placed on board or not; but it is clear enough that a carrier thus situated ought to be estopped from showing that a less quantity was received, because it was his own carelessness in certifying to a fact which was, or at any rate ought to have been, within his own or his agent's knowledge. When one has advanced money upon the faith of a statement thus within the knowledge of the person making it, I think all would agree that the latter cannot be heard to dispute it. A carrier or a warehouseman is not, however, supposed to know the contents of merchandise so packed as to conceal such contents, and therefore his ignorance cannot be said to be carelessness. In *Armour v. Michigan Cent. R. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603, the same principle was announced. The defendant acknowledged in its bill of lading the receipt of a quantity of lard which in fact it had not received. Drafts were attached to the bill, and were paid on the faith of defendant's acknowledgment in the bill of the receipt of the lard. It was held that the defendant was bound by the acts of its agent who signed the bill of lading, and that it was estopped from denying the receipt of the lard.

It would seem as if this decision were right upon the plainest principles of justice. A written declaration was made that acknowledged the receipt of property which in fact had not been delivered, and which defendant's agent knew had not been delivered, but trusted that it would be. It was a statement of that nature which either was, or necessarily ought to

have been, within the personal knowledge of the defendant's agents, and as to such a statement another person had the right to believe it and act as if it were true.

The case of *Miller v. Hannibal etc. R. R. Co.*, 24 Hun, 607, was reversed in this court in 90 N. Y. 430, 43 Am. Rep. 179.

The point under discussion in that case, and the only one to which the attention of this court on appeal was directed, was whether the written and printed part of the bill of lading should be read together, so that the printed part, which acknowledged the receipt of the merchandise "in apparent good order, contents unknown," should be construed in connection with the written part, which acknowledged the receipt of "30 bbls. eggs." It was held the whole should be construed together, and that the bill simply admitted the receipt of 30 bbls., described as containing eggs, but the actual contents of which were unknown. The judge, in the course of his opinion, said that, if the description of the article were a representation that the barrels contained eggs, plaintiffs would have the right to recover, citing the case of *Meyer v. Peck*, 28 N. Y. 590. It was held that it was not. Although there was in the bill of lading the added expression, "contents unknown," yet there was no decision that, in the absence of such expression, the description would have amounted to a representation. That question was not before the court, was not in fact discussed directly, and was not decided. For the reasons already suggested, it would seem improper to so regard the description of merchandise which, when received, is so covered and packed as to securely conceal the actual contents from the carrier or warehouseman.

In *First Nat. Bank v. Dean*, 137 N. Y. 110, there was a direct written representation on the receipts that the brandy was stored in a "free warehouse" of defendant's, which expression means that the revenue tax or import duties have been paid on all goods there deposited. This was a representation of a fact which was within the knowledge of the defendant, and we held that he could not be permitted to show that the representation was untrue as against a *bona fide* holder for value of the certificates, who had purchased in reliance upon the representation that the brandy was "free." The real point in dispute there was, whether the plaintiff occupied the position of such a holder.

From this review of the authorities upon which it was claimed that the courts of New York had taken an excep-



tional stand, I think it quite plain that in truth no exceptional doctrine obtains here. I think that we, in common with the courts of other states, hold the carrier or warehouseman estopped in regard to any error or misstatement in the bill or receipt only when it amounts to a representation as to a fact which was, or in the ordinary course of business ought to have been, within his knowledge, and which, therefore, such a third person acting reasonably would have a right to rely and act upon.

The court below, however, has sustained the right of the plaintiffs to recover in this case chiefly upon the provisions of the factor's act of 1858, as amended by that of 1866: Laws 1858, c. 326; Laws 1866, c. 440. The first section of the amended act prohibits a warehouseman (among others) from issuing a receipt for any goods unless such goods shall have been actually received into the store or upon the premises of such warehouseman at the time of issuing the receipt.

The court held that if the goods were not Portland cement then the receipts issued by the defendant were untruthful and a violation of the above cited first section of the act.

We think the act was not intended to and does not reach this case. It was not passed in order to transform a warehouseman from a mere depositary to that of an insurer of the kind and quality of goods deposited with him. It was not intended to alter the law in regard to the character of such a representation as is contained in these receipts or to make it anything other than a description of property as above stated. We are quite clear the act does not cover such a case as this if we assume the defendant was honestly mistaken when he described the goods actually received by him as Portland cement. The court withdrew from the jury the question of the knowledge of the defendant as to the character of the merchandise received by him as entirely immaterial, and hence we must assume his ignorance in discussing his liability.

The English statute to amend the law relating to bills of lading, passed in 1855 (18 & 19 Vict. c. 111), recited that "it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid." It was then enacted that bills of lading in the hands of a consignee or indorsee for

value, representing goods to have been shipped on board a vessel, should be conclusive evidence of such shipment as against the master, notwithstanding the goods or some part had not been so shipped unless the indorsee had notice, etc.

The statute evidently referred to a case where there had been no delivery of any goods or only a part delivery of the amount receipted for, and we think the section of the acts of the legislature of this state above cited refers to the same kind of omission. Signing a receipt for goods actually delivered, but known by the signer to be something other than that described in the receipt would be a fraud, and amount to a false representation for which the signer would be liable in any event. But this issue was not submitted to the jury.

It is urged that such a receipt is made negotiable. We do not see that its negotiability is of the least importance in the decision of this question. That there is a certain kind of negotiability attached to this kind of a receipt and to a bill of lading is not disputed: *Dows v. Perrin*, 16 N. Y. 325; *Dows v. Greene*, 24 N. Y. 638; *Lickbarrow v. Mason*, 1 H. Bl. 357; 6 East, 21; 1 Smith's Lead. Cas., 8th Am. ed., 1159, and notes; Factors' Acts, sec. 6, above cited.

It is not the same thing as the negotiability of a promissory note or bill of exchange. It could not be in the nature of things, but by the indorsement and delivery of such a receipt or bill of lading, the indorsee for value and without notice is entitled to hold the property represented thereby under the circumstances stated in the above mentioned acts.

In this case the plaintiffs are entitled to be treated as the owners of the property which was deposited with defendant, and they are entitled to its redelivery to them upon payment of the charges, just the same as the original owner would have been but for the transfer. When, however, the plaintiffs demand, not the identical property which was deposited with the defendant, but such property as would have been deposited had the description in the receipt been correct, the right to demand such a delivery must be based not upon the mere transfer of the receipt, but upon the principle of estoppel; such a principle as precludes a party who has made a representation upon which another has acted from denying the truth of that representation. Obviously the first inquiry must be whether such a representation has been made, and when it turns out that it has not, the estoppel falls to the ground. We have seen that the character of the representa-

tions made by defendant was nothing more than that he had in fact received twenty-five hundred barrels of what purported to be and was described to him as and what he believed was Portland cement, packed as such cement was usually packed and bearing the outward *indicia* of such article. There is in such case no room for the application of that principle which decrees that when one of two equally innocent persons must suffer from the fraud of a third, that one should suffer who has enabled the third person to commit the fraud.

Upon the proper construction given to the language of the receipt the representation contained therein was true. If, however, the plaintiffs chose to regard a mere description of the outward appearance of property packed in barrels as a representation and warranty by defendant that the contents were actually as described in the receipt and to advance money upon the faith of such alleged representations, the fault lies wholly with the plaintiffs, who placed a degree of faith in the correctness of the description which was totally unwarranted from the nature of the transaction and for which the defendant ought not to be held responsible.

Our conclusion is that the trial judge erred in his charge to the jury above quoted, and in his refusals to charge as above requested, and for such errors the judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

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In the case of *Farmers' Nat. Bank v. Dean*, 137 N. Y. 110, referred to in the opinion of the principal case, the warehousemen had issued their receipt for certain barrels of brandy, and on the top of the receipt had specified the location of their several warehouses and classed them as bonded and free, and in such classification had described the places wherein the brandy was stored as "free warehouses." These terms, as understood in commercial parlance, signify that the revenue taxes and the importing duties on the property stored therein has been paid. The classification in the receipt was incorrect, and the stores in which the brandy was stored were not free warehouses. On the contrary, the brandy described in the receipt was subject to the payment of internal revenue taxes, and persons who acquired the warehouse receipts in good faith would be greatly damaged if required to pay such taxes. It was assumed by the court, and apparently conceded by counsel that the warehousemen were responsible for damages suffered by any *bona fide* assignee of the persons to whom the receipts were issued. The opinion of the court, however, was devoted almost exclusively to the discussion of the question whether or not the plaintiffs acquired the warehouse receipts under such circumstances as to entitle them to protection as *bona fide* purchasers thereof, and that question being determined in their favor.

the court adjudged the warehousemen to be liable to them for the injuries resulting from the warehouse being styled "free" instead of "bonded" warehouses.

**WAREHOUSE RECEIPTS — WARRANTY IMPLIED AS TO NATURE OF ARTICLES.** — A warehouseman is estopped from denying the description of property in his receipt so far as it relates to matters which are or ought to be within his knowledge, but not in respect to matters not open to ordinary inspection and visible: *Hale v. Milwaukee Dock Co.*, 23 Wis. 276; 99 Am. Dec. 169, and note. The obligation of a warehouseman is discharged by delivering the property actually received in store, although it does not answer the description of the receipt: *Hale v. Milwaukee Dock Co.*, 29 Wis. 492; 9 Am. Rep. 603. A warehouseman's receipt is a contract of the parties as to the very property stored: *Leonard v. Dunton*, 51 Ill. 482; 99 Am. Dec. 568. See note to *Robson v. Swart*, 100 Am. Dec. 243, as to the conclusiveness of a warehouseman's receipt against him on the question of quality.

## PAGE v. KREKEY.

[137 NEW YORK, 307.]

**A GUARANTY OBTAINED FROM ONE WHO WAS INTOXICATED** when he signed it, who was unable to read and was ignorant of its contents, and who affixed his guaranty upon a false representation that it was an application for a license, is invalid in the hands of any person receiving it with notice of the means by which it was procured.

**GUARANTY.** — A CHANGE OR ALTERATION in a contract to which a guaranty was applicable discharges the guarantor whether material or not. Hence if A guarantees that if B does not buy and pay for certain articles to be thereafter furnished, the latter will deliver them at R, and subsequently goods are shipped to B, which if he does not pay for, he is to deliver to M, the guaranty does not apply to the latter contract, and A is not answerable for the nondelivery of the goods to M.

**EVIDENCE THAT DEFENDANT COULD NOT READ, ERROR IN REJECTING.** —

If defendant seeks to escape from an instrument signed by him, on the ground that he could not read and its contents were misrepresented to him, and after testifying that he is unable to read, produces two other witnesses to testify to the same fact, but their evidence is excluded, this exclusion is reversible error if the defendant's inability to read is not conceded, and the court, in its charge to the jury, informs them that they are not bound to take the defendant's statement because of his interest in the result of the suit. The defendant, if the question was still an open one, had the right to fortify his evidence in any way that he could.

**ACTION upon a guaranty.** Verdict and judgment for the plaintiff.

*Edward W. S. Johnston*, for the appellant.

*Philip G. Bartlett*, for the respondent.

O'BRIEN, J. The judgment from which this appeal is taken was recovered upon a guaranty, signed by the defendant and



sent to the plaintiff, a resident of Vermont, by mail. The plaintiff had business transactions with one Bernard Thinnies prior to the guaranty. The latter was a tanner in Brooklyn, and the plaintiff, a dealer in green calf skins, had shipped to him skins at various times to tan and, unless he elected to buy them at a certain price, then to return them, so tanned to the plaintiff, or deliver them according to his order. The following is the instrument upon which the action was brought:—

“BROOKLYN, N. Y., March 14, 1889.

“Mr. C. S. PAGE, Hyde Park, Vt.:

“I am well acquainted with B. A. Thinnies, tanner, of this place. I believe him to be a good tanner, honorable and straightforward in his dealings and attentive to business, and if you will from time to time send hides and skins to him, I hereby guarantee that he will not convert or misappropriate them, but will well and faithfully tan them, and, if he does not buy and pay you for them within the time agreed upon between you, I agree that he shall deliver them at Rose, McAlpine & Co., New York City, N. Y.

“Notice of your acceptance is hereby waived.

“JOSEPH KREKEY,

“P. O. address, 248 Freeman St.”

It was shown at the trial that the defendant was an illiterate man, who could not read nor write, except possibly to sign his name. That he signed the paper at the request of Thinnies when in a state of intoxication, and under the false representation that it was an application for a license under the excise law. The principal part of the instrument was in print, probably prepared by the plaintiff, or under his direction. At all events it was presented to the defendant by Thinnies, the representations as to its character were made by him, and when he procured the defendant's signature, he sent it to the plaintiff, who, so far as appears, never met or had any personal transaction with the defendant. The plaintiff's claim against Thinnies, exclusive of interest, was \$2,122.79 for skins shipped to him under six written contracts, bearing various dates between May 1, 1889, and July 1, 1889. All of these contracts provided that in case of failure to pay for the goods they should be delivered to the firm of Myers and Gordon. The only question submitted to the jury was whether the defendant, in signing the paper, observed proper care and caution, or was

chargeable with negligence. In determining the legal effect of this paper, and the obligation thereby created against the defendant, we must assume that he signed it when intoxicated, that he was unable to read it, that he was ignorant of its contents, and that he fixed his signature to it upon the false representation that it was an application for a license.

There can be no doubt that, as between the parties to this transaction, the instrument was void. It was also invalid in the hands of any person who received it with knowledge or notice of the circumstances under which the defendant's signature was obtained. Sometimes releases, discharges, and other instruments are procured by the fraud of a third person, without the knowledge or participation in the fraud of the party to be benefited who, nevertheless, will not be permitted to reap the benefit of a fraud, though he was himself innocent. The case of *Bedell v. Bedell*, 37 Hun, 419, is an example of this class of cases. The decisions in these cases rest upon principles obviously just and reasonable. When the fraudulent act is not imputable to the person claiming the benefit of the instrument, upon the principle of agency, he is generally debarred from enforcing it upon the ground of the fraudulent origin of the paper and the fact that he has lost nothing upon the faith of it. Without examining all the cases cited by the learned counsel for the defendant, it may be assumed that in other jurisdictions the courts have held that in a case like this the instrument could not be enforced any more than if the signature of the defendant had been forged. That is the principle which is invoked in behalf of the defendant to relieve him from all liability, but it has not received the sanction of the courts of this state.

While it has been quite uniformly held here that an instrument procured by fraud, trick, or artifice, or executed by a party in such a state of intoxication as to be incapable of consenting or contracting, is invalid as between the parties to the transaction, these facts do not always constitute a defense as against an innocent person, who is himself free from any fraud or negligence, and who has advanced money or property to another upon the credit afforded by an instrument like this. But even in such a case, the person who has signed the paper is not liable upon it unless it is found that he failed to observe proper care and caution and was chargeable with negligence in attaching his signature. If he actually signed the paper, though procured to do it by fraud, and is chargeable with

negligence, he is liable to an innocent party who acted to his prejudice upon the faith of the instrument. Such cases are not governed by the rules applicable to the *bona fide* holder of negotiable paper procured by fraud, but by the equitable rule that where one of two innocent parties must suffer, he who has put it in the power of a third person to commit the fraud must sustain the loss. If the defendant is to be held liable in this case, it must be upon the principle that by his misplaced confidence in Thinnes, he enabled him to obtain property from the plaintiff, who is an innocent third party: *McWilliams v. Mason*, 31 N. Y. 294; *Western etc. Ins. Co. v. Clinton*, 66 N. Y. 326; *Powers v. Clarke*, 127 N. Y. 417; *Casoni v. Jerome*, 58 N. Y. 315; Baylies on Sureties and Guarantors, 214; Burge on Suretyship, 218.

If this instrument had been a negotiable promissory note the defendant's liability to the plaintiff would depend upon the question of negligence and there does not appear to be any sound reason for a different rule in this case: *Chapman v. Rose*, 56 N. Y. 137; 15 Am. Rep. 401; *Whitney v. Snyder*, 2 Lans. 477; *National Exchange Bank v. Veneman*, 43 Hun, 241; *Fenton v. Robinson*, 4 Hun, 252.

The general principle of law upon which the case was disposed of at the trial, and upon review at general term was, in this respect, favorable enough to the defendant. The guaranty contemplated a contract between the plaintiff and defendant's principal. All the goods sent to Thinnes were in pursuance of contracts in writing. The instrument which the defendant signed guaranteed the performance of these contracts only in case they were drawn in accordance with its terms. It was contemplated that there should be a contract between plaintiff and the defendant's principal, but not a contract that in any respect differed from the terms of the guaranty. After the defendant became surety the terms of the obligation, the performance of which he guaranteed, were changed by the contract between the plaintiff and the principal. The defendant's undertaking was that if his principal did not buy the skins and pay for them, he would deliver them to Rose, McAlpine & Co. The contract subsequently executed and to which it applied bound the principal to deliver them to Myers and Gordon another party and at another place. The question is whether the contract guaranteed has not been so changed as to discharge the surety. Suppose that the contracts had been drawn and in existence when the defendant

signed the paper, then, of course, the legal effect of the guaranty would be that the principal would perform the contracts. But if the plaintiff and the principal subsequently changed them by substituting Myers and Gordon for Rose, McAlpine & Co., then we would have a plain case of a guaranty by the defendant of a contract to deliver, at a certain place changed by the parties to it by providing for delivery at another and different place. It seems to me that such a change of the obligation, to which the guaranty applied, would discharge the surety. What the defendant, by the paper, said to the plaintiff was that, if you will make a contract with my principal to send him hides and skins to tan, providing that he will tan them, with an option to buy, and if not, then to deliver to Rose, McAlpine & Co., I will be bound for the faithful performance of that contract, not for the performance of a contract to deliver at another place. Suppose that the contracts as made provided for sending to defendant's principal different property than hides or skins, or property in addition to them, would the defendant be responsible for default in its performance? It seems to me that where a party, intending to enter into a contract with another, prior to its execution secures from the other a guaranty of the performance of such contemplated contract, in which the terms upon which the surety is to be bound are specified, and the contract, when drawn, does not correspond to the terms of the guaranty the surety will be discharged from liability, for default in the contract as made. In such a case the obligation of the principal is different from that for which the surety became bound. This question seems to have been disposed of in the court below on the ground that the change was not material. But the answer to that is that the defendant's obligation is *strictissimi juris*, and he is discharged by any alteration of the contract, to which his guaranty applied, whether material or not, and the courts will not inquire whether it is or is not to his injury: *Paine v. Jones*, 76 N. Y. 278; *Grant v. Smith*, 46 N. Y. 98; *National etc. Bank Ass'n v. Conkling*, 90 N. Y. 116; 43 Am. Rep. 146; *Bangs v. Strong*, 7 Hill, 250; 42 Am. Dec. 64; *Henderson v. Marvin*, 31 Barb. 297.

The defendant was sworn as a witness at the trial, and testified that he could not read. He also called two witnesses, and offered proof by them to show that he was unable to read, which was objected to by the counsel for the plaintiff, and



excluded under exception. There was no other proof given upon this point. If the case had been submitted to the jury upon the assumption that the defendant was unable to read, and that fact had been conceded, the exclusion of the testimony of the two witnesses referred to would not have been material. The following passage from the charge of the learned trial judge in submitting the case to the jury will show that the fact was not conceded, and the case did not go to the jury upon any such assumption, but it was still regarded as a question for them to pass upon. The learned judge, after stating that the question depended upon the negligence of the defendant, and that the burden of showing the absence of it was upon the defendant, and that before they could dispose of that question they must believe the defendant's story, proceeded as follows: "He is here testifying in his own behalf to save himself from liability, and unless you are satisfied his story is true, and believe that he did sign the paper without knowing anything about it, and on the distinct false representation by Thinnes that it was a mere application for a license, the plaintiff is entitled to a verdict. . . . You are not bound to take his statement, because he is interested in the result. He is here trying to escape liability which, upon the face of the paper, he is bound by. On the other hand, if you are satisfied he has told the truth, and has acted in good faith, then I say the question further arises as to whether he has further satisfied you that he was not negligent in any way in doing what he did. He says that he cannot read or write. He can sign his name, but he says he cannot read English, and that he cannot read this paper, and did not know what it contained. . . . As a general rule, where one person leaves to another the preparation of a writing, and takes his word for it as to what it contains, he cannot complain if it is not what he thinks it is, because he has selected the person to prepare the agreement, and if that person deceives him it is his own fault; but considering the circumstances surrounding this case, the inability of the defendant to read or write, if you believe he is unable to, or his inability to understand what he was doing, his general intelligence, and all the surrounding circumstances, it is for you to say whether he is to be excused, or that he did under the circumstances what a prudent person would do."

The jury, under this charge, had the right to disregard the testimony of the interested witness, and find that the de-

defendant could read, and that he knew the contents of the paper. The general principle charged was undoubtedly correct, but the difficulty was that it permitted the jury to pass upon a question in regard to which the defendant was not allowed to give all his testimony. The error in excluding evidence in regard to the ability of the defendant to read could have been cured by instructing them that they must assume that he could not, or that the fact was conclusively proven as claimed by the defendant. The defendant had a right, if the question was still open, to fortify his own testimony in any way that he could. His own statement would not conclude the jury, but that of other disinterested witnesses would, in the absence of any opposing testimony. The plaintiff's counsel would now be entitled to argue, if necessary to his case, that the jury found that the defendant was able to read the paper. As the case was submitted to the jury with this question unsettled, and for the jury to pass upon, the ruling excluding the testimony bearing on the point was error. Where testimony in corroboration of the party as to a material fact is excluded as cumulative, or upon the ground that the fact is no longer in dispute, then, for all further purposes of the trial, the fact should be deemed conclusively established, and should not be submitted to the jury upon the uncorroborated testimony of an interested party. As there was an exception both to the charge and to the ruling, the defendant is entitled to raise the question here.

For these reasons the judgment should be reversed and a new trial granted, costs to abide the event.

All concur (ANDREWS, C. J., and GRAY, J., on second ground in respect to error in excluding evidence), EARL, J., not voting.

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**GUARANTY — CONTRACT OF CONSTRUED.** — A guarantor, like a surety, is bound only by the strict letter or precise terms of the contract of his principal, whose performance he has guaranteed: *Staver v. Locke*, 22 Or. 519; 29 Am. St. Rep. 621, and note; note to *Huff v. Slife*, 13 Am. St. Rep. 500; note to *Gates v. McKee*, 64 Am. Dec. 549.

**CONTRACTS — EFFECT OF THE INTOXICATION OF ONE OF THE PARTIES TO.** — A contract entered into by one who is so drunk as not to know what he is doing is voidable: *Carpenter v. Rodgers*, 61 Mich. 384; 1 Am. St. Rep. 595, and note. Drunkenness to afford a ground for avoiding a contract must be so excessive as to render the person incapable of consent, or for the time to incapacitate him from exercising his judgment: *Reynolds v. De Chaums*, 24 Tex. 174; 76 Am. Dec. 101, and note; *Watson v. Doyle*, 130 Ill. 415; *Bush v. Breinig*, 113 Pa. St. 310; 57 Am. Rep. 469; *Newell v. Fisher*, 11 Smedes & M.

431; 49 Am. Dec. 66, and note; see also note to *Gardner v. Gardner*, 34 Am. Dec. 353, and extended note to *Lancaster Co. Bank v. Moore*, 21 Am. Rep. 29.

ILLITERACY AS A GROUND FOR AVOIDING AN INSTRUMENT: See *North v. Williams*, 120 Pa. St. 109; 6 Am. St. Rep. 695; *Bingham v. Salenc*, 15 Or. 208; 3 Am. St. Rep. 152.

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## PECK v. STATE.

[137 NEW YORK, 372.]

**JUDGMENTS AGAINST STATE OFFICERS, WHEN DO NOT BIND THE STATE.** — A judgment against the managers of a state asylum for the insane in *mandamus* requiring them to adjust and determine the amount due for materials delivered and work done under a certain contract and to make a certificate thereof, is not binding on the state, for there is no provision to be found in any statute giving such managers authority to represent the state in any litigation, or giving the consent of the state to be bound by an adjudication to be made against them.

**A JUDGMENT AGAINST STATE OFFICER** never estops the state on the principle of *res judicata*.

APPEAL from an award of the board of claims against the state. The claim of the plaintiff was originally based upon a contract made by the board of managers of the Buffalo state asylum for the insane for furnishing material and performing work in the construction of the asylum. In 1878, plaintiffs procured a judgment in *mandamus* against the managers of the asylum requiring them to adjust and determine the amount due them. In this proceeding a reference was had and the referee found that a specified amount was due the plaintiffs, and a judgment was entered directing the managers of the asylum to issue a certificate in favor of the plaintiffs, showing that the amount found by the referee was due to them. In the proceedings before the court of claims the plaintiffs relied upon the judgment in *mandamus* and the certificate of the managers of the asylum made pursuant thereto and offered no other evidence in support of their claim.

*S. W. Rosendale*, attorney-general, for the appellant.

*E. A. Clark and F. C. Peck*, for the respondent.

EARL, J. On the trial before the board of claims, the claimant introduced no evidence but the judgment in the *mandamus* proceeding against the board of managers of the asylum, and the certificate made by them as commanded by that judgment, and upon that evidence the board of claims based its award.

The important question to be determined upon this appeal

is whether the judgment in the *mandamus* proceeding against the board of managers is binding upon and estops the state. The learned counsel for the claimant, upon his argument in this court, has called our attention to no authority which sustains his claim that that judgment is *res adjudicata* against the state; and we know of no principle of law that gives it such force. The state was not a party to that proceeding, and in that proceeding the asylum managers did not represent the state. It was a proceeding against them to compel them to discharge what was claimed to be a duty resting upon them under the law of their creation and the contracts into which they had entered. While they represented the state in making the contracts with Linus Jones Peck & Co., they did not stand in the place of the state in any suit brought against them, either for misfeasance or nonfeasance in the discharge of the duties devolved upon them by law. No provision is found in any statute giving them authority to represent the state in any litigation, or giving the consent of the state to be bound by any adjudication to be made against them. A state cannot be sued in its own courts, except by its consent; and this rule is founded upon public policy of great importance, and it would be greatly impaired and could be largely nullified, if the state could be bound by judgments rendered against its agents or officers. Such judgments may bind the officers and compel them to discharge their duties, and thus frequently they enable claimants to obtain payment of their claims against the state and other rights to which they are entitled by law. But the adjudication in such actions never estops the state on the principle of *res adjudicata*. And so it has been frequently held: *James v. Campbell*, 104 U. S. 356; *Louisiana v. Jumel*, 107 U. S. 711; *Cunningham v. Macon etc. R. R. Co.*, 109 U. S. 446; *Hans v. Louisiana*, 134 U. S. 1; *North Carolina v. Temple*, 134 U. S. 22; *Pennoyer v. McConnaughy*, 140 U. S. 1; *People v. Dennison*, 84 N. Y. 272; *Corkings v. State*, 99 N. Y. 491; *Rexford v. State*, 105 N. Y. 229; *Gates v. State*, 128 N. Y. 221.

In *People v. Squire*, 110 N. Y. 666, we held that a judgment in a *mandamus* proceeding against the commissioner of public works of the city of New York did not bind the city for the reason that it was not a party to the litigation. In *Parmenter v. State*, 135 N. Y. 154, recently decided in this court, we were of opinion, although it was not necessary there absolutely to announce it, that a judgment in a *mandamus* proceeding



against the comptroller of the state was not *res adjudicata* against the state, and did not create an estoppel against it for the reason that it was not a party to the proceeding, although the attorney-general appeared there in defense of the comptroller. That the state is not bound by the adjudication in the *mandamus* proceeding is also shown by the case of *Carr v. United States*, 98 U. S. 433.

But it is further said on behalf of the claimant that the state was bound by the certificate given by the managers of the asylum under the compulsion of the judgment, without reference to the circumstances under which it was made. There is nothing in the act by which the managers of the asylum were constituted which makes their certificate thus given binding upon the state or even evidence against the state. It was not a certificate based upon their judgment or upon any examination made by them, or upon any exercise of their discretion, but a certificate compelled by a judgment not binding upon the state and not evidence against the state. There is nothing in the contracts requiring the managers to give such a certificate. Under the first contract the firm of Linus Jones Peck & Co. were to be paid for certain kinds of stone delivered seventy-five per cent of the price thereof monthly, upon the estimate of the supervising architect or superintendent of the quantity delivered the month preceding such estimate; and the remaining twenty-five per cent thereof monthly after the same shall have been laid in the wall and measured and accepted by the supervising architect and superintendent of the building; and for other kinds of stone they were to be paid seventy-five cents per cubic foot to be measured by the supervising architect or superintendent and paid for at the end of each month after the same had been delivered upon the ground and approved by the supervising architect and superintendent. The contract contains the further provision that the board of managers "hereby covenant and agree with the party of the second part to estimate and measure all stone delivered monthly after the delivery thereof as aforesaid, and to pay for the same in accordance with the provisions of this contract hereinbefore mentioned." Under the second contract for cutting the stone, it was provided that the board of managers should cause monthly estimates to be made at the end of each current month by the supervising architect and superintendent of all work done or completed during the month, and to pay ninety per cent of the amount

thereof on the first of the ensuing month, and further, to have the work measured in the wall, or so much thereof as should be laid monthly, at the end of each current month as the work progressed, by the supervising architect and superintendent, and on the first of the succeeding month pay in full for the work, less ninety per cent previously paid upon the monthly estimate for the same work, to the end that there might be final settlements monthly of the work as it progressed until its completion.

It is very clear from these provisions in the contracts that the estimates and measurements were to be made by the superintendent and supervising architect. They were to inspect and accept the work and material, and it was upon their estimates and certificates that payments were to be made. There is no provision whatever for certificates to be made by the managers as a necessary preliminary to the payment of the amounts due the contractors; and the practice under the contracts was in accordance with these views. As the materials were delivered and the work performed, the supervising architect and superintendent made the measurements and ascertained the amounts due for the work and materials and certified the same to the board of managers. The board of managers thereupon caused vouchers to be made for such measurements and estimates, and delivered the same to the firm from time to time, and made the payments of seventy-five per cent under the first contract and ninety per cent under the second contract as provided therein. The vouchers thus made and presented to the firm upon which payments were made to them were, after the payments, returned to the managers. It cannot, therefore, be said that the cause of action of the claimant first accrued when the certificate was executed by the board of managers under and in pursuance of the judgment in the *mandamus* proceeding. The payments of seventy-five per cent and ninety per cent were due to the firm when the material and work were accepted, measured, and certified to by the supervising architect and the superintendent, and certainly when the vouchers were made by the managers upon which they made payments to the firm. When the remaining sums, to wit., twenty-five per cent under the first contract and ten per cent under the second contract, which are the sums mainly now in controversy, became due according to the terms of the contract, the contractors were entitled to the payment of the same; and if

upon their demand payment was refused, they could have instituted proceedings before the state board of audit and could thus have had their claim adjudicated, and could have obtained payment of any award made to them. Even if upon a hearing before the state board of audit it would have been requisite for them to have the vouchers showing the amounts due them for materials and work, those vouchers were in existence, either with the managers or with the state comptroller, and could easily have been procured for evidence before the state board of audit. But still further, having delivered the materials and performed the work, all of which had been accepted by the state, even if the contractors had needed the certificate of the managers as a condition precedent to the payments, they could have demanded it, and its unjust refusal would have enabled them to prosecute their claim before the state board of audit without it: *Thomas v. Fleury*, 26 N. Y. 26; *Nolan v. Whitney*, 88 N. Y. 648; *Smith v. Alker*, 102 N. Y. 87; *Flaherty v. Miner*, 123 N. Y. 382.

If we assume that the certificate of the asylum managers was competent evidence against the state of the amounts due upon the contracts, then it only shows what amounts became due to the contractors about fourteen years before its date, and does not establish that they became due for the first time at its date.

Assuming, therefore, that all these facts which appeared in the judgment rendered in the *mandamus* proceeding were properly in evidence, it is clear that this claim was barred by the statute of limitations long before it was filed in the board of claims: Laws of 1883, c. 205, sec. 7. Unless the judgment in the *mandamus* proceeding is *res adjudicata* against the state, there is absolutely no basis upon which this award can rest, and having reached the conclusion that it is not, the award must be reversed and a new trial granted before the board of claims, costs to abide the event.

All concur, O'BRIEN and MAYNARD, JJ., not sitting.

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JUDGMENT AGAINST A CITY IS BINDING ON THE STATE AND THE PEOPLE THEREOF, when the question was concerning land which the people claimed to hold in trust as a public park dedicated to public use as such: *People v. Holladay*, 93 Cal. 241; 27 Am. St. Rep. 186. See also the discussion of the question appended to the report of that case in the present series. Similarly a judgment against a county or its legal representatives in a matter of general interest to the people thereof concludes not only the parties named as defendants, but also the citizens of the county not so named: *Sauls v. Freeman*, 24 Fla. 209; 12 Am. St. Rep. 190.

## LINKAUF v. LOMBARD.

[137 NEW YORK, 417.]

**CORPORATIONS. — PLEA OF ULTRA VIRES CANNOT BE AVAILED OF** to defend against an obligation incurred, when the contract has in good faith been performed by the other contracting party, and the corporation has had the benefit of it. This plea should never prevail when it would not advance justice.

**CORPORATIONS. — OFFICERS AND MANAGERS OF A CORPORATION CANNOT BE HELD PERSONALLY LIABLE** upon a contract entered into by them while acting for the corporation, on the ground that the contract was foreign to and independent of the corporate business of the corporation, and not a proper or necessary incident thereof.

**CORPORATION. — PERSONAL LIABILITY OF THE AGENTS OF A CORPORATION** cannot be established by proving that they determined to enter upon the business, and did enter upon and manage it without any formal action on the part of the corporation or its board of directors, if it further appears that no one was interested in the business except as a stockholder of the corporation, and that the profits of the business were received and the expenses thereof paid by such corporation.

**JURY TRIAL. — JUDGES ARE NO LONGER REQUIRED TO SUBMIT A QUESTION** merely because some evidence has been introduced by a party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party.

**JURY TRIAL. — IF THERE IS NO EVIDENCE UPON AN ISSUE** before a jury, and the weight of evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit or to direct a verdict, as the case may require.

**ACTION** to recover the value of goods shipped by plaintiffs. Judgment in favor of plaintiffs, and defendant appealed.

*John A. Deady*, for the appellants.

*Horace E. Deming*, for the respondents.

GRAY, J. The plaintiffs were a mercantile firm in Mobile, Alabama, and have brought this action to recover for the value of goods shipped to them from New York upon a steamship of what was known and advertised as the New York and Mobile Steamship Line. The shipping contract had been made with a person signing as "agent" merely, the paper being headed "New York and Mobile Steamship Line." The vessel was lost upon the voyage, and the defendants are sued as having been engaged as common carriers, under the name above stated, in the business of transporting freight and merchandise between the ports of New York and Mobile. Their answer denies that allegation. Upon the trial it was shown that the New York and Mobile Steamship Line was not a corporation, but a mere name or title; and the plain-



tiffs introduced evidence for the purpose of establishing that the defendants were associated together in transacting the business under that name. Upon the part of the defendants evidence was given to show that the defendants were the officers and managers of a corporation, organized under the general manufacturing act of this state, and transacting business under the name of "Lombard, Ayres & Co.," and that this steamship enterprise was conducted by that corporation, in connection with their chartered business, which was the "distilling and refining of petroleum," and the buying, selling, or otherwise dealing "in all materials, apparatus, and products necessary or useful thereto, or resulting therefrom, etc."

The defendants' counsel, at the close of the plaintiffs' proofs, moved to dismiss the complaint on the ground, among others, that no cause of action was shown against the defendants, and when all the proofs were in he moved to direct a verdict for the defendants, on the ground that no connection was shown between the plaintiffs and them in the contract. Both motions were denied, and the denials were excepted to, and the question is thus raised as to whether there was any evidence for the jury to consider which established or tended to establish the fact that the defendants were associated in running this steamship line in their individual interest, and not the corporation of Lombard, Ayres & Co. If the evidence was conflicting upon that question, if it was open to opposing inferences by the jury, we should not be authorized to interfere with their verdict; but we are unable to find anything in the record from which it could justly be inferred that these defendants were individually concerned in this enterprise; or that, in all its incidents, it was not conducted by and for Lombard, Ayres & Co., the defendants, as the managers of that corporation, having the management and direction of the steamship business, through agents selected by them, at the two ports. This was made evident upon the testimony of the witnesses whom the plaintiffs called and examined. One of these witnesses, named Tweedy, had been a clerk of the firm of Bowring and Archibald, who chartered the vessels, and his testimony was that that firm acted as agents for the corporation of Lombard, Ayres & Co. in securing the charter party; that they acted for a while as agents of the line, and kept an account for each voyage, and that the expenses in excess of receipts were paid by Lombard, Ayres & Co., and when receipts were in excess of expenses, they

would hand over a check to that corporation. From the evidence of that witness it would seem clear enough that the defendants did not inaugurate and run the line for themselves. Upon the evidence, however, of another witness, Haven, it is insisted that the jury were warranted in finding against the defendants, on the question of who were the principals behind the agent who had made the contract with the plaintiffs. But his testimony does not, when fairly read, bear the construction nor justify the inference contended for.

Haven was secretary of the Lombard, Ayres & Co. corporation, and he, particularly, managed this line of steamships. From his testimony it appeared that the establishment of the line was determined upon between himself, and Mr. Lombard and Mr. Ayres, who were, respectively, the president and vice president of the Lombard, Ayres & Co. corporation. Undoubtedly, between these three, the inauguration of this enterprise, its policy, management and all measures in the interest of the line were, or we must assume that they were, discussed and decided upon. There seems to have been no reference of matters to the action of the board of trustees of Lombard, Ayres & Co., and the official records of that company were said to be bare of any official action by that body in reference to the direction of the affairs of the line; and it appeared that those three gentlemen decided all such matters by themselves, and in the most informal way, so far as the corporation was concerned. While from Haven's testimony it did certainly appear that this line of steamers was started and run, as the result of the informal action or decision of himself and his two associates; that they controlled and managed it equally informally between themselves; that the board of trustees of Lombard, Ayres & Co. did not act officially with respect to it, and that the company's books contained no record of resolutions nor memoranda upon the subject of the management of this line; nevertheless, it did appear, upon his examination by plaintiffs, that Lombard, Ayres & Co. furnished the agents of the line with the funds to pay its bills and expenses; and upon his cross-examination, that Mr. Lombard and Mr. Ayres were the appointed managers of the affairs of Lombard, Ayres & Co., having absolute control; that the agents of the steamship line were the agents for that corporation; that this line was run as one of its departments, and that the witness, Lombard and Ayres were neither associated together nor had any interest in the line, except as they

were interested in the corporation as stockholders and the principal officers or managers.

The plaintiffs placed much reliance upon this evidence, in its failure to show any facts making this steamship enterprise to appear in anywise as a corporate matter, and because, from the way it was started and conducted, it might fairly be inferred that these three defendants were concerned in the undertaking as individuals and not as trustees. They argue that this inference is not only warranted by the evidence, but that it is borne out by the legal limitations upon the chartered powers of Lombard, Ayres & Co., which, being incorporated under the provisions of the general manufacturing act, was legally incapable of operating a steamship line, or of acting as common carriers in the transportation of merchandise. They say that there was a strong, if not a conclusive presumption that such an undertaking was no part of the corporate business in which Lombard, Ayres & Co. was authorized to engage, and they suggest that the trial judge should have ruled, because of the provisions of the charter of that corporation, that there was no question of fact for the jury at all. Upon the proposition advanced, and assuming for the purpose of the discussion that it was without the chartered powers of Lombard, Ayres & Co. to charter vessels and to carry freight, we think a plea of *ultra vires* would have been unavailable as a defense to the corporation, if it had been sued upon an executed contract made by its agent. An extended discussion of this question is hardly necessary to be entered upon. It is sufficient for our purpose to say that the plea of *ultra vires* cannot be availed of to defend against an obligation incurred, when the contract has been in good faith performed by the other contracting party and the corporation has had the benefit of it: *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; 20 Am. Rep. 504; and see *Holmes v. Willard*, 125 N. Y. 75-80. The plaintiffs were dealing with the agent of an undisclosed principal and they had the option to sue the agent, or the principal when discovered. If they had sued Lombard, Ayres & Co. to enforce this liability under the contract of its agent, it could not have escaped by the plea of *ultra vires*. To admit of such a proposition would be to overlook the rule that the plea should never prevail when it would not advance justice. That a corporation has engaged in a business foreign to its chartered powers might afford ground for complaint and action by its stockholders; but not for a defense to its liability

to others, who have acted, under such circumstances, as are here disclosed, in good faith in their dealings with its agents. We do not see that the argument referred to by the respondents in that connection has any force or bearing upon the question of whether the defendants were liable to the plaintiffs. The trial judge fell into a great misapprehension when, in his charge to the jury, he, in effect, instructed them that, in determining the question of the defendants' liability, they could consider whether the running of this steamship line was not something foreign to, and independent of, the corporate business of Lombard, Ayres & Co., and not a necessary or proper incident of its business.

What had that to do with establishing the defendants' liability upon the contract? It might be perfectly true that the corporation had engaged in a business project not contemplated by its charter, and yet that fact would not go to establish a contract liability in the individuals who were its officers, and who had, as such, managed and directed the undertaking. If the evidence was such as to warrant two inferences; one, that the line was the individual enterprise of the defendants, and the other that it was an enterprise conducted as a department of the corporation, of which the defendants were officers, then the question to be submitted to the jury was, which of these two inferences they would draw. The inference that it was the individual enterprise of these defendants, must, however, be based upon evidence tending to establish the fact affirmatively and not negatively, that, if the corporation did not own the enterprise, because it could not lawfully do so under its charter, therefore, the defendants were associated in its ownership and conduct as individuals.

Returning then to the question of what evidence there is in the record to show that the defendants were engaged in this business enterprise, we find that, whatever may have been the language, or the more or less general expressions of the witness Haven, as to its inception upon the sole decision of himself, Lombard and Ayres, and as to its conduct in the same way; and however informal and irregular the undertaking, from the absence of any official or corporate action by the board of trustees or by the stockholders, Haven did positively testify that he, Lombard, and Ayres had no individual interest in it, and that it was a department of the business of Lombard, Ayres & Co. Upon that evidence, supplemented, on the part of the defendants, by evidence showing that Lombard



and Ayres had been appointed managers of Lombard, Ayres & Co., with full and absolute powers of control and management over, and relating to, its business affairs; that the steamers were chartered by agents for that corporation, in aid of its business, in order to procure staves and shooks for the manufacturing of barrels and cases; that no one had any interest in that business, except as a stockholder of the corporation, and that moneys received were paid to and all expenses incurred were paid by the company; in that and like evidence we do not think that there was anything which justified an inference that the defendants were running this line as their individual enterprise. Conceding to the testimony of Haven the widest sense, we could, at most, extract fairly from it that he, Lombard and Ayres, with apparently unlimited powers in relation to the affairs of the corporation of Lombard, Ayres & Co., engaged it in more or less independent enterprises, on their own judgment and without much, if any, regard to the chartered powers of their corporation and without going through the form of putting their acts in official guise, or seeking corporate sanction. But, with all that in view, and with the positive and uncontradicted denials of any individual interest, it cannot be said to follow that, because of this utter indifference, or neglect, to secure authority from, or to cover their acts by, some action of the board of trustees, the officers became individually liable as partners to third parties. As formerly suggested, such conduct or misconduct, might give rise to proceedings by the state, or by the stockholders; but it would not constitute any ground for a defense by the corporation, when sued upon its agent's contract, as in a case like this.

At most, it was only open to a surmise that the defendants were individually concerned in running this steamship line, and that was not enough to justify the trial judge in letting the case go to the jury. To permit a jury to speculate and surmise upon a question of responsibility is to withdraw from the litigant a safeguard intended for the protection of his rights. He is entitled to the judgment of the court upon questions, to which the character of the evidence admits of but one answer. No such possibilities of a failure of justice should be countenanced. In the case of *Improvement Co. v. Munson*, 14 Wall. 442, Justice Clifford well said: "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the

party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule; that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof rests."

The rule should be regarded as settled, under all the authorities, as well by the decisions of the courts of this state as by those of England, that where there is no evidence upon an issue before the jury, or the weight of the evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit, or to direct the verdict, as the case may require. Reference to the following cases will suffice: *Rudd v. Davis*, 3 Hill, 287; 7 Hill, 529; *People v. Board of Police*, 35 Barb. 651; *Herring v. Hoppock*, 15 N. Y. 409; *Wilds v. Hudson Riv. R. R. Co.*, 24 N. Y. 430; *Corning v. Troy etc. Factory*, 44 N. Y. 577; *Neuendorff v. World Mut. L. Ins. Co.*, 69 N. Y. 389; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341; 57 Am. Rep. 729; *Schofield v. Chicago etc. Ry Co.*, 114 U. S. 615-619; *Gunther v. Liverpool etc. Ins. Co.*, 134 U. S. 110, 116; *Metropolitan Ry Co. v. Jackson*, L. R. 3 App. C. 193, Lord Blackburn's opinion.

Applying this just rule in this case, it is clear that the judge erred in submitting the question to the jury of the defendants' liability, when there is no evidence which could properly and justly have warranted them in finding against them, or which could have withstood the test of a motion to set aside the verdict. If it could have been shown that the conduct of this line was the subject of recorded official action by the board of trustees of the Lombard, Ayres & Co. corporation, it could not have been pretended that the defendants were liable.

The cases referred to, where members of a corporation, continuing to do business after the expiration of its charter, have been held as partners, as to third persons, for the acts or contracts of agents; or where parties who are actually partners *inter sese*, and who do business under some corporate name, have been individually held to a partnership liability, have no application to this case, where the corporation was a going

concern, but, as it is claimed, had engaged in a business beyond the scope of its chartered powers. The fact is that, however much it may have exceeded its authorized powers in engaging in such a business, nevertheless, it did engage in it, and a contract liability arising thereout could not be avoided by any plea of having exceeded its powers; that was a question which concerned its stockholders, or the state, and not the plaintiffs. If the defendants could not have been deemed liable, had it been shown that the business of the steamship line was the subject of the official action of the board of trustees, and was within the corporate management of Lombard, Ayres & Co., it does not follow, because of the loose, defective, or irregular way in which that corporation's interests were evidenced and managed, in that undertaking into which it had been launched by its managers, that the liability had shifted from it upon the individuals who were its officers or managers.

Our conclusion is that the trial judge erred in refusing to dismiss the complaint, or, subsequently, to direct a verdict for the defendants, and that the judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event.

All concur, except O'BRIEN, J., dissenting.

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CORPORATIONS. — THE PLEA OF *ULTRA VIRES* SHOULD NOT PREVAIL as a general rule, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong: *Carson City etc. Bank v. Carson City etc. Co.*, 90 Mich. 550; 30 Am. St. Rep. 454, and note collecting previous decisions in this series to the same point. When a corporation has enjoyed the benefits of a contract, it cannot claim that it was *ultra vires* for the purpose of escaping its liabilities: *Sherman Center Town Co. v. Morris*, 43 Kan. 282; 19 Am. St. Rep. 134; *Long v. Georgia etc. R'y Co.*, 91 Ala. 519; 24 Am. St. Rep. 931; *Sherman Center Town Co. v. Fletcher*, 46 Kan. 524; *Heims Brewing Co. v. Flannery*, 137 Ill. 309.

TRIAL — WITHDRAWAL OF THE CASE FROM THE JURY. — It is the duty of the trial judge, when requested before the submission of the case to the jury, to decide as a preliminary question of law whether there is any evidence on which the jury could properly find a verdict for the party on whom the burden of proof lies, and, if there is not, he ought to withdraw the case from the jury: *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 33; 8 Am. St. Rep. 804.

## MADISON SQUARE BANK v. PIERCE.

[137 NEW YORK, 441.]

**A NEGOTIABLE INSTRUMENT PURPORTING TO BE PAYABLE TO THE MAKER, AND BY HIM INDORSED to a third person and by the latter indorsed to another, is binding upon the maker as a principal debtor, and he is liable to pay the debt in preference to and in exclusion of all the other parties to the paper, and they, in some form or other, are entitled to have final recourse against him.**

**INDORSER, PAYMENT BY, WHEN DOES NOT DISCHARGE THE MAKER. — If a negotiable instrument payable to the order of the maker is indorsed by him to a third person, who, in turn, indorses it to another, a payment made by such third person in partial discharge of his liability as indorser does not diminish the liability of the original maker to any extent, and the holder is still entitled to recover judgment against the maker for the full amount of the paper, though to the extent of the payment made by the indorser, the recovery must be held in trust for him.**

ACTION upon a promissory note in which the judgment both of the trial court and of the general term was in favor of the plaintiff.

*David Keane*, for the appellant.

*John Delahunty*, for the respondent.

FINCH, J. We have a novel and interesting question before us on this appeal, although its apparent importance will lessen as we pass from first impressions to some slower reflection. It arises upon facts which are very brief and simple, and may at once be stated. The defendant Pierce made his promissory note payable to his own order, and indorsed it to the Bates Company, Limited, which indorsed it to the plaintiff bank, the latter discounting it, and paying the proceeds over to the immediate indorser. Thereafter the Bates Company became insolvent, and passed into the hands of a receiver, who paid to the bank upon the liability of the indorser seventy-three and one quarter per cent of the amount secured by the note. Later, the bank sued Pierce, the maker, and recovered judgment for the full amount of the note in spite of the proof showing the payment made by the receiver, and in disregard of the claim asserted by the defendant that he should only be held liable for the balance remaining unpaid. That judgment has been affirmed by the general term, Judges Daniels and Barrett each writing very strong and valuable opinions in support of their doctrine, and relying upon the authority of *Jones v. Broadhurst*, 9 Man. Gr. & S. 177, 67 Eng.



Com. L. 175, which fully warrants their conclusion. The question does not seem ever before to have arisen in this country, and we are left at liberty to examine the English rule, and to follow it or not, as we approve or disapprove its logic and its consequences.

We are not to regard the note as being accommodation paper, but must assume its transfer for value. The form of the transaction is equivalent to what it would have been if the Bates Company had been named as payee, and loses none of its force by the intervention of the maker as first indorser. That indorsement, in the form adopted, was needed for the regular transfer of title, but does not change or affect the nature and character of the maker's liability. He remains the ultimate debtor, the person who ought to pay the debt, in preference to and in exoneration of all the other parties to the paper, who in some form or other are entitled to have final recourse to him; and it is to the case of such a maker of the note or such an acceptor of the bill of exchange that the English rule alone applies; and it is explicitly declared inapplicable where the indorser or drawer is the real debtor, although in form only secondarily liable.

Pierce, therefore, was the ultimate debtor, and the party who ought to pay the note, both in discharge of the obligation to the holder and in exoneration of the indorser. When the bank sued on the note, it was the legal holder and the legal party in interest. Upon production of the paper and the usual proof, judgment against the maker for the full amount was inevitable, unless some defense should be interposed. The only possible one for Pierce was part payment, and he was compelled to assert, and his counsel are compelled to argue, that the money paid by the indorser to the holder inured to the benefit of the maker as a payment on his debt; but that doctrine cannot prevail for very obvious reasons. The indorser's payment did not in the least lessen or satisfy the maker's debt. He owed it all exactly as before. What had happened possibly changed somewhat the real creditor, but left the whole debt due and unpaid. To whom he should pay might become a new question, but how much he should pay in discharge of the note was not made doubtful in any degree. What the receiver advanced to the holder is familiarly described as a payment; but it was such relatively to the indorser's liability alone; while relatively to the obligation of the maker, it was an equitable purchase instead of a

payment. That view of it was taken in a very early case, the decision of which depended necessarily upon it. In *Callow v. Lawrence*, 3 Maule & S. 95, it appeared that one Pywell drew a bill upon Lawrence to his own order, which Lawrence accepted. The drawer indorsed the bill to Taylor, who discounted it, and thereafter indorsed it to Barnett. It was protested for nonpayment. The drawer paid Barnett the full amount and took the bill, and striking off the indorsements of Taylor and Barnett, transferred the bill to Callow, who sued the acceptor upon it. The latter claimed that the bill was paid and extinguished, which the court denied, saying that the drawer "became the purchaser of the bill" when he paid and took it up out of Barnett's hands; that it was not paid by the drawer, *animo solvendi*, in order to extinguish it, but only to redeem himself from the situation in which he stood. That must always be true of payment by indorser to holder, where the maker is the ultimate debtor. To the extent of the money paid, the indorser becomes equitably entitled to be substituted to the rights and remedies of the holder, and becomes *pro tanto* the beneficial owner of the debt; so that the maker's obligation to pay the note in full, at first due to the holder solely in his own right, becomes, after the part payment by the indorser, still wholly due to the holder, but partly in his own right and partly as trustee for the indorser. A court of law cannot split the note into parts, and must act upon the legal interest and ownership.

In the present case there was no privity between maker and indorser as it respects the action of the latter. He paid not as the agent of the maker, not at his request, not for his benefit, and under no duty to relieve him, but independently, upon his own obligation, to lessen his own responsibility, and not at all to discharge the ultimate debt which it was the maker's duty to pay. It seems very clear, therefore, that the maker cannot utilize for his own benefit a payment which, as to him, is not a payment upon the debt. It becomes, as I have said, merely a question to whom he shall pay, and who may sue for and collect the whole unpaid sum. In that question the maker has no concern beyond the inquiry whether he may become liable to different persons for the same debt, and encounter the danger of paying it twice. I can discover no such peril. The judgment in favor of the holder is a bar to any other suit on the same note, and payment to the holder discharges the note utterly. Ordinarily,

the indorser cannot recover except upon the note and as holder and in accordance with the law merchant. If he ever has any other right of action against the maker, it is either in equity or by force of some facts beyond the bare relation established by the paper; and where the note is merged in the holder's judgment, or paid in full to him by the maker, the indorser's only right is through the judgment or against the proceeds, if he has made a partial payment to the holder. That does the indorser no wrong. If he is not content that the holder shall collect to some extent as his trustee, he may prevent it by payment in full to the holder, and so entitle himself to the possession of the note on which to sue, or if judgment has been obtained, to be subrogated to all of the rights of the plaintiff therein.

I think this result is clearly indicated by our own decisions. In *Mechanic's Bank v. Hazard*, 13 John. 353, the maker of the note had been arrested in an action upon it and his bail sought to relieve themselves by force of a payment made by the indorser to the holder, but such effect was denied to it; the court saying that it was not a payment by or on behalf of the maker, or of which he or his bail could avail themselves. And in *Guernsey v. Burns*, 25 Wend. 411, where the suit was by the holder, representing the legal title and interest, it was said to be no defense to the maker and no concern of his that some property in the note was in another.

It thus becomes apparent that there is no very great importance in the question which method of securing payment from the maker is adopted since the same result follows from each and that it narrows down to the inquiry whether as matter of correct doctrine and of convenience in practice the holder may recover the whole debt against maker or acceptor for himself and as trustee for the indorser to the extent of his acquired interest; or whether he shall take judgment only for the balance, leaving the indorser to sue in some way and on some theory, which apparently could not be upon the note because already merged in the judgment, but might be for money paid for the use of the maker since he gets the benefit of it in the reduction of the judgment, as was held in *Pownall v. Ferrand*, 6 Barn. & C. 439, where the holder deducted the indorser's payment from the levy against the maker. The former seems to me to be the logical and convenient method and so I think we should follow the English doctrine.

I have not underrated the assault made upon it by the ap-

pellant. He asserts that *Jones v. Broadhurst*, 9 Man. Gr. & S. 177; 67 Eng. Com. L. 175, is contrary to the earlier cases and has been criticised and shaken by the later ones. I have examined them all, with some wonder at the amount of learning and ingenuity expended upon the subject: *Pierson v. Dunlop*, Cowp. 571; *Walwyn v. St. Quintin*, 1 Bos. & P. N. R. 652; *Bacon v. Searles*, 1 H. Black, 88; *Hemming v. Brook*, 1 Car. & M. 57; *Randall v. Moon*, 12 Com. B. 261; *Cook v. Lister*, 13 Com. B., N. S. 543; *Solomon v. Davis*, 1 Cababe & E. 83; *Thornton v. Maynard*, L. R. 10 Com. Pl. 695. The prior cases were very fully and carefully reviewed by Baron Cresswell in the opinion rendered in *Jones v. Broadhurst*, 9 Man. Gr. & S. 177; 67 Eng. Com. L. 175, and of the subsequent cases I deem it only necessary to say, that, along with some criticism and occasional doubt, the doctrine has remained substantially unshaken, and the case last cited was declared by Lord Coleridge to be the accepted law.

It must not be forgotten, however, and I may prudently repeat, that the doctrine has no application to accommodation paper, and rests wholly upon the actual and ultimate indebtedness of maker or acceptor as the party who ought to pay. In such a case as that, which correctly describes the one now before us, and where no disturbing facts affect the relations of the parties as fixed by the paper itself, I think the holder may sue and recover the full amount, receiving so much of the proceeds as represents a part payment by the indorser as trustee for him.

It follows that the judgment should be affirmed, with costs.

All concur, except MAYNARD, J., dissenting.

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**NEGOTIABLE INSTRUMENTS — LIABILITY OF MAKER.** — The maker becomes liable upon a note made payable to his own order by indorsement and delivery thereof: *Hall v. Burton*, 29 Ill. 321; 81 Am. Dec. 310. The release of an indorser does not discharge the principal: *Commercial Bank v. Cunningham*, 24 Pick. 270; 35 Am. Dec. 322. Satisfaction by the indorser of judgment against himself does not necessarily destroy one that has been rendered against the maker on the same note: *Lyon v. Bolling*, 9 Ala. 463; 44 Am. Dec. 444. The maker of a note on which judgment has been rendered for its face value, although part of note has been paid, cannot recover back the amount so paid from the holder of the note: *Davis v. Murphy*, 2 Rich. 560; 45 Am. Dec. 749.



# CASES

IN THE

## SUPREME COURT

OF

### NORTH DAKOTA.

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#### **BOSS v. NORTHERN PACIFIC RAILROAD COMPANY.**

[2 NORTH DAKOTA, 128.]

**RAILROAD COMPANIES — INJURIES TO EMPLOYEES — CONTRIBUTORY NEGLIGENCE.** — An employee who fails to take the place upon a car which the defendant company has provided for him, and occupies a more dangerous position, is presumed to be guilty of such contributory negligence as will defeat a recovery for injuries received by him while in that position, and to overcome that presumption he must show that he occupied the more dangerous position through no fault or negligence of his own, and not from choice.

**RAILROAD COMPANIES — ASSUMPTION OF RISKS BY EMPLOYEES.** — An employee, when he enters upon his service, assumes the ordinary risks incident thereto, and also the extraordinary risks of which he has notice or of which, in the usual exercise of his faculties, he ought to have notice.

**RAILROAD COMPANIES — DUTY TO FURNISH SAFE APPLIANCES FOR EMPLOYEES.** — An employee, upon entering the service of a railroad company, has the right to assume that the railroad and its appurtenances are so constructed as to render him safe in the performance of his duties, and that he will not heedlessly be exposed to any extraordinary risk of which he has no notice.

**RAILROAD COMPANIES — DANGEROUS APPLIANCES.** — An employee does not assume the risk arising from the erection of a high switch stand and signal so near the track that, at best, it clears the cars but a few inches, particularly when he knows that the rules of the company forbid the erection of any such structure in such position; and the mere fact that he has passed it several times while riding to and from his work upon one of the defendant company's trains is not sufficient to charge him with knowledge of the danger to which its position exposes him.

**NEGLECT — PROXIMATE AND REMOTE CAUSE.** — The action of the fellow-workmen of a railroad employee in crowding him so close to the side of the platform of a car that he is struck by a high switch stand which, owing to the negligence of the railroad company, has been erected dangerously near the track, does not break the direct causal connection between the negligence and the injury.

**NEGLIGENCE — NATURAL AND PROBABLE CONSEQUENCE.** — When a railroad employee, in boarding the train which is to take him back to the depot near which he is working, goes with several other employees to the front end of a car, at which, unknown to him, there is a locked door which prevents ingress to the car, and being unable, on account of the immediate starting of the train, to seek an entrance by the other door, remains on the platform, and while in that position, is struck by a high switch stand which stands dangerously near the track, the injury so received is a natural and probable consequence of the negligent retention of the switch stand in such a position.

**TRIAL — EXCEPTION TO ORAL INSTRUCTIONS, WHEN SHOULD BE TAKEN.** — Although the statute requires the instructions to be in writing, the error of giving oral instructions will be deemed to have been waived if counsel sit by and make no objection at the time.

*John C. Bullitt, Jr., and Ball and Smith*, for the appellant.

*Taylor Crum and S. G. Roberts*, for the respondent.

**BARTHOLOMEW, J.** On the fifteenth day of December, 1885, plaintiff was in the employ of defendant as a section hand, and was engaged in unloading wood in defendant's yards at Fargo. On that day, and while riding on one of defendant's trains from the roundhouse to the depot — a distance of about one mile — plaintiff was struck by a switch signal, and knocked from the train, and injured. This action was brought to recover damages for such injury. The train on which plaintiff was riding was known as the "Jamestown accommodation." It consisted of an engine, tender, freight caboose car, and an ordinary coach. This caboose car was equipped, as it appears such cars usually are on defendant's road, with a platform and steps at each end, with a door in each end, and side doors in the front part. The front end of this car was being used as a baggage car, and the rear end as a smoking car. The end door in front was habitually locked, but there was no notice or anything to indicate that entrance could not be made at that end. Ordinarily, these cars when in proper use on freight trains, are not locked at either end. This train regularly made a brief stop at the roundhouse, and passage on the train was free to all parties from the roundhouse to the depot. The section foreman of the gang in which plaintiff worked had directed the men under him who did not bring their dinners with them to ride on this train to the depot in going to dinner, and plaintiff and others of his fellow workmen had been in the habit of so riding for a number of days. They had, however, been directed by the conductor and brakemen to ride in the caboose car and not in the coach. On the day of

the accident, plaintiff and the others were working about five hundred or six hundred feet from and north of the point where the train would stop. When the train whistled the men started in a run to reach the point where it would stop. Plaintiff seems to have been in front. He crossed the track to the south side in front of the engine, and passed back until he reached the front steps of the caboose car, where he climbed upon the platform. Access to the train was from the ground on either side. About the same time others of the workmen were getting on the front platform of the caboose from the north side. Plaintiff tried the door in the front end of the car, and found it locked. It does not appear that he made any effort to leave the front platform and get aboard at the rear of the car. The train started almost immediately. One of the section men who went to the rear of the caboose testifies that the train was moving when he got on. There are two parallel tracks from the roundhouse to the depot. This train came in on the south track, but before reaching the depot it was thrown through a switch on the north track. When the train started there were so many of the section hands on the platform that plaintiff was crowded down until he sat upon the second step, with his feet resting on the lower step. As the train was thrown onto the switch he arose to his feet, he says, to enable him to hold on better. As the train passed from the switch onto the north track a sudden lurch of the car threw plaintiff to the south until his head passed the line of the outside of the car, and was struck by the target on the switch stand at that point. When struck, plaintiff was not looking to the east in the direction the train was running, but was looking to the southwest. The train was running at more than double the speed allowed by the rules of the defendant company inside the Fargo yard limits. The switch stand by which plaintiff was injured was about seven feet high, and was located four feet from the track. The target at the top extended nine inches in each direction. When the stand was erect this target would be within eight inches of a passing train. The switch stand was bent, throwing the top still nearer the train, and it had been known to come in contact with passing cars. The rule of the defendant, with which plaintiff was familiar, required all switch stands of this height to be placed not less than six feet distant from the track. Where a switch stand was required to be erected within less than six feet of the track, a low pattern was used.

This switch stand had been in use for two years prior to plaintiff's injury. Defendant's road master had notified the proper division superintendent, long prior to the injury to plaintiff, that this switch stand was too high and dangerous. Immediately after the injury to plaintiff it was removed, and the low pattern substituted.

There was a general verdict for plaintiff. The facts as recited are either uncontradicted, or supported by such evidence that the jury might fairly find them to exist. There was a motion to take the case from the jury at the close of plaintiff's testimony and repeated when the testimony was all in; but as the same points are preserved and presented under the exceptions to the instructions, and to the refusal of the court to give certain instructions asked, the motion need not be specially noticed. The negligence of defendant would seem to be established too clearly to be seriously questioned. The learned counsel for defendant contend, however, that the facts do not establish any negligence of which this plaintiff can take advantage; that the defendant had the unrestricted right to erect structures on its right of way where and when it pleased, subject only to liabilities for such injuries as might be caused by such structures to employees while engaged in their proper sphere of duty, and to passengers while riding in their proper place in the cars. As a general proposition the contention is correct. Whether at the time of the injury plaintiff be regarded as a passenger or an employee, we think he was lawfully upon the train; that he was not a trespasser. But as the case has been submitted to us on the theory that his rights were only those of an employee, and the duty and liability of the defendant to him were only such as it owed to its employees, and as that view is the more favorable to the defendant, we will accept it, in passing upon the case. The plaintiff was, then, lawfully on the train, in obedience to the orders of his foreman. He had no duty to perform on the train except to ride in such places on the caboose car as defendant had provided for that purpose. If he failed to do so, if he occupied a more dangerous position — and the steps to a platform would be a more dangerous position — that would raise a presumption of such contributory negligence on his part as would defeat a recovery, admitting the negligence of defendant. To overcome that presumption of contributory negligence, and entitle himself to a recovery, it would be necessary for the plaintiff to establish the fact that he occupied



such position through no fault or negligence of his own, and not from choice. On this point the learned trial court fully and correctly charged the jury. If plaintiff succeeded in establishing the facts as above indicated, he would then be in a position to take advantage of defendant's negligence. But it is insisted that plaintiff failed to show that he was not in this dangerous position from choice, because he failed to show that he made any effort to get on board at the rear platform after he found the front door locked. But it was the duty of the jury to consider all the circumstances. It is apparent that it required a vigorous effort on the part of the plaintiff and his fellow workmen to reach the train before it would start. Plaintiff got on board at the first available point. There was nothing to notify him that he could not gain entrance in that way. He had been in the employ of defendant for years, had been accustomed to ride in their freight caboose cars when they were in proper use on freight trains, and knew that both doors were habitually unlocked when the car was in use. He had no knowledge that the front door of this car was kept locked, and only learned that he could not gain entrance when he tried the door. The train was expected to start every moment, and did start almost instantaneously. Plaintiff was compelled to remain on the platform, or take his chances of getting on board from the ground with the train in motion. His only choice was a choice between two dangers, and whether or not, in taking the course he did, he was guilty of any negligence was a question for the jury. We cannot say that they were warranted in finding that plaintiff, at the time he was injured, was on that platform without fault on his part, and not of his own free will.

It is further urged that the risk of his being injured as he was injured was assumed by plaintiff when he entered the employ of defendant. It is beyond legal controversy that the employee, when he enters upon the service, assumes the ordinary risks incident to such service, and also the extraordinary risks of which he has notice, or of which in the usual exercise of his faculties he ought to have notice. It is equally well settled that an employee, upon entering the service of a railway company, has the right to assume that the railway and its appurtenances are so constructed as to render him safe in the performance of his duties, and that he will not needlessly be exposed to any extraordinary risk of which he has no notice: *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701; 1 Am. St.

Rep. 266; *Baltimore etc. R. R. Co. v. Rowan*, 104 Ind. 88; *Houston etc. R'y Co. v. Oram*, 49 Tex. 342; *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206; *Chicago etc. R. R. Co. v. Russell*, 91 Ill. 298; 33 Am. Rep. 54. Nor does he assume the risk arising from the erection of a high switch stand and signal so near the track that at best it clears the cars but a few inches, particularly when he knows the rules of the company forbid the erection of any such structure in such position: *Pidcock v. Union Pac. R. R. Co.*, 5 Utah, 612; *Scanlon v. Boston etc. R. R. Co.*, 147 Mass. 484; 9 Am. St. Rep. 733; *Boss v. Northern Pac. R. R. Co.*, 5 Dak. 308. Nor can we say that plaintiff, in the ordinary exercise of his faculties, was bound to know the condition of that switch stand. It is true that he had passed it upon this train nearly every day for two weeks; but he had no duty to perform in connection with the running of the train,—nothing in any manner that would be likely to call his attention to the condition of this switch stand. Under such circumstances it would be only natural that he should pass it without notice. We do not see why he should be charged with knowledge of its condition simply because he had passed it any more than any passenger who had passed it an equal number of times: *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701; 1 Am. St. Rep. 266; and *Pidcock v. Union Pac. R'y Co.*, 5 Utah, 612. It is undisputed that plaintiff had no actual knowledge of the existence of this danger. Had he seen it, duty and self-preservation alike would have required him to avoid it, if possible. Had he known of its existence, or had he been chargeable with such knowledge, perhaps it would have been negligence on his part not to have watched for and guarded against it. But it cannot be said, as a matter of law, that plaintiff was negligent in not looking for an object of the existence of which he had no knowledge, and which he had a legal right to presume did not exist. Railroad travel is so rapid that it has frequently been held negligence for a party, while riding in the cars, to voluntarily expose his person beyond the outer line of the car. In this instance, however, the evidence tends to show that plaintiff was thrown to the south and beyond the line of the car by a sudden lurch of the train as it passed through the switch, caused, doubtless, by the improper speed at which the train was running. We cannot say as a matter of law that this exposure was the result of any negligence on plaintiff's part, and we wish to add here that the law on the sub-

ject of contributory negligence, so far as it applies to this case, was very fully and fairly stated in the charge of the learned trial court to the jury, and the evidence nowhere discloses a state of facts that would warrant the court in taking that question from the jury.

Appellant insists that its negligence in maintaining the switch stand was not the proximate cause of plaintiff's injury, and that, as the facts were undisputed, the court should have so instructed the jury as a matter of law; and in support of this contention counsel cite *West Mahanoy Tp. v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604; and *South Side etc. R'y Co. v. Trich*, 117 Pa. St. 390; 2 Am. St. Rep. 672. It is claimed, first, that as it appears that plaintiff was crowded down upon the lower step and into a dangerous position by his fellow workmen upon the platform, therefore the superseding or responsible negligence of a third party intervened between the negligent act of defendant and the injury. As to this point, a perusal of the cases cited at once discloses that they are not applicable to the case at bar. In the first case, action was brought against the township to recover the value of a team by reason of the negligence of the township in suffering its highways to become obstructed. An ash heap had been allowed to accumulate in the highway, which overturned plaintiff's sleigh, and the team ran away. After running some distance, they went upon the railroad track, but were frightened off by a train, and their direction changed. After running some two miles the other way, they again went upon the track, and were killed by another engine. The court very properly held that the accident at the ash heap was not the proximate cause of the death of the horses. There was an all-sufficient subsequent intervening cause in that case. And the case of *South Side etc. R'y Co. v. Trich*, 117 Pa. St. 390; 2 Am. St. Rep. 672, is similar in principle. A street car was stopped to enable a passenger to get on at the rear platform. Just as the passenger reached the platform, the driver, suddenly and without notice, whipped up his horses to avoid a runaway team. The sudden start threw the passenger back on the ground, and she was injured by the runaway team. The court held that the negligence of the driver in suddenly starting the car was not the proximate cause of the injury. In this case, too, there was a subsequent intervening cause. These cases from Pennsylvania reiterate and confirm the rule first announced in that court in *Pennsylvania R. R. Co. v. Kerr*,

62 Pa. St. 353; 1 Am. Rep. 431; and repeated in *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, as follows: "The immediate, and not the remote, cause is to be considered. This maxim is not to be controlled by time or distance, but by succession of events. The question is, did the cause alleged produce its effect without another cause intervening, or was it to operate through or by means of this intervening cause?" In this case the injury—the hurt—was caused by the switch stand, and that alone. It is true that if any one of a great many circumstances that preceded that injury, including the crowding on the platform, had never occurred, plaintiff would not have been where he was, and would not have been injured; but no one of these circumstances was directly or indirectly the cause of the injury. The intervening cause, to be a shield to defendant, must be such as to actually break all connection of cause and effect between the negligent act and the injury. To be a superseding cause it must alone, and without the slightest aid from the act of defendant, produce the injury, and to be a responsible cause it must be the culpable act of a responsible party: *Shearman and Redfield on Negligence*, secs. 31, 32, and cases cited. But the direct connection of cause and effect between the improper switch stand and the injury remains unimpaired in this case. The utmost latitude that could be given the evidence would only warrant the conclusion that the culpable act of the fellow workmen concurred with the existing, continuing, negligent act of defendant in producing the injury. But the concurrent negligence of the fellow workmen is of no importance. Where the negligent acts of two parties concur in producing an indivisible injury, the injured party has his right of action against either: *Pastene v. Adams*, 49 Cal. 87; *Martin v. North Star Iron Works*, 31 Minn. 407; *Ricker v. Freeman*, 50 N. H. 420; 9 Am. Rep. 267; *Atkinson v. Goodrich Trans. Co.*, 60 Wis. 141; 50 Am. Rep. 352; *Delaware etc. R. R. Co. v. Salmon*, 39 N. J. L. 309; 23 Am. Rep. 214.

"The breach of duty on which an action is brought must be not only the cause, but the proximate cause, of the damage to plaintiff." Under this familiar language, it is urged that the breach of duty in this case was not the proximate cause of the injury in the sense that the injury was not one that could have been naturally and reasonably anticipated as a result of such breach of duty. There is not an entire uniformity of holding upon this point. The rule most generally



followed, and which we adopt, was announced in *Milwaukee etc. R'y Co. v. Kellogg*, 94 U. S. 469, as follows: "But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been seen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible character of the saw mills and piles of lumber." But the argument in this case is that defendant could not reasonably have foreseen or anticipated the circumstances that led up to the injury. We think this is a misconception of the rule. Shearman and Redfield on Negligence, sec. 29, thus states the rule: "The practical solution of the question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact exist, whether they could have been ascertained by reasonable diligence or not, would have thought, at the time of the negligent act, reasonably possible to follow if they had been suggested to his mind." The supreme court of Wisconsin, which fully approves the rule announced in *Milwaukee etc. R'y Co. v. Kellogg*, 94 U. S. 469, say in *Atkinson v. Goodrich Trans. Co.*, 60 Wis. 141; 50 Am. Rep. 352: "The circumstances which do in fact exist are to be determined by the jury from all the evidence, and, where they have determined what the circumstances were at the time, then they can with some reasonable degree of certainty determine the question whether the result could reasonably have been expected to occur in the light of such circumstances." As we have said, defendant's negligence was a continuing act. In the light of the circumstances, as the jury was warranted in finding them to exist at the time, the injury was in a high degree probable. The action of the court in refusing to take the question of proximate cause from the jury was entirely correct. What we have already said will obviate the necessity of any detailed consideration of the errors assigned upon the instructions given and refused. The charge of the court, which we deem fair in all respects to the defendant, was substantially in accord with the views here expressed. The instructions asked and refused embodied defendant's

views of the propositions we have already discussed. The main charge of the court to the jury was in writing, but the court read the sections of the statutes defining the various degrees of negligence, and made some oral comments to the jury in connection therewith. All that was said by the court was taken down by the stenographer. It does not appear that it was not written out and given to the jury upon their retirement. No exception was taken at the time to the manner of giving the instructions. The statute (sec. 5048, Comp. Laws), requires the instructions to be in writing. At the close of the instructions, counsel agreed in open court, "that, at any time within which a stay was granted, either party might take his or its exceptions to the charge, or any part thereof;" and within the life of this stay defendant took exception to the giving of oral instructions, but not to the matter of the instructions so given. We hold that the agreement could cover exceptions to the matter of the charge only. It is not competent for counsel to sit by and make no objections to oral instructions when given on that ground, and by agreement save their exceptions weeks later. Such a course is not fair to the court, and has the support of no adjudicated case, so far as we know. When counsel so sit by without objection, they must be held to have waived the error: *Sackett's Instructions to Juries*, 14; *Garton v. Union City Nat. Bank*, 34 Mich. 279; *State v. Sipult*, 17 Iowa, 575; *Vanwey v. State*, 41 Tex. 639. Many errors are alleged upon the rulings of the court in the admission or rejection of testimony. We have examined them all, and consider them not well taken. Their reproduction here would be an unwarranted use of space. The judgment of the district court is in all things affirmed. All concur.

WALLIN, J., having been of counsel, did not sit on the hearing of this case; Judge WINCHESTER, of the sixth district, sitting by request.

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**RAILROAD COMPANIES — INJURIES TO EMPLOYEES — CONTRIBUTORY NEGLIGENCE IN OCCUPYING DANGEROUS POSITION.** — It is contributory negligence on the part of a switchman to ride in a sitting position upon the beam of the pilot of a road engine, with his feet hanging down over the cowcatcher, and the fact that upon switch engines switchmen ride standing upon the platform provided for that purpose in front of the engine, has no tendency to prove that they are justified in riding in a sitting position upon the cowcatcher of a road engine: *Glover v. Scottin*, 82 Mich. 369. So where a watchman in a railroad yard uses a platform appropriated to the transfer of freights, for the purpose of running along it at night in the dark, he does so at his own risk, it not appearing that the platform was intended by the company

for such a purpose, or that he had any reason to think it was so intended: *Hamilton v. Richmond etc. R'y Co.*, 83 Ga. 346. So where the plaintiff, a laborer in defendant's employment, and well acquainted with the character and location of the road, was riding in a "shanty car," having doors on each side, attached to a material train, which was moving at a high rate of speed over a new and crooked roadbed, and, becoming anxious for his safety, left his position at the end of the car, and while endeavoring to pass between the stove and one of the doors which was open, was thrown out by a sudden jerk of the train and injured, it was held that, as he could have reached the spot safely by passing on the other side of the stove by the closed door, he was guilty of contributory negligence and could not recover: *Taylor v. Richmond etc. R. R. Co.*, 109 N. C. 233. Unless an employee is acting under orders in remaining on or near the track, he places himself there at his own peril, and cannot recover for an injury there received: *Moore v. Norfolk etc. R. R. Co.*, 87 Va. 489. On the other hand, although a rule of the railroad company forbids switchmen to go between cars for the purpose of coupling or uncoupling them, plaintiff cannot be charged with contributory negligence because, when injured, he was standing on the foot-board of the tender, "which was put there for switchmen to ride on": *Richmond etc. R. R. Co. v. Jones*, 92 Ala. 218. In *Kelleher v. Milwaukee etc. R. R. Co.*, 80 Wis. 584, the facts in evidence were these: The switchman was upon the platform of a car which was being switched on the side track. Water was running from a steam pipe at the end of the car, and, to avoid it, he leaned forward, and was struck by a shed, which was twenty-two and a half inches from the side of the car. His duties required him to be upon the platform and at times to lean out. There was evidence tending to show that he did not know of the shed and its distance from the track, and had not the means of such knowledge. Under these circumstances, it was held that the court could not say, as a matter of law, that the defendant was not negligent, or that the plaintiff was guilty of contributory negligence.

**MASTER AND SERVANT—ASSUMPTION OF RISKS BY EMPLOYEE.**—The most recent cases in the present series to the point that one who engages in the employment of another for the performance of a specified duty for compensation takes upon himself the ordinary perils incident to the employment are enumerated in the note to *Daniel v. Chesapeake etc. R'y Co.*, 32 Am. St. Rep. 892. Assumption of risks will not be imputed to the servant unless he has knowledge of them: *Fisk v. Central Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22; *Runnel v. Dilworth*, 131 Pa. St. 509; 17 Am. St. Rep. 827; *Georgia Pac. R'y Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47; *Clark v. Missouri Pac. R'y Co.*, 48 Kan. 654; *Carlson v. Oregon Short Line etc. R'y Co.*, 21 Or. 450. But such knowledge will be presumed to exist where the risks are apparent to ordinary observation: *Roseth v. Smith*, 38 Minn. 14; 8 Am. St. Rep. 637; *Kean v. Detroit etc. Rolling Mills*, 66 Mich. 277; 11 Am. St. Rep. 492; *Nadau v. White River Lumber Co.*, 76 Wis. 120; 20 Am. St. Rep. 29; *O'Neal v. Chicago etc. R'y Co.*, 132 Ind. 110; *McLaren v. Williston*, 48 Minn. 299. See also note to *Shortel v. St. Joseph*, 24 Am. St. Rep. 322.

**MASTER AND SERVANT—DUTY OF MASTER TO FURNISH SAFE APPLIANCES AND SAFE PLACE TO WORK IN.**—It is the duty of the master to provide and maintain suitable means and instrumentalities for the conduct of his business: *Wornell v. Maine etc. R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321; *Little Rock etc. R'y Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230; *Richmond etc. R'y Co. v. Norment*, 84 Va. 167; 10 Am. St. Rep. 827; *Griiffin v. Boston etc.*

*R. R. Co.*, 148 Mass. 143; 12 Am. St. Rep. 526; *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631; *Wabash etc. R'y Co. v. Morgan*, 132 Ind. 430; *Muirhead v. Hannibal etc. R. R. Co.*, 103 Mo. 251. This duty extends to the maintenance of a safe roadway: *McKee v. Chicago etc. R'y Co.*, 83 Iowa, 616; and a projecting rock endangering brakemen in the discharge of their duties is a defect which will render a railroad company liable for injuries resulting from its existence: *Georgia Pac. R'y Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47. In *Bonner v. La None*, 80 Tex. 117, a railroad company was held liable for injuries caused by a collision with a switch stand placed too near the track, the court laying down the general rule that a company is responsible to one of its servants for injuries sustained without fault or negligence on his part from its negligent construction or erection of an appendage of its road which subjects its employees to unnecessary hazard and danger, which the injured party could not reasonably have anticipated and of which he was not informed. Similarly, constructing and maintaining a side track so near to a building in the yards of a railroad company, and under its control, as to endanger the lives of its employees while switching cars on said track, is a violation of the duty of the company to provide a safe place for its employees to work in; *Sweet v. Michigan Cent. R. R. Co.*, 87 Mich. 559; and in an action against a railroad company for the death of a switchman caused by the proximity of a shed to a side track, a finding by the jury that "the shed was so close to the track as to render the place unnecessarily dangerous to employees in performing their duties at that place" is a sufficient finding of defendants' negligence: *Kelleher v. Milwaukee etc. R. R. Co.*, 80 Wis. 584. On the other hand, where the plaintiff, in attempting to get out of an ash pit between the rails, from which he was shoveling ashes, was struck by a locomotive, and it was shown that near the pit there was a water plug so arranged that a locomotive discharging ashes into the pit could at the same time take water, it was error in the court to submit to the jury the question whether the relative position of the water plug and the stopping place was an improper and negligent construction: *Reichel v. New York etc. R. R. Co.*, 130 N. Y. 682. And a brakeman is held to assume the risk of injury caused by the negligence of the company's employees in leaving a freight car on a side track so as to injure the brakeman while riding on a passing train: *Schaub v. Hannibal etc. R'y Co.*, 106 Mo. 74.

NEGLIGENCE. — PROXIMATE AND REMOTE CAUSE: See notes to *Brown v. Chicago etc. R'y Co.*, 41 Am. Rep. 53-58; *Forney v. Geldmacher*, 42 Am. Rep. 390-393; *Hency v. Dennis*, 47 Am. Rep. 381; *Campbell v. City of Stillwater*, 50 Am. Rep. 569-574; *White v. Conly*, 52 Am. Rep. 157-166.



## IN RE DANCE.

[2 NORTH DAKOTA, 184.]

**JUSTICES OF THE PEACE — VALIDITY OF JUDGMENT.** — When the trial is by jury, the justice must enter judgment at once in accordance with the verdict, and such entry must be made within the township and county for which he was elected.

**CERTIORARI, TO WHOM SHOULD BE DIRECTED.** — A writ of *certiorari* cannot be directed to an ex-officer after he has parted with the record which it is sought to have reviewed.

**CERTIORARI — CONCLUSIVENESS OF RECORD.** — In reviewing a judgment of a justice's court upon a common-law writ of *certiorari*, the record imports verity, and cannot be contradicted by the supplemental return of the justice.

**CERTIORARI — THE NECESSARY PRESUMPTION ARISING FROM A RECORD** cannot be contradicted by parol evidence any more than the express words of the record itself.

*W. E. Dodge and W. E. Purcell*, for the appellant.

*Benton and Amidon*, for the respondent.

**BARTHOLOMEW, J.** The facts giving rise to this case, briefly stated, are as follows: One A. W. Kuhn was justice of the peace in Norman township, Cass County. An action, properly brought on for trial before said justice and a jury on January 3, 1890, at a point in said township agreed upon by the parties thereto, and in which the petitioner in this case was one of the defendants, resulted in a judgment against the defendants. On March 22, 1890, the petitioner obtained from the judge of the district court of Cass County a writ of *certiorari* to review said judgment. In the interim the official term of said Kuhn had expired and his docket has passed to the possession of his successor, one William G. Dance. The writ was directed to Justice Dance, requiring him to send up a transcript of the records and proceedings in the case and of all the pleadings and papers on file in his office relating thereto. The return of this officer to the writ showed a complete and legal judgment. Every entry which the law required should be made had been made. We do not understand that this is questioned. At the end of the formal judgment and preceding the signature of the justice, were the words, "Dated at Kindred, Cass County, N. D., January 3rd, 1890." Kindred is a village in Norman township. When this return was in, petitioner applied for and obtained a supplemental writ, directed to Ex-Justice Kuhn, requiring him to return a full "statement" of all his proceedings in said action. This supplemental writ

was issued upon an affidavit tending to show that the statements in the record were in fact false. When the response of Mr. Kuhn to the supplemental writ was received, it stated that when the verdict of the jury was returned he adjourned court, without fixing time or place of further meeting, and took his docket and went to the city of Wahpeton, in Richland County, where on January 5, 1890, the judgment was entered and signed. If the statements contained in the return of Ex-justice Kuhn be true, he lost jurisdiction of the case when he adjourned as stated, and all his subsequent acts were without authority. Our statute (Comp. Laws, sec. 6104) requires the justice, when a trial is by jury, to enter judgment at once in accordance with the verdict; and by section 6109 this judgment must include the costs allowed by law to the prevailing party. These provisions are mandatory: *Hull v. Mallory*, 56 Wis. 355; *McNamara v. Spees*, 25 Wis. 539; *Brady v. Taber*, 29 Mich. 199. Nor could Justice Kuhn legally enter judgment, or tax costs, or exercise any other judicial function outside the township and county for which he was elected. Section 6041, Compiled Laws, requires justices of the peace to keep their offices and hold their courts at some place within such county and township; and for a construction of similar provisions, see *State v. Marvin*, 26 Minn. 323, *Phillips v. Thralls*, 26 Kan. 780. But when the return of Ex-Justice Kuhn was received, the defendant moved the court to quash the supplemental writ and return upon the following grounds, among others: 1. That the writ of *certiorari* cannot be directed to an ex-official after he has parted with the record that is sought to be reviewed; 2. That a parol return made by an ex-official is not competent to contradict the record kept by him at the time of the transactions. This attack was unsuccessful in the district court, and the defendant brings the questions to this court by appeal.

The points above specified were well taken, and the motion should have been sustained. To sustain the position that the writ of *certiorari* may be directed to an ex-officer after he has parted with the record respondent relies upon *Harris v. Whitney*, 6 How. Pr. 175, and *Conover v. Derlin*, 15 How. Pr. 470. The cases do not go far enough. There is no allusion to the real point here. Those cases do hold that the writ may run to an ex-officer, but there is no suggestion that such ex-officer was not in each of those cases in possession of the record to be reviewed. On the contrary, in *Conover v. Devlin*, 15 How.

Pr. 470, the writ directed the ex-officer "to certify to this court the proceedings had before him in this matter *and the record thereof*" (the italics are ours), thus clearly showing that such ex-officer had the record in his possession. And to support the position that the writ was properly directed the court quote the following from Bacon's Abridgments, "Certiorari," F: "If the person who ought to certify a record, as a justice of the peace who hath taken a recognizance, or a judge of *nisi prius* who hath taken a verdict, or a coroner who hath taken an inquest, die with the record in his custody, the *certiorari* may go to his executor." Certainly that authority would never be cited to show that the writ could run to one not in possession of the record. Neither can it be said from what appears in the case that the party to whom the writ was directed was not in the possession of the record in *Harris v. Whitney*, 6 How. Pr. 175. There was in that case no motion to quash the return, but it was claimed that the return was a nullity on the authority of *Peck v. Foot*, 4 How. Pr. 425, where the court held that the return was an official act, and could only be made by an officer. The case of *Harris v. Whitney*, 6 How. Pr. 175, overrules the case of *Peck v. Foot*, 4 How. Pr. 425, and holds that the return may be made by an ex-officer—a holding that would be generally followed to-day, even as to the common-law writ, if such ex-officer still retained the record to be reviewed. It is true, however, that the return made by the the ex-officer in *Harris v. Whitney*, 6 How. Pr. 175, was of matter not of record. So far as any report shows, there was no transcript in the return; certainly there was nothing in the return to contradict the record made below. But how far short this case falls of being an authority under our statute and in this state will become clear when we remember that the court upheld the subject-matter of that return upon the theory—and expressly so state—that it was competent for an ex-officer to make his return by affidavit; and that, if such ex-officer died before return made, the case could be heard on the affidavits of bystanders, and that each party could prepare such affidavits and serve on opposite party; thus clearly showing that in the judgment of the court, under the statute then governing them, an issue of fact might be determined by the superior court on *certiorari*. The authorities hereafter cited will show that such a proceeding is unknown under the common-law writ. Our statute seems conclusive upon the point that the writ cannot run to an ex-

officer who has parted with the record. Section 5509, Compiled Laws, reads: "The writ may be directed to the inferior court, tribunal, board, or officer, or to any other person having the custody of the records or proceedings to be certified." It is only when such "other person" has the custody of the record or proceedings that the writ can be directed to him. Again, sec. 5510 reads: "The writ of *certiorari* shall command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, and annex to the writ a transcript of the record and proceedings, describing or referring to them with convenient certainty, that the same may be reviewed by the court; and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed." What does the statute mean by a transcript? Webster defines it: "That which has been transcribed; a writing or composition consisting of the same words as the original; a written copy." There can be no transcript of that which never had a prior existence. How, under that statute, can a matter resting purely in the memory of an ex-justice, and by him reduced to writing for the first time after the writ is served upon him, have any standing in court as a return to a writ of *certiorari*? But, more, the very definition and office of the common-law writ preclude its running to anyone who has not possession of the record to be reviewed. In Bacon's Abridgments it is thus defined: "A *certiorari* is an original writ, issuing out of chancery or the king's bench, directed to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice before him or such other justices as he shall assign to hear the cause." The substance of this definition has never been departed from except where the statute has broadened the scope of the writ. In *Donahue v. Will Co.*, 100 Ill. 94, it is said: "It [the writ of *certiorari*] requires no return of the evidence or certificate of facts outside the record, and the trial must be had upon the record alone." Again from the same court: "The common-law writ of *certiorari* simply brings before the court for inspection the record of the inferior tribunal or body, and its judgment affects the validity of the record alone—that is, determines that it is valid or invalid." *Hyslop v. Finch*, 99 Ill. 171. If only the record can be returned or considered, then only the custodian of the record can make return. In *Milwaukee Iron Co. v. Schubel*,



29 Wis. 444, 9 Am. Rep. 591, it is held that the party who has the custody of the record, and he alone, can make return to the writ. Wood on Mandamus, page 173, thus states the rule: "It [the writ of *certiorari*] is addressed to all the persons whose return is necessary to enable the court to determine the regularity or validity of the proceedings of the officer or tribunal sought to be reviewed, and the fact that the person is out of office is no objection if he has the custody of the record." In addition, on this point, see *State v. City of Fond du Lac*, 42 Wis. 287; *Crawford v. Township Board*, 22 Mich. 405; *People v. Supervisors*, 1 Hill, 195; *People v. Commissioners*, 30 N. Y. 72; *State v. Noonan*, 24 Minn. 125; *Wardsworth v. Sibley*, 38 Wis. 486; *Roberts v. Commissioners*, 24 Mich. 182; *People v. Hill*, 65 Barb. 171; *Farmington River etc. Co. v. County Comm'rs*, 112 Mass. 206; *Commonwealth v. Winthrop*, 10 Mass. 177; *Rutland v. County Comm'rs*, 20 Pick. 71.

Upon the theory that the supplemental return contradicts the record entries, and to show the competency of such return for that purpose, the case of *Blair v. Hamilton*, 32 Cal. 50, is relied upon by respondent. That case is based upon *People v. Board etc.*, 14 Cal. 479, and *Love v. Alexander*, 15 Cal. 300. No other cases are cited. The California statute is identical with our own, so far as the scope of the writ is concerned, though their practice act gives a wider range of investigation under the writ than we have; but that is immaterial. But these cases are hardly authority for the position. In *People v. Board etc.*, 14 Cal. 479, and *Blair v. Hamilton*, 32 Cal. 50, it was held that the superior court had the right to have before it the evidence on which the inferior tribunal based the conclusion that it had jurisdiction, and that, where this evidence did not establish jurisdiction as matter of law, the action of the inferior tribunal could be set aside. No effort was made in either of those cases to contradict any statement of fact contained in the record by matter resting in parol. In *Love v. Alexander*, 15 Cal. 300, there was no question on *certiorari* before the court. An incidental reference was made to the holding in *People v. Board etc.*, 14 Cal. 479. The learned judge who wrote the opinion in *People v. Board etc.*, 14 Cal. 479, used this language, at page 500: "The provisions of our statute are merely in affirmance of the common law. The nature and effect of the writ remains unchanged. Its functions are neither enlarged nor diminished,

and the rules and principles which govern its operation are still the same." Our statute being identical with that of California, of course all the decisions under the common-law writ should have proper weight in this state. Many of the cases already cited announce in positive terms that the reviewing court can consider only the record made by the inferior tribunal, which is simply declaring in another form that the record cannot be contradicted. This is specially true of the cases cited from Illinois and Massachusetts. The point is emphasized that the record cannot be contradicted, but the case must be decided upon an inspection of the record. In *State v. Kemen*, 61 Wis. 494, it is said: "Upon a writ of *certiorari* nothing can be inquired into except what appears of record in the inferior court or body, and upon the return no parol testimony is allowed to establish any issue made by the return to the allegations contained in the petition for the writ." *Weaver v. Lammon*, 62 Mich. 366, was *certiorari* to a justice of the peace. He made return of a transcript of the record, and also of certain matters not of record, and these matters contradicted the record. Said the court: "The judgment as it appears entered in the docket must control. The record of his judgment in his docket cannot be contradicted by his return to the writ." That case cannot be distinguished in principle from this case, except that the return of the extraneous matter was an official act of the justice before his term expired. *Miller v. McCullough*, 21 Ark. 426, was an attack by *certiorari* on a justice-court judgment. The petition for the writ alleged that the defendant was not served with process in the proper township. The transcript sent up by the justice in obedience to the writ showed service in the proper township, but the defendant in the *certiorari* proceeding admitted in open court that service was not made in the township stated in the return. Held, that on *certiorari* the record was conclusive even as against such admission: See also *Prall v. Waldron*, 2 N. J. L. 135; *Inhabitants etc. v. County Comm'rs*, 5 Allen, 13; *Cassidy v. Millerick*, 52 Wis. 379. It is seldom that a case can be cited so entirely in point to the matter under discussion as is this last case from Wisconsin. That case was *certiorari* to a justice of the peace. There had been an adjournment in the case, and it was claimed that the justice failed prior to such adjournment, or while the parties were present, to enter in his docket any place to which said cause was adjourned, but that at some subsequent time he had

added to the docket entry the following words: "At my office, in the town of Poyssippi. S. B. Halleck, justice of the peace." It was also claimed that on the adjourned day the case was not called at the office of the justice, but at a town hall some miles distant. The justice was required to make a return as to these allegations, and his return showed the allegations to be true; but the record certified up in obedience to the writ showed the quoted words regularly entered in connection with the time of adjournment. The court, after a review of the authorities, say: "These decisions clearly indicate that in reviewing a judgment of a justice court upon a common-law writ of *certiorari*, the record imports verity notwithstanding the statements of the justice to the contrary, even upon matters of jurisdiction. The cases also dispose of the question as to the place of calling the suit at the time to which it was adjourned. Upon such a writ it must be conclusively presumed that it was called at his office. To allow the return to have any effect as against the record and the presumptions arising from it would be to authorize issues of fact as to what did or did not occur." To our minds, the conclusion thus reached is unavoidable on principle. To permit the record to be impeached by the recollections of the justice is, in effect, contradicting the return by parol evidence; and there is such an avalanche of authority against that proceeding that no one would claim that it could be done. If the supplemental return was properly received in this case, then we are reduced to this position: When Justice Dance certified the record in obedience to the writ, had the petitioner sought to bring in Ex-justice Kuhn, and show by his affidavit or his oral testimony in open court that the statements in the record were untrue, such a course would not have been tolerated for a moment. But Mr. Kuhn, a private citizen, is allowed to make an unsworn statement out of court, dignify it with the name of a "return," and by the magic of that name the statement is powerful enough to scatter a record which the same matter, coming from the same party under the solemnity of an oath, would be powerless to touch. Further, the statute makes the transcript *prima facie* evidence of all the facts therein stated. The supplemental return contradicts the transcript. The transcript is entitled to as much weight as the unsworn statement of a private citizen. Suppose the truth of that statement be questioned, how is a court to reach a decision? No evidence can be introduced to fortify or de-

feat either the transcript or the statement. By what instrumentality is the court to solve the dilemma? By the allowance of the supplemental return an issue of fact would be formed in a proceeding where the trial of an issue of fact is positively prohibited by law. It is true that in nearly all the states there now exists some form of statutory writ of *certiorari* broader in its scope and more flexible in its operation than the common-law writ to which we are confined.

It is urged upon us, however, that the return to the supplemental writ does not, in fact, contradict the record of the justice as the statute requires it to be kept; that the statute nowhere requires the justice to enter the time or place of entering judgment; and that the words, "Dated at Kindred, Cass County, N. D. January 3rd, 1890," not being required by statute, form no part of the record proper, and hence can be contradicted by parol. It is true that entry is not specially enjoined. We may erase it, and still the difficulty is not removed, because the facts stated in that entry are necessarily presumed from what the law does require to be made matter of record. In every case in justice court, when all the entries that the law requires to be made are made (and there is no claim that the transcript as returned in this case does not show all the entries required by statute), the record must necessarily show a valid judgment; otherwise a judgment of a justice of the peace could not be proven by the docket or a transcript thereof. But, as we have already seen, the judgment, in order to be valid, must be entered at once on the return of the verdict, and the justice must make the entry while in the proper township and county. Hence, in this case, with the quoted entry erased, we must presume from the record that the judgment was entered on January 3, 1890, in Norman township, Cass County, North Dakota; otherwise we would have a judgment containing every entry that the statute requires, yet void on its face. To allow the necessary presumptions arising from a record to be contradicted by parol would be just as fatal to a record in every case as to allow the express words of the record to be contradicted. In *Cassidy v. Millerick*, 52 Wis. 379, the justice stated that he called the case at the town hall three miles from his office, but the court said: "Upon such a writ [*certiorari*] it must be conclusively presumed that it was called at his office. To allow the return to have any effect as against the record and the presumptions arising from it, would be to authorize issues of fact as to what did or did not occur."



The evil that would result, in cases of this character, from holding that the record imports verity, is far less than the evil that would result from permitting court records to be frittered away by the memory of man. Nor do we think the petitioner was without remedy in this case; but that question, while important, is not controlling. It often happens that a party is without remedy except against the offending official. It was well said, in *Cassidy v. Millerick*, 52 Wis. 379: "The question is not, whether the defendant had a remedy, but was he entitled to the one he sought in this writ?" For the reasons above stated, the district court is directed to reverse its judgment, and quash the supplemental writ and the return thereto. All concur.

CORLISS, C. J. I concur on the ground that the record of the case showed that the judgment was entered at the proper time and place, and that this record cannot be overthrown by the parol return. There can be no stronger presumption that an officer will make a false record than that he will make a false return. The issue between the record and the return cannot be litigated; and as one or the other must prevail, it is consonant with sound principle to give verity to the record.

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JUSTICES OF PEACE — JUDGMENT — TIME OF ENTRY. — When a justice of the peace fails to enter judgment within ninety days after a verdict has been rendered in the case, a judgment then rendered by him is without jurisdiction, and void: *Tomlinson v. Litze*, 82 Iowa, 32; 31 Am. St. Rep. 458, and note.

CERTIORARI — TO WHOM SHOULD BE DIRECTED. — The police judge who presided at the trial to be reviewed on *certiorari* is still competent to perfect his answer to the *certiorari*, though he has retired from office and become assistant city attorney, if it does not appear that he has taken any part as counsel in the *certiorari* case: *Phillips v. Atlanta*, 87 Ga. 62.

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## HAXTUN STEAM HEATER COMPANY v. GORDON.

[2 NORTH DAKOTA, 246.]

**MECHANIC'S LIENS.** — A lien for labor or material is paramount to the lien of a mortgage executed after the building was commenced, but before such labor or material was furnished.

**MECHANIC'S LIENS FOR ADDITIONS, ENLARGEMENTS, OR ALTERATIONS,** made after a building is finished, do not attach from the commencement of the original building, but only from the commencement of such additions, enlargements, or alterations.

**MECHANIC'S LIENS.** — THOUGH A CHANGE IN THE PLAN OF A BUILDING, or of some part thereof, is made while it is in process of construction, a lien

for labor or materials furnished in connection with such change attaches as of the date of the commencement of the building, and takes precedence over any mortgage executed after such commencement and before such change in plan, although the mortgagee, in making his loan, took into consideration the plans and specifications of the building as then existing, and advanced sufficient money to have carried them out had they not been changed.

**ACTION to foreclose a lien. Judgment for plaintiff. Defendant appeals.**

*Burke Corbett*, for the appellant.

*Fred. B. Lathrop*, for the respondent.

**BARTHOLOMEW, J.** This is a contest for priority between plaintiff, the Haxtun Steam Heater Company, a mechanic's lien holder, and the defendant, the Dakota Investment Company, a mortgagee. There was a decree below for the plaintiff, and the investment company appeals. Section 5478 of our Compiled Laws reads as follows: "The liens for labor done or things furnished shall have priority in the order of the filing of the accounts thereof, as aforesaid, and shall be preferred to all other liens and encumbrances which may be attached to or upon said building, erection, or other improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection, or other improvement." The unquestioned facts are these: One Gordon was the owner of certain lots in the city of Grand Forks, upon which he desired to erect an hotel building. On August 12, 1889, he commenced the erection of said building. August 17, 1889, Gordon executed to the appellant a mortgage upon said lots for the sum of \$10,550; that said mortgage was properly recorded on August 19, 1889; that in October, 1889, Gordon entered into a contract with the respondent, by which respondent agreed to place a steam heating apparatus in said building, which was furnished and put in place in November and December of that year, and before the completion of the building; and within the required time respondent furnished and filed the necessary documents to perpetuate its lien for the unpaid amount due for such heating apparatus. The appellant introduced certain evidence, which, on motion of respondent, was subsequently stricken out by the court as immaterial. This action of the court is assigned as error. The rejected evidence showed that before the building was commenced, Gordon procured an architect to make plans and specifications therefor; that there was no

general contractor for the erection of the building, but that Gordon contracted with various parties for different lines of material and work as the same were needed; that said plans and specifications were always used as the basis upon which such contracts were made; that said plans and specifications contemplated heating said building with stoves, and not by steam, but included a smoke stack for future use, as it would be cheaper to put it in then than afterwards; that said plans and specifications, and the submission of bids by different contractors thereunder, formed the basis upon which appellant made the loan to Gordon; that after such loan was perfected, and the mortgage executed and recorded, the plans for said building were so far changed as to substitute a steam heating apparatus for stoves; that said change was made at the solicitation of respondent's agent, and when made, and when the contract for the steam heating apparatus was entered into, respondent had both actual and constructive notice of the mortgage to the appellant. This statement uncovers the contention of the parties. Respondent claims that under the statute its lien has priority over any mortgage on the lots made subsequent to the commencement of the building, although prior to the time when respondent made its contract with Gordon and furnished any part of its labor and materials. The appellant, on the other hand, insists that, as it parted with its money, and took its security on the basis of the plans and specifications as they then existed, it is by law entitled to priority over any lien for labor or materials subsequently furnished for purposes not then contemplated in the plans and specifications of the building then being erected; that as to the steam heating apparatus furnished by respondent, it was so far a change of and enlargement upon the original building that, as to it, and the inception of a lien therefor, the building was not commenced, in the sense of the statute, until the contract for such apparatus was entered into. All of the errors assigned are but different methods of bringing forward this one claim, and the case presents but the single question.

Mechanic's lien statutes, containing provisions similar to or identical with the section quoted from our statute, exist in many of the states and have been frequently before the courts. The precise point here raised has not been often ruled, nor, unfortunately, have the rulings been uniform, yet we are clear that the holding of the lower court has the support of the de-

cided weight of authority as well as sound principle. Appellant cites us to the case of *Welch v. Porter*, 63 Ala. 232. That case was decided under a statute which declares that the lien conferred thereby, "should attach and be preferred to all other encumbrances which may be attached to or upon such buildings, erections, or other improvements, or the ground, or either of them, subsequent to the commencement of such buildings or improvements." It must be admitted that this case fully sustains appellant's position, and goes even further, for the court say: "Nor do we doubt that when, by the terms of the contract, one person is to do the labor and another is to furnish the material, the lien of each attaches from the time he commences the performance of his contract." And again: "If he were to hold that because a building had been commenced, a subsequent contractor or material man could acquire a lien which would take precedence over an intervening encumbrance, we think we would shock the moral sense of the profession and fail to carry out the intent of the legislature."

In that case there was no question of alteration in the original plans, or enlargement upon the building, and the court holds that the lien of each mechanic or material man attaches only from the time he commences the performance of his contract. The case stands alone, however. No other case can be found going to the same extent. Appellant also cites in support of its position *Soule v. Dawes*, 7 Cal. 576. But in that case the facts were of an entirely different character. There the lot owner entered into a contract for the erection and completion of a building for a consideration certain, to be paid part in money and part by the conveyance to the contractors of certain other realty. While the building was in progress of erection the owner mortgaged the property where the building stood to a party who was thoroughly conversant with the terms of the contract with the contractors. After the building was completed the contractors waived the conveyance of the realty that was to be taken in part payment, and took the owner's note for the amount, and subsequently filed a lien and sought to have it declared superior to the mortgage. But the court held that the parties could not change the terms of payment to the detriment of the mortgagee. The language used by the California court was entirely pertinent to the facts in that case, but certainly never was intended to apply to the facts of a case like the one before us. This case was again before the supreme court in 14 Cal. 247. At that time



a new element was introduced into the case in the form of a claim for extra work not covered by the compensation fixed in the original contract. The court allowed the claim as superior to the mortgage, but upon the theory that the extra work was done with the mortgagee's knowledge and without any objection on his part, and the language used would indicate that the claim would not have been allowed under other circumstances. The cases that have held that the lien for labor or material was paramount to the lien of the mortgage executed after the building was commenced, but before such labor or material was furnished, are very numerous. The leading ones are *Neilson v. Iowa etc. Ry Co.*, 44 Iowa, 71; *Dubois v. Wilson*, 21 Mo. 213; *American F. Ins. Co. v. Pringle*, 2 Serg. & R. 138; *Gordon v. Torrey*, 15 N. J. Eq. 112; 82 Am. Dec. 273; *Meyer v. Construction Co.*, 100 U. S. 457; *Davis v. Bilsland*, 18 Wall. 659; *Parrish's Appeal*, 83 Pa. St. 111; *Manhattan L. Ins. Co. v. Paulison*, 28 N. J. Eq. 304. In some states, also, the mechanic's lien attaches to the particular structure or improvement for which the labor or materials were furnished, in preference to a mortgage on the land executed prior to the commencement of such structure or improvement: See *Brooks v. Railway Co.*, 101 U. S. 443, and cases there cited. But this is only true where such structure or improvement is of such a nature and so built that it can be sold separately, and severed and removed without injury to the realty as it existed prior to the building of such structure or improvement: *Getchell v. Allen*, 34 Iowa, 559; *Equitable L. Ins. Co. v. Slye*, 45 Iowa, 615. It has also been repeatedly held that when a building was once finished, the lien for labor or material subsequently furnished for additions, enlargements, or alterations thereto did not attach from the commencement of the original building, but only from the commencement of such additions, enlargements, or alterations: See Phillips on Mechanic's Liens, sec. 220, and cases cited. The cases where the subsequent labor or materials, for which a lien superior to the intervening mortgage is claimed, were furnished and used in the construction of the building before its completion, but for purposes not contemplated in the original plans, or when the mortgage was executed, are less numerous. Phillips on Mechanic's Liens thus states the principle: "The criterion would seem to be that everything done before the building is finished, according to the original plan or design, whether agreeably to that plan or not, may be made the subject of a lien which

will relate back to the period when the building was commenced, to the exclusion of intervening encumbrances. . . . So long as any part of a building is incomplete the whole is so, and may be moulded into any shape to suit the wishes of the owner, without excluding the alterations so made from the benefit of the lien law:" Sec. 220.

*Norris's Appeal*, 30 Pa. St. 122, is an instructive case, and discusses many of the principles that ought to govern this case. In that case a party commenced the erection of a building for the purpose of manufacturing saws by hand. Before it was entirely completed he conceived the idea of changing it into a steam manufacturing establishment, which required the erection of additional buildings and the outlay of much more money. He paid off all mechanic's claims up to that date, and mortgaged the premises. Subsequently he began the erection of the additional buildings which, when completed, formed, with the building first erected, one establishment. A lien was filed for labor and material that went into the additional buildings, but the court held such lien junior to the mortgage, on the ground that the steam manufacturing establishment was an entirely different structure from the one first erected, and was not commenced until the additional buildings were commenced. Judge Sharswood in his opinion, adopted by the court, says: "The true question then is, was the whole establishment erected on substantially one plan and design from the commencement, or was the plan or design so materially changed during the progress of the work as to make the whole a different building from that which was or would have been erected had no such change taken place? I use this language cautiously, to exclude the idea that any project of subsequent alteration whether vague or certain, whether entertained at the commencement or suggested during the progress of the building, and not embodied in the actual plan upon which it was commenced and carried on, could make any difference." Further on he says: "It may be safely conceded that unimportant alterations in the plan, such as the height or number of the stories, the arrangement and finish of the rooms, or even the addition of one or more outhouses, not materially altering its character, would not affect the rights of subsequent claimants." See, also, *Pennock v. Hoover*, 5 Rawle, 307; *Equitable L. Ins. Co. v. Slye*, 45 Iowa, 615. In this case the heating apparatus was furnished and placed in the building in the course of its erection. That it

became a part of the structure is not questioned. The law would presume, in the absence of all testimony, that the heating apparatus augmented the value of the building in an amount equal to its cost. The building, when completed, was the same building that was commenced before the mortgage was given. "The purpose of its design" was in no manner changed. It had the same dimensions, the same general arrangement, and was furnished and fitted for the purposes originally intended. That it was heated in a different manner is of no more significance than would have been the addition of another coat of paint or plaster. From the time of its commencement there was, so far as the record shows, no cessation or delay in its erection until it was completed. It is idle to say that there can be two points of time at which such a building is commenced. We cannot add to the statute. These statutes have generally been liberally construed to give effect to the benefits they are intended to secure. To deny the respondent a lien for its labor and materials that went into that building, superior to the lien of a mortgage that, confessedly, was executed five days after the building was commenced, would be in clear disregard of the statute. It may be that there is an element of hardship in it. It may be that the mechanic or material man could protect himself by searching the record, but experience shows that line of business is not usually done in that manner. It may be that the person who takes a mortgage upon realty whereon a building is in process of erection assumes some risks that he cannot accurately measure. But so the law is written. Nor is there any great hardship in it. The mechanic or material man is entitled to no lien until he has augmented the value of the property, and then only to the amount, theoretically and presumptively, of such augmented value. This increased value of his security is directly beneficial to the mortgagee. It is true that to save his mortgage lien he may be required to make an increased investment in the security, but the increased investment is measured by the increased value. One lien or the other must be superior, and the legislature, in its wisdom, has seen proper to require that the mortgagee should take care of the mechanic's lien—usually insignificant in amount as compared with the mortgage—rather than the mechanic, often a day laborer, should take care of the mortgage of the capitalist. As under the statute the respondent's lien was superior to the lien of appellant's mortgage, the ex-

cluded evidence was immaterial, and the conclusions of law drawn by the trial court from the undisputed facts were entirely correct. Judgment affirmed. All concur.

**MECHANIC'S LIENS — PRIORITY OF.** — If a mortgagee of a railway and its rolling stock permits it to remain in the use and possession of the mortgagor, and a locomotive becomes in need of repair, and is intrusted to a mechanic to repair, he has a lien thereon which has precedence of the lien of the mortgage: *Watts v. Sweeney*, 127 Ind. 116; 22 Am. St. Rep. 615, and note. A mechanic's lien takes the precedence over a mortgage lien which originated subsequently to the commencement of the house: *Farmers' Bank v. Winslow*, 3 Minn. 86; 74 Am. Dec. 740, and note; but a mortgage upon the legal estate for purchase money is entitled to priority over a mechanic's lien against the equitable estate of the vendee under a contract of sale: *Campbell and Pharo's Appeal*, 36 Pa. St. 247; 78 Am. Dec. 375, and note. A mechanic's lien prevails over that of a vendor if the contract of sale provided that the vendee should go on and build upon the premises: *Henderson v. Connelly*, 123 Ill. 98; 5 Am. St. Rep. 490; but see *Gillespie v. Bradford*, 7 Yerg. 168; 27 Am. Dec. 491, and note. A prior encumbrancer has the first lien on the land as unimproved, and the mechanic has a first lien on the building: *North Presbyterian Church v. Jenne*, 32 Ill. 214; 83 Am. Dec. 261, and note. The claimant of a mechanic's lien anterior to a homestead right may enforce his lien without any reference whatever to such homestead right: *Tuttle v. Howe*, 14 Minn. 145; 100 Am. Dec. 205. As to the priority between a certain chattel mortgage and a mechanic's lien, see *Kendall Mfg. Co. v. Rundie*, 78 Wis. 150. A mechanic's lien is equal to that of a judgment — it cannot be superior to it: *Rees v. Ludington*, 13 Wis. 276; 80 Am. Dec. 741, and note.

**MECHANIC'S LIEN — EFFECT OF ALTERATION OF CONTRACT.** — A builder's lien is not waived by the fact that the original contract has been changed in small particulars by mutual consent, and the time for completing it is extended: *Montandon v. Deas*, 14 Ala. 33; 48 Am. Dec. 84.

## DAVIS v. BRONSON.

[2 NORTH DAKOTA, 300.]

**CONTRACTS — RIGHT OF ONE PARTY TO FINISH PERFORMANCE AFTER THE OTHER HAS REPUDIATED THE AGREEMENT.** — A contracting party who has certain things to do under his contract, has no right to proceed to execute it after he has been notified that the other party to the contract will not stand by his compact; and the mere fact that the contract has been made with several joint contractors, while the refusal to perform has emanated from only one of them, does not affect the operation of the rule. Hence, when one has agreed to erect a building for two persons who have bound themselves jointly to pay a certain sum for the work, but before entering upon the performance of the work, is notified by one of those persons that he will not carry out his part of the contract, the allowable and only proper course is to treat the contract as broken by both the joint contractors and sue for damages. The party who has contracted to erect the building cannot, under such circumstances, go on and complete it, and recover the contract price.



*George W. Newton*, for the appellant.

*Moer and Harris*, for the respondents.

CORLISS, C. J. The theory on which plaintiffs were allowed to recover against the appellant was, that they had fully performed on their part all the conditions of an agreement with appellant and others to erect and equip a creamery at La Moure, in this state. We are compelled to reverse the judgment, because it appears that the plaintiffs were not justified in proceeding with the work under the contract for the purpose of charging the appellant with the full amount which he and his copartner agreed to pay as their share of the contract price, as it is undisputed that the appellant broke the contract the day after it was made, and plaintiff's received notice of his determination not to carry out the agreement on his part on the second day after the contract was entered into. This was before they had taken any steps under it. Appellant could not, under the facts of this case, rescind the agreement without the assent of all parties thereto. Nor is it claimed that he did rescind it. The utmost that can be urged is that he arbitrarily refused to perform his part of the contract. This would subject him to an action for damages for breach of the contract. But the plaintiffs could not, in the face of this refusal on his part to perform, undertake and carry to completion the work under the contract to be performed by them, and thereupon insist that they were entitled to recover from the appellant his share of the contract price. The authorities are very clear on this point: *Bishop on Contracts*, secs. 837-841; *Danforth v. Walker*, 37 Vt. 239; 40 Vt. 257; *Moline Scale Co. v. Beed*, 52 Iowa, 307; 35 Am. Rep. 272; *City of Nebraska v. Nebraska City etc. Coke Co.*, 9 Neb. 339; *Clark v. Marsiglia*, 1 Denio, 317; 43 Am. Dec. 670; *Butler v. Butler*, 77 N. Y. 472; 33 Am. Rep. 648. No damages for breach of the contract by the appellant were proved, nor was there any allegation of such damages. The action was upon the contract to recover the contract price, and not for damages for breach of it. For this vital error the judgment is reversed, and a new trial ordered. All concur.

ON REHEARING.

It is urged that *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548, and *Roebling's Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 660, are conclusive in favor of the doctrine that one party to a contract cannot, by notice of his determination not to per-

form, given before the time to begin performance has arrived, create such a breach of the contract as will compel the other party, who does not assent to the breach, to treat the contract as then broken, and limit him to the recovery of such damages as are proper on the basis that the contract is then broken. These cases do sustain such a doctrine, and it is undoubtedly an elementary rule of law. The full scope of these and kindred decisions is, that the person who has not broken his part of the compact may, at his option, extend to the person who has signified his purpose to violate the agreement, an opportunity for repentance, measured by the time to elapse between the refusal to perform and the date when performance is to commence. He may, and some cases hold that he must, treat the contract as subsisting, not for the purpose of performing it in the face of a persistent, unchangeable refusal of the other party to carry out, and then of recovering the full contract price, but for the purpose of insisting that such party shall, when the time of performance arrives, finally determine whether he will stand by his agreement of by his former repudiation thereof. All that these cases decide is, that the repudiating party may not force the other party to sue for a breach of the contract before the time of performance arrives, and therefore have his damages fixed by the condition of affairs at the time of the premature repudiation of the contract, as though such repudiation had been made on the day of the performance; but when the time to perform arrives, then, if the refusal to carry out the agreement is not withdrawn, there is no principle on which the other party to the contract can perform and sue for the contract price any more than in the case of a refusal made for the first time on the very day of the performance.

The party keeping the contract need not mitigate the damages by treating as final a premature repudiation thereof, but this is far from establishing the proposition that he may increase the amount to be paid by the other party by completing the contract after notice of repudiation, made on the day of performance, or made before that day, and never withdrawn, but, on the contrary, constantly insisted upon down to and including that day. In *Kadish v. Young*, 108 Ill. 170-185; 48 Am. Rep. 548, the soundness of the cases cited to sustain our conclusion is expressly recognized. After citing some of them, the court says: "It will be observed in each of these cases the time for the performance of the contract

had arrived, and its performance had been entered upon. In neither of them was the defendant at liberty, after notifying the plaintiff not to proceed further in the performance of the contract, to demand that he should proceed to perform it. As it was said in *Frost v. Knight*, L. R. 7 Ex. 111, the defendant was, in case of notice, not to perform a contract the time of performance of which is to commence in the future. In these cases there is no time or opportunity for repentance or change of mind; in those there was." The court quote with approval the language used in *Danforth v. Walker*, 37 Vt. 244, where the court say: "While a contract is executory, a party has the power to stop performance on the other side by an explicit direction to that effect by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that hour or stage in the execution of the contract. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such damages of the other party." It is to be noted that in the case at bar the refusal to perform was not premature. The contract specified no time when performance thereof should be entered upon by the plaintiffs, but it provided that the building, with all its equipments, must be finished within one hundred days after the amount had been subscribed. The plaintiffs might, under these provisions, have entered upon the performance of their part of the agreement at once. It was the right of the appellant to notify them immediately of his determination not to carry out his part of the contract, in order to save himself from the increased damage which a partial performance before notice might cause. *Daniels v. Newton*, 114 Mass. 533, 19 Am. Rep. 384, is confidently relied on by respondents. The language used in this and similar cases must be construed in the light of the facts.

In *Daniels v. Newton*, 114 Mass. 533, 19 Am. Rep. 384, an action for damages was brought before the defendant was under any obligation to perform the contract, the action being based upon defendant's premature refusal to carry out the contract. The decision merely was that the action was prematurely brought; that the defendant might before the time for performance arrived, change his mind, and insist on a performance of the contract. The case does not decide that when one party to a contract may, under its terms, enter upon the performance of it, the other party may not, subject

always to liability for damages, prevent the completion of the contract, or prevent the commencement of the work thereunder, for the purpose of subjecting him to liability for the full contract price. If respondents' contention is sound, it was beyond the power of the appellant ever to escape the payment of the contract price, although he had been the only party to the contract on his side. He could not break it so as to subject himself to damages and prevent the respondents from completing the creamery and holding him for the contract price until the same had been fully completed and ready for delivery, for only then, it is said, was the appellant bound to do any act on his part under the contract; and when the creamery was finished it was claimed that appellant would not escape payment of the price, because it is said the title instantly vested in him and his associates in the contract, not only without his assent, but against his will.

What, then, becomes of the doctrine that one party to a contract cannot, except in special cases, enforce specific performance thereof, but must make his claim for damages? And what becomes of the authorities recognized as sound by respondents' own cases, which hold that the party who has something to do must not, after notice of refusal from the other party, go on with the work, and thus increase the liability of such other party to him? Respondents seem to urge that at no time is notice of refusal to perform efficacious to prevent performance on the other side except at the moment that the party breaking the compact is bound to perform. Their own cases are against this position. Said the court in *Daniels v. Newton*, 114 Mass. 533; 19 Am. Rep. 384: "The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of nonperformance on his part or prevents him from entering upon or completing performance on his part at a time when and in a manner in which he is entitled to perform it or have it performed." It may well be true that where the performance by the party notified not to perform consists of a single act — as the tender of a deed — notice before the time for such delivery will not warrant an action for damages; but where the final act of tender is the culmination of other acts which, in the nature of the case, must precede it — as where the party is to manufacture or build the thing to be delivered — then it is quite clear that the conduct which before the time of delivery prevents the taking of the preliminary steps — the manufacture of the ar-



ticle or the erection of the building — as effectually prevents, before the day of tender arrives, the possibility of delivery, as though that day in fact had arrived, and a tender of the thing had been rejected. In such a case the contract is as effectually broken by the notice not to go on with it, given before the day of delivery arrives, the person who is to do the work having then the right to enter upon the performance of the same, as though the notice had been given on the very day of delivery. The question in all cases is whether one party has prevented performance by the other party at the time when performance by him is due. This can be done as well by preventing the taking of those preliminary steps without which the final step cannot be taken as by preventing the taking of such final step itself. These preliminary steps must often precede by many days the time of performance, and it therefore must follow that notice of refusal to carry out the contract in such a case given before the time of performance, will operate as a breach of the contract in case the time has arrived at which the person willing to keep the contract may enter upon the work under the contract.

Counsel refer to the statute touching rescission of contracts, and insist that the appellant has not shown that the case falls within any of the provisions of such statute. In this he is correct. There was no rescission of the contract. A lawful rescission of an agreement puts an end to it for all purposes, not only to preclude the recovery of the contract price, but also to prevent the recovery of damages for breach of the contract. This is the common-law rule, and our statute merely echoes this rule. "A contract is extinguished by rescission": Com. Laws, sec. 3588. Counsel seem to be unable to make the distinction between the right of one party to refuse to perform his agreement, always subject to his liability for damages, and the rescission or utter destruction of a contract for all purposes, resulting from mutual consent, or from the action of one party alone, where by reason of fraud, duress, or other legal ground for rescission, the right is vested in him to elect to abrogate the contract without liability thereunder for damages or for the contract price. The burden of the argument seems to be that no person can break a contract unless he can and does rescind it. The result is that no compact can ever be violated so as to subject the person attempting to infringe it to damages, for there is no breach on this theory, except in cases where there can be no breach, because by

rescission the contract is annihilated so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken. The two lines of thought run in diverse directions. One starts with the fact that one party has refused to perform, and leads to the conclusion that the other party must do nothing from the moment he is aware of such refusal to increase the liability of the one breaking the agreement, and must, therefore, so long as such refusal is not recalled, abstain from going on with the work he has to perform under the contract; the other finds a mutual abandonment of the compact, or an abandonment by one who, under the law, has a legal right to abandon it, and leads inevitably to the conclusion that there is no contract to be performed by anyone, and hence that no damages for breach thereof can be incurred, and that no liability for the contract price can possibly exist. That the Massachusetts supreme court, in *Daniels v. Newton*, 114 Mass. 533, 19 Am. Rep. 384, did not intend to decide contrary to our views is apparent from the fact that the same court, only six months later, without overruling *Daniels v. Newton*, 114 Mass. 533, 19 Am. Rep. 384, or even regarding it as at all bearing on the question, expressly recognized and enunciated the doctrine on which we rest our decision. In *Collins v. Delaporte*, 115 Mass. 159, that court says: "A party to an executory contract may stop its performance by an explicit order, and will subject himself only to such damages as will compensate the other party for being deprived of its benefits."

It is urged that the plaintiffs were bound to build the creamery despite the defendant's refusal to go on with the contract, because there were other parties to the contract who could have held the plaintiffs liable in damages had they, acting upon defendant's breach of the agreement, refrained from constructing the building. We see no principle on which the other parties could have recovered from the plaintiffs damages under these circumstances. Their agreement was with all the defendants, including this appellant. They did not agree to build a creamery for the other defendants, and take their responsibility for the contract price. It furnishes an ample justification for a failure to go on with the work that one of the contracting parties — perhaps the only responsible one — has by a breach of the contract made it impossible for the plaintiffs to complete the building, and charge such party with the contract price. The contract was

entire, and the plaintiffs could not be compelled to perform it as to and for only a portion of the contracting parties. It is illogical to assert that the plaintiffs would have been liable to the other parties had they, acting upon the appellant's breach, refrained from carrying out the agreement on their part. On what principle does this assertion stand? The general rule is, as we have already stated, that the contracting party, who has certain things to do under his contract, has no right to proceed with the execution of the contract, and charge the other party with the expense thereof, after he has been notified that such other party will not stand by his compact. There is no reason why the rule should not apply in the case of a refusal to perform, emanating from one or two. The parties on the same side of a contract are bound together in interest, and there is no reason why all of the rest should not be responsible for the default of any one. The nature of the engagement is, that the contracting party will continue bound to perform only on condition that they all continue faithful to their compact, and not on condition of only a portion standing by their engagement. Whether defendant may be liable to his cocontractors for breach of an implied agreement to keep his promise we need not now decide.

It is urged that the decision in *Buchel v. Lott*, Tex. App., Jan. 13, 1890, is in point. We cannot see the faintest resemblance between that case and the one at bar. The appellant, with others, had signed a subscription list, aggregating twenty-three thousand dollars. The amount subscribed was to be a bonus to be paid on the construction of a line of railway within a specified time. The railroad was so constructed, and in an action against the appellant to recover the amount of his subscription, the court held him liable on the theory that the consideration for his promise was executed, the promise of each subscriber being such a consideration for the promise of the others as rendered absolute the obligation to pay the amount of the subscription, and that therefore appellant could not withdraw his subscription. In the class of cases of which this is one the doctrine is recognized that the liability is as absolute as though each subscriber had received as a loan the amount which he agrees to pay as a subscription. There is an obligation to pay the money, which is indefeasible by any act of the subscriber. Said the court in this case: "He became bound upon said

contract the moment he signed it for the amount subscribed by him, subject only to the condition that the railway should not be constructed according to the terms of the contract." This doctrine is by no means recognized universally, and it is not too much to say that the weight of reason and authority is against it: *Twenty-Third St. Baptist Church v. Cornell*, 117 N. Y. 601; *Presbyterian Church v. Cooper*, 112 N. Y. 517; 8 Am. St. Rep. 767; *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528; 23 Am. Rep. 286; *University v. Livingston*, 57 Iowa, 307; 42 Am. Rep. 42; but this question we are not called upon here to decide, nor is it at all material; for, assuming the decision to be sound, it makes nothing against our position, for here there was a general agreement on the part of all to pay five thousand dollars for the creamery. Each was bound for the full amount. The plaintiffs agreed to build the creamery for five thousand dollars, and the engagement of the subscribers is to pay, not the amount set opposite their several names, but the sum of five thousand dollars generally. "We, the subscribers hereto, parties of the second part, agree to pay the above amount for said creamery when completed," etc. The consideration for this joint promise to pay five thousand dollars was the erection of this creamery. The consideration therefor was not executed, but executory. There did not arise upon the signing of the contract by the appellant an absolute obligation to pay five thousand dollars, or any portion of it, the same as though he had actually received the consideration for the promise—the theory upon which subscribers are held liable in the class of cases to which *Buchel v. Lott*, Tex. App., Jan. 18, 1890, belongs—but he became bound to stand by his agreement, or in default thereof, to pay such damages as a breach of his contract would cause. The petition for rehearing is denied.

All concur.

BARTHOLOMEW, J., having been of counsel, did not sit on the hearing of the above case, nor take any part in the decision, Judge Templeton of the first judicial district sitting by request.

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**Right of Party to Proceed to Execute Contract after His Adversary Declines to Do so on His Part.**

The rules of law, as developed by the cases in which this subject has been dealt with, may, we think, be referred to three elementary principles: 1. A contract cannot be rescinded without the consent of both the parties thereto, except in certain cases, the most important of which are fraud and failure of



consideration: Bishop on Contracts, secs. 823 ff; Wharton on Contracts, secs. 282 ff; 2. Specific performance of an executory contract will be enforced only in a certain limited class of cases, the essential requisite being mutuality of remedy: Pomeroy's Equity Jurisprudence, sec. 1402 ff; 3. When a contract is broken by one of the parties thereto it is the duty of the other party to keep down the damages as far as possible: *Miller v. Mariners' Church*, 7 Greenl. 51; 20 Am. Dec. 341; *Davis v. Fish*, 1 G. Greene, 406; 48 Am. Dec. 387; *Hamilton v. McPherson*, 28 N. Y. 72; 84 Am. Dec. 330. From the first of these principles it follows that the mere declaration of one party that he rescinds the contract, and a subsequent refusal further to perform it, not acquiesced in by the other party, does not amount to a rescission, but only to a breach: *City of Nebraska v. Nebraska City Gas etc. Co.*, 9 Neb. 339; *Clark v. Marsiglia*, 1 Denio, 317; 43 Am. Dec. 670; *Derby v. Johnson*, 21 Vt. 17; *Danforth v. Walker*, 37 Vt. 239. From the second principle it follows that since the defaulting party, neither before nor after the breach, would have in ordinary cases, the right to compel the other party to perform the contract specifically, the latter cannot perform it specifically *proprio motu*, and thus put himself in a position to compel specific performance by his adversary. As the court remarks in the principal case, to allow such a course would completely revolutionize the accepted doctrine that usually the only remedy for breach of contract is a suit for damages. The third principle leads us directly to the conclusion that since in these cases of a refusal to perform, the only remedy is a suit for damages, the party who is injured by the breach of the contract must hold his hand immediately after being notified. If, according to the generally accepted doctrine, he cannot remain inert and passive with impunity, but must take such measures as are reasonably within his power to make the damages as light as possible, much less will he be justified in pursuing such a course of conduct as would actually have the effect of swelling the amount of the damages. The reason why this rule should operate in respect to the contract of employment is thus clearly stated in *Derby v. Johnson*, 21 Vt. 17: "The employer might be entirely ruined by being compelled to pay for work which an unexpected change of circumstances, after the employment, would render of no value to him. If, for instance, in this case the location of the railroad had been changed from the place where the work was contracted to be done, or if the plaintiff's employers had become wholly insolvent after the making of the contract, the injury to them, if they had no power to stop the work, might be immense and altogether without remedy. Rather than an injury so greatly disproportioned to that which could possibly befall the workman should be inflicted on the employer, it seems better to allow them to stop the work, taking upon themselves, of course, all the consequences of such a breach of their contract. Such, we think, is and ought to be the law." It is sufficiently obvious that the reasoning here employed is applicable, *mutatis mutandis*, to other kinds of executory contracts.

*Right to Stop the Performance of an Executory Contract.* — The accepted rule, therefore, which has been formulated in view of the above considerations may be stated as follows, in the language of the court in *Danforth v. Walker*, 37 Vt. 239: "While a contract is executory, a party has the power to stop the performance on the other side by an explicit direction to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such

increased damages of the other party." In that case the defendant had contracted with the plaintiffs for a quantity of potatoes to be delivered during the winter as called for by the defendant. Before they were all purchased by the plaintiff, the defendant directed the plaintiffs to purchase no more potatoes on the contract until they should hear from him, and while this order still remained unrevoked, the plaintiff went on to purchase potatoes sufficient to make up the stipulated quantity. It was held that they had no right to do this, but that their remedy was limited to treating the direction not to purchase as a breach of the contract for which they were entitled to recover as damages the difference between the price the defendants had stipulated to pay and what it would have cost the plaintiffs to have procured the quantity of potatoes still remaining to be purchased when the defendants' letter was received. The statement of the rule in this case is referred to with approval in *Collins v. Delaporte*, 115 Mass. 159. In *Unexcelled Fireworks Co. v. Polites*, 130 Pa. St. 536, 17 Am. St. Rep. 788, the defendants had ordered certain lots of fireworks from the plaintiffs, and before the goods were separated from the bulk, countermanded the order and notified the plaintiffs not to ship them. The latter replied that the goods would nevertheless be shipped at the stipulated time, and this accordingly was done. On their arrival the defendant declined to accept them, and they were taken back to the plaintiffs, who placed them on storage, subject to defendants' order. It was held that the letter countermanding the order was a refusal to receive the goods, and that the direction not to ship them was a revocation of the carrier's agency to receive them, which rendered the delivery to such carrier unauthorized. Under these circumstances the true and only remedy of the plaintiffs was an action for special damages for refusing to receive the goods, and no action could be maintained for the price. In *Dillon v. Anderson*, 43 N. Y. 231, the plaintiff contracted to make two boilers for the defendants' steamship. Soon after the performance of the contract was begun, the defendant, by notice to the plaintiff, stopped the work, but the latter, in spite of the notice, continued to work upon the boilers, and in his action for damages claimed an allowance for the wastage of the materials, which wastage would not have occurred if the work had not been continued after the notice had been received. The court held that the plaintiff had no right, after receiving the notice, to work upon the boilers to the damage of the defendant, and that this item could not properly be allowed. In *Moline Scale Co. v. Beed*, 52 Iowa, 307, 35 Am. Rep. 272, the defendant had ordered, through plaintiff's agent, a scale to be erected on defendants' premises, but, before the order was communicated to the plaintiff, countermanded it by telegram. Subsequently, the plaintiff shipped a set of scales to the defendant, who refused to receive them. The court held that, under these circumstances, an action for the contract price could not be maintained, saying: "We have been cited to no adjudicated case, and are unable to find any, where it has been held that a vendor can recover the contract price, unless the contract be such as to enable him to put the article sold in such condition as to transfer the title of the property to the vendee. . . . In the case at bar, the plaintiffs' obligation would not be discharged without building the scales. We think that in all the cases where it is held that the contract price may be recovered, it will be found that the article sold was completed and ready for delivery and tender made: *Gordon v. Norris*, 49 N. H. 376; *Dustan v. McAndrew*, 44 N. Y. 72." So where the plaintiff agreed to furnish to defendant and erect on his premises a gas generator, and, in pursuance of the contract, shipped the necessary materials to the defendant's place of residence,

but the defendant thereupon refused to allow him to set up the generator upon his premises, it was held that, under these circumstances, the property in the chattels had not passed, and that the plaintiff could not recover the contract price: *Butler v. Butler*, 77 N. Y. 472. "The goods," said the court, "remained the goods of the plaintiff. . . . The defendant was not to have these articles as separate parts or members from which, by the application of skill and labor, a machine could be constructed, but a complete thing, placed upon his own premises, of the required capacity and ready for use; and until that was furnished, the property in these chattels did not pass from the plaintiff." In support of this position numerous authorities are cited. In *Clark v. Marsiglia*, 1 Denio, 317, 43 Am. Dec. 670, the defendant employed the plaintiff to do work at an agreed price, but countermanded the order before the work was finished. The plaintiff, however, went on and finished the work and demanded the price agreed upon. The court held that this claim was not sustainable, saying: "The plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been. To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events, would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year, his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work, and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence; but upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith towards the employer." The reason of the rule which allows a party contracting for services or the performance of some work necessarily admits an exception where the contract is a proper one for specific performance in equity. In such a case the party desiring to adhere to his contract can do so, in spite of a prohibition from the other party to proceed, and recover the contract price. In *Marsh v. Blackman*, 50 Barb. 333, this principle was applied to a case in which the plaintiff had agreed in writing with the defendants to support and maintain the father of the latter during his natural life, for a stipulated sum per week, and the defendants, after performance had been commenced, notified the plaintiff not to continue such performance, and that they would make no further payments. The plaintiff nevertheless continued to furnish the stipulated maintenance, and in an action to recover the weekly payments, it was decided that the defendant's attempt to put an end to the contract was no defense.

*Rights of Party Who is Notified not to Proceed with Performance of Contract.* It has been shown above that, after one of the parties to a contract has received notice that the other does not intend to carry out his agreement, or that further performance of the contract is to be discontinued, the party so notified cannot, as a general rule, take any positive steps which will have the effect of increasing the damages to which his adversary has thus rendered himself liable. On the other hand, such a notification has the effect



of releasing the party notified from the duty of doing anything further in performance of the contract; but the mere notice of an intention not to perform a contract is not of itself a breach of the contract. To have that effect it must be acted upon by the party receiving it: *Leigh v. Paterson*, 8 Taunt. 540; 4 Eng. Com. L. 267; *Phillpotts v. Evans*, 5 Mees. & W. 475; *Ripley v. McClure*, 4 Ex. 359; *McPherson v. Walker*, 40 Ill. 371; *Zuck v. McClure*, 98 Pa. St. 541; though, if not withdrawn before the time fixed for performance, the notice is evidence of a continued intention to refuse performance down to and inclusive of that time, and is a sufficient excuse for the default of the party receiving the notice: *McPherson v. Walker*, 40 Ill. 371; *Ripley v. McClure*, 4 Ex. 345. If the party notified elects to treat the notice as a breach of the contract, he is not obliged to complete the performance of what he has himself undertaken to do in order to maintain an action against the party renouncing the contract. The refusal to perform the contract under such circumstances is to be considered in the same light, as respects the plaintiff's remedy, as an absolute physical prevention by the defendant. The case most often cited in support of this proposition is *Cort v. Ambergate etc. Ry Co.*, 6 Eng. L. & Eq. 230; 15 Jur. 877. There the plaintiff had agreed to manufacture a large quantity of railway chairs for the defendant company, and after delivering a portion was directed to make no more, as they were not wanted. The defendants contended that, as the plaintiffs did not make and tender the residue of the chairs, they could not be said to have been "ready and willing" to perform the contract. Lord Campbell, in delivering the judgment of the court, disposed of this objection thus: "We are of opinion that the jury were fully justified, upon the evidence, in finding that the plaintiffs were ready and willing to perform the contract, though they never made and tendered the residue of the chairs. In common sense, the meaning of such an averment of 'readiness and willingness' must be, that the noncompletion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it, if it had not been renounced by the defendants. What more can reasonably be required by the parties for whom the goods are to be manufactured? If, having accepted a part, they are unable to pay for the residue, and have resolved not to accept them, no benefit can accrue to them from a useless waste of materials and labor, which might possibly enhance the amount of damages to be awarded against them." As to the question whether the notice of the defendant company not to make any more chairs was to be deemed, in point of law, a prevention of performance, the learned judge thus expressed his views: "We think there is evidence to show that the defendants did prevent and discharge the plaintiffs from supplying the residue of the chairs, and from the further execution of the contract. It is contended that 'prevent' here must mean an obstruction by physical force; and, in answer to a question of the court, we were told that it would not be a preventing of the delivery of goods if the purchaser were to write in a letter to the person who ought to supply them, 'Should you come to my house to deliver them, I will blow your brains out.' But may I not reasonably say that I was prevented from completing a contract by being desired not to complete it? Are there no means of preventing an act from being done except by physical force or brute violence?" The conclusion of the court as to the right of action in such cases was announced as follows: "Upon the whole, we think we are entirely justified, on principle, in holding that, when there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the



purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract." The principles announced in this

decision have frequently been applied in England and in this country: *Hochster v. De la Tour*, 2 El. & B. 678; *Avery v. Bowden*, 5 El. & B. 714; *Frost v. Knight*, L. R. 7 Ex. 112; *Wilkinson v. Verity*, L. R. 6 Com. P. 206; *Eckenrode v. Canton Chemical Co.*, 55 Md. 51; *Black v. Woodrow*, 39 Md. 194; *Hosmer v. Wilson*, 7 Mich. 294; *Park v. Kitchen*, 1 Mo. App. 357. In *Pond v. Wyman*, 15 Mo. 183, the rule is succinctly stated to be, that a refusal to permit the plaintiff to perform a contract is equivalent to a performance, for the purpose of maintaining an action on the contract. As an extension of the principle, it has been held that the suspension of work by the party for whom it was to be done until after the time when the work was to have been completed, releases the other parties from the obligation to finish the work under the contract, and puts an end thereto, and that the party thus suspending the contract is liable for a breach of it: *Kugler v. Wiseman*, 20 Ohio, 361.

*The Party Receiving the Notice may, if he Wishes, Keep the Contract Alive.*—Although a notification from one of the parties to a contract that he does not intend to perform it may be regarded by the other party as a breach for which suit may be brought, he is not obliged to avail himself of this privilege, but may, if he prefers it, continue to treat the contract as still in force for certain purposes, always, of course, with due regard to the necessary limitation that he cannot do anything to increase the damages which will ultimately fall on the defaulting party. Thus, when a contract is made for personal services, for a particular term, at stipulated wages, if the party employed is, without cause, discharged during the term, he has the right to regard the contract as broken, and may immediately sue and recover all the damages resulting from its breach, which he may sustain up to the time of the trial; but he is not compelled to accept the breach of his employer as a termination of the contract; he may elect to treat it as continuing, and, keeping himself in readiness to perform the contract on his part, may recover the wages due on the expiration of the term: *Strauss v. Meertief*, 64 Ala. 299; 38 Am. Rep. 8. So, where the vendee in an executory contract of sale has notified the vendor that he will not receive the goods, the vendor may nevertheless tender them on the day appointed for delivery, and recover damages for nonacceptance which will be assessed as of the date fixed for delivery: *Leigh v. Paterson*, 8 Taunt. 540; *Phillpotts v. Evans*, 5 Mees. & W. 475; *Kadish v. Young*, 108 Ill. 170; 48 Am. Rep. 548; *Roebling Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 660. In all cases where the contract is thus kept alive, the defaulting party as well as the other will receive the benefit of it. "He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it": Cockburn, C. J., in *Frost v. Knight*, 7 L. R. Ex. 111, cited approvingly in *Howard v. Dulu*, 61 N. Y. 375; 19 Am. Rep. 285, and *Roebling Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 660. The right of the defaulting party to take advantage of supervening circumstances, is well illustrated in *Avery v. Bowden*, 5 El. & B. 714, *Reid v. Hoskins*, 5 El. & B. 729, in both of which cases the plaintiff had

contracted for a cargo of wheat to be loaded at Odessa. The defendant's agent in each case refused to furnish the cargo, and in each case the master of the ship did not treat the refusal as a breach of the contract, but continued to demand the cargo. Before the expiration of the running days, war was declared between England and Russia. The court held that this event dissolved the contract, and that, as the plaintiff had by his conduct kept the contract alive, he had lost his right of action by the intervention of a circumstance which excused the other party from performance. A necessary result of the existence of this rule is that, where a contract is thus renounced by one party and kept alive by the other until the date appointed for performance, the damages are, in such a case, to be estimated as of that date, and not of the date of the renunciation: *Phillipotts v. Evans*, 5 Mees. & W. 475; *Kadish v. Young*, 108 Ill. 170; 48 Am. Rep. 548; *Roebeling Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 660.

*Completion of Executory Contract of Sale, when Vendor is to appropriate the Goods to the Vendee.* — Where the transfer of the property in the articles sold depends upon the appropriation by the vendor of a portion of a larger mass to the vendee, it would seem that a notification from the latter that he will not take the goods deprives the vendor of the right to do anything further in regard to the appropriation, and that his remedy is confined to an action for refusing to accept the goods: *Unexcelled Fire Works Co. v. Polites*, 130 Pa. St. 536; 17 Am. St. Rep. 788. The cases in which the vendor stands in a position of complete performance on his part, and then receives notice of renunciation from the vendee, manifestly belong to a different category, and do not fall properly within the scope of the present note.

## YEATMAN v. KING.

[2 NORTH DAKOTA, 421.]

**SEED GRAIN STATUTES, NATURE OF THE OBLIGATION INCURRED BY ACCEPTING AID UNDER.** — The obligation which rests upon a person who has received temporary aid from a county, in accordance with the provisions of the seed grain statutes, to repay to the county the value of the seed grain lent, is not a tax in any sense of the word, but a debt pure and simple, and no legislative fiat can alter its true character.

**CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — SEED GRAIN STATUTES, PRIORITY OF LIENS ON LAND CREATED BY.** — A provision in a seed grain statute which declares that the debt for grain furnished to indigent farmers in accordance therewith shall be "a first lien upon the real estate of the person assisted," is within the constitutional inhibition against the impairment by a state of the obligation of contracts, in so far as it attempts to make such lien paramount to those to which the land was subject when the statute was passed.

*Ben Borton and Fredrus Baldwin*, for the appellants.

*John S. Watson*, for the respondent.

**CORLISS, C. J.** The contest here is between plaintiff and defendant, Foster County, for priority of lien. The action is to foreclose a real estate mortgage. Foster County is made a

party defendant on the theory that it holds a lien on the mortgaged real property subordinate to the lien of plaintiff's mortgage. This contention of the plaintiff is denied by Foster County, and the latter, having been defeated by the trial court, brings the question before us for review. It is purely an issue of law. The facts are undisputed. Plaintiff's mortgage is dated July 1, 1886, and was duly recorded July 5, 1886. On March 26, 1889, Foster County entered into a contract to furnish, and actually did furnish on that day, to the mortgagor and owner of the mortgaged premises, pursuant to such contract, 150 bushels of seed wheat, to be used by him to raise a crop upon the mortgaged premises in the season of 1889. The seed was actually used for that purpose. All proceedings were duly taken by the county in conformity with the statute to perfect a lien upon the land under the provisions of chapter 43 of the Laws of 1889. This act, so far as it is material to this case, provides that "if the said indebtedness (for the seed grain furnished) be not paid on November 1, 1889, the amount thereof shall be entered upon the tax list of such county for the year 1889, as a tax upon the land upon which such seed wheat was sown, to be collected as other taxes are; and the sum so entered and levied shall be a first lien upon the crop of grain raised each year by the person receiving said seed grain, and also upon the real estate owned by such person, until the tax is fully paid." On April 14, 1890, Foster County furnished the mortgagor, King, seed wheat for the season of 1890, to be sown upon this same land. It was so sown. The county claims a lien upon the land for the value of this seed, under the provisions of chapter 152 of the laws of 1890. No question is raised as to the existence of liens on the land for the seed wheat furnished in 1889 and 1890. The only inquiry is, whether such liens are paramount to that of the mortgage, which was executed and became a lien upon the land more than two years before the first law was enacted. It is unnecessary to refer to the provisions of the act of 1890, as the law of 1889 confers upon the county greater rights than are conferred upon it by the act of 1890, the lien being in express terms declared to be a first lien under the statute of 1889, while the act of 1890 is silent on this subject of priority. Having reached the conclusion that the provision of the act of 1889, giving priority to the seed lien, cannot, in the face of the inhibition against the impairment by a state of the obligations of a contract, work the destruction or

impairment of a prior subsisting lien, created before the act of 1889 was passed, it is, of course, unnecessary to determine whether the act of 1890 does or does not attempt to make the seed lien paramount. The statute which makes the lien a first lien upon the land describes it as a tax lien, and the amount due for the seed grain is declared to be a tax, and the amount thereof, in case of default in its payment, is directed to be entered upon the tax list of the county. But the voice of the legislature cannot alter the essential nature of things. No legislative fiat can make that a tax which is not and cannot be a tax. If the law-making power were vested with unlimited authority to fix the meaning of words, to take cases without the prohibition of the constitution by arbitrary definitions, the fundamental rights of the citizen would be safe only so long as the legislature should abstain from defining away constitutional protections. Due process of law might be defined to embrace arbitrary confiscation; such a thing as an *ex post facto* statute might be defined practically out of existence; and many, if not all, of the barriers erected to shield the fundamental rights of the citizen from legislative assault—barriers seemingly of adamant, and apparently standing upon abiding foundations—would crumble before the breath of legislative definition. We are confident the agent has no power to define away the limitations upon his delegated authority. Said Mr. Justice Miller, in *Davidson v. New Orleans*, 96 U. S. 97: "But when, in the year of grace 1886, there is placed in the constitution of the United States a declaration that 'no state shall deprive any person of life, liberty, or property, without due process of law,' can a state make anything due process of law which by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition of the state is of no avail, or has no application, where the invasion of private rights is affected under the form of state legislation." In *Munn v. Illinois*, 94 U. S. 113, the language of Mr. Justice Field is equally emphatic. Speaking of the provision in the constitution of Illinois declaring certain grain elevators public warehouses, he said: "There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted." Chief Justice Waite, in the same case, after reaching the conclusion that the business of the warehouseman at Chicago, under the peculiar circumstances, was



affected with a public interest,—was a public business,—said: “It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts.” It is needless to dwell longer upon a principle so obvious.

Is, then, the obligation under the law resting upon the person who has received temporary county aid in the shape of seed grain, to repay to the county the value thereof, a tax in any sense of the word whatever? We are very clear that it is not. If the oracle be consulted, we find it gives back no answer that will justify the theory that this obligation is a tax. Says Judge Cooley at the very threshold of his work on taxation: “Taxes are defined as being the enforced proportional contribution of persons and property, levied by authority of the state for the support of the government and for all public needs.” The amount to be paid by him who has been supplied by the public with seed grain is not in any sense a “contribution,” but it is a debt owing by him to the county for value received by him in the form of property. If it could be regarded as a contribution, it is not a proportionate contribution, for he who owes the duty to make this payment owes it in addition to his duty to pay his proportion of taxes, and he may be the only person in the county upon whom this extra obligation rests. Neither can it be said to be an “enforced” contribution. Whatever he is bound to pay is owing because of his voluntary purchase of seed grain from the county. There is no coercion. He pays what he agrees to pay and no more. The money is not paid for the support of the government, nor for any public purpose. So far as the statute apportions the burden of furnishing this seed grain among all taxpayers, the sum so apportioned is a proper tax. This we have held under the peculiar phraseology of our constitution, and in view of the trend of legislation in the north-western agricultural states, acquiesced in by the people, which we regarded as so expanding the significance of the words “public purpose,” when applied to taxation, as to make the imposition of taxes for such a purpose constitutional: *State v. Nelson Co.*, 1 N. D. 88; 26 Am. St. Rep. 609. But there is no resemblance—not the faintest—between the enforced obligation resting upon all alike to keep a portion of the population destitute of means and credit from becoming a public charge by affording them temporary relief, and the voluntary obligation assumed by the unfortunate citizen on receiving public aid to pay back to the public treasury the value of that aid.

The obligation resting upon him who has been supplied with seed grain, common to all other taxpayers in the county, to contribute the funds to furnish him this seed grain, is, when legally apportioned, a tax. The obligation resting upon him alone to pay to the county the value of this property is a debt pure and simple, without a single element of a tax about it. No part of the money paid by him in discharge of this obligation goes to the support of the government. Not a penny of it is paid to buy seed grain for others. It is paid only to discharge a personal debt to the county for aid received.

Another consideration affords strong evidence that the claim for the value of the seed grain furnished is not a tax, although placed upon the tax roll, to be collected as a first lien out of the real estate. Practically every state constitution embodies a provision for uniformity in taxation. The great purpose of such articles is to prevent unjust discrimination in taxation. Whenever there is a tax violative of the terms of such a provision, we must expect to find the tax an unjust one. Now, it is clear if the obligation to pay for seed grain is a tax, it is in conflict with the terms of section 1925 of the organic act of the territory of Dakota, in force at the time the act of 1889 was passed; and that the act of 1890 is in conflict with the terms of section 176 of the constitution of this state in force when the latter act was passed. These provisions require uniformity of taxation. But so far from there being any injustice in requiring the person who has been the recipient of aid to pay for the seed grain furnished him, the justice of such a policy is too palpable to justify comment.

And yet no one can pretend that there is any uniformity in a system of taxation that imposes upon one or a few citizens, and upon his or their property, in addition to the burden resting upon all alike, an additional sum as a tax. We must therefore conclude that that which creates a plain violation of the terms of such a fundamental provision, if regarded as a tax, and yet bears no semblance to unjust discrimination, cannot possibly be a tax at all. The determination of this question is the pivotal point in the case. If this obligation is a tax in a proper sense, then the state may give it a priority of lien. If not a tax, then the legislature cannot, by designating it as a tax, give it any greater preference as a lien than could be given it should no such name be affixed to it. To postpone a legal existing lien upon real property to a subsequent lien by a statute enacted subsequently to the attaching

of such prior lien is to impair the obligation of a contract. This object cannot be accomplished by indirection — by calling something a tax which is not a tax. The legislature could not, by an act passed after the plaintiff's mortgage had been executed and become a lien upon the property, confer upon any person who should loan or advance money or money's worth to the mortgagor, a lien upon such property prior to that of the existing mortgage. Nor can the legislature lawfully give to a court or other public corporation or subdivision of the state any such priority in such a case unless the claim be for a tax, as a tax is known to the law. Neither can the state itself secure any such priority under such circumstances.

When entering into contract relations with individuals, the state, or a municipal corporation thereof, is to be treated the same as an individual. It cannot call or charge up the amount of a loan as a tax, and by that device confer upon the loan all the qualities of a tax. If it could, and in this manner insert a lien for this pseudo tax ahead of existing liens, the holder of security upon real estate would be at the mercy of the state despite the supreme law of the land preventing the impairing the obligations of a contract by any state. If the state can make this claim a tax, then there is no limit to its power by definition to confiscate the securities of others. The amount advanced to the individual by the state would not affect the right of the state to call it a tax. Neither would the purpose for which the advance was made, nor the exigency to meet which the sum was loaned, limit in any manner the power of the legislature to invest such loan with all the attributes of a tax. The loan by the public supplanting the first lien upon real property might be so great as to work a destruction of the lien supplanted. But it is sufficient to condemn a law that it works any impairment, however slight, of the obligations of a contract. To affect a dollar of a prior lien by subsequent legislation is as vicious before the law as to destroy the lien altogether: *Walker v. Whitehead*, 16 Wall. 314.

The mortgagee had, when the law of 1889 was enacted, secured a first lien upon the real estate covered by the mortgage. It was for this he had contracted with the mortgagor. Any law affecting the priority of this lien, or giving the mortgagor authority to do so, clearly impairs the obligation of this contract. Said the court in *Toledo etc. R. R. Co. v. Hamilton*,

134 U. S. 296, 301: "There was no statute in force at the time the mortgage was executed giving any priority to subsequent mechanic's lien; and by the mortgage the mortgagee took its vested priority beyond the power of the mortgagee or the legislature thereafter to disturb."

The state cannot interfere with the remedy given by existing laws to enforce a contract when the consequence is an impairment of the creditor's rights. This doctrine has perhaps been more frequently enunciated and applied in the cases of an attempted statutory extension of the mortgagor's right to redeem made after the mortgage had been executed. The courts, including the final arbiter of the question, the federal supreme court, have very properly held that such a law impaired the rights of the mortgagee under his security, as they affected the price which the real estate would bring on foreclosure. No one would be willing to pay as much for a piece of land, the possession of and absolute title to which he could not secure for several years after purchase, as he would be willing to pay for the same land with a right to immediate possession, or possession after the lapse of only one year. A law giving a right to redeem where no such right existed at the time of the execution of the mortgage, or materially enlarging a right of redemption already existing at the time of the execution of such mortgage, would directly and inevitably lessen the value of the mortgagee's security, and therefore impair the obligation of the contract.

In *Howard v. Bugbee*, 24 How. 461, the court adjudged as void, as impairing the obligation of a contract, a statute of Alabama conferring upon a judgment creditor of the mortgagor a right to redeem from mortgage foreclosure sale within two years thereafter, so far as such statute affected mortgages in existence when the law was passed. The court said: "The main ground of the defense in that suit was that the mortgage from Parsons, under which the defendant derived title, having been executed before the passage of the act providing for the redemption, the act, as respected this defendant, was inoperative and void, as impairing the obligation of the contract. The court of chancery so held, and dismissed the bill; but on appeal to the supreme court, that court reversed the decree below, and entered a decree for the complainant. The case is now here on a writ of error to the supreme court.

The only question involved in this case was decided in *Bronson v. Kinzie*, 1 How. 311. It was then held after a very



careful and extended examination by the court, through the chief justice, that the state law impaired the obligation of the mortgage contract, and was forbidden by the constitution. This decision has since been repeatedly affirmed: *McCracken v. Hayward*, 2 How. 612; *Gantly v. Ewing*, 3 How. 716. . . . We are entirely satisfied with the soundness of the decision in the above case, and with the grounds, and shall simply refer to them as governing the present case." The same doctrine is enunciated in *Scobey v. Gibson*, 17 Ind. 580; 79 Am. Dec. 490; *Iglehart v. Wolfin*, 20 Ind. 32; *Rucker v. Steelman*, 73 Ind. 396; *Ex parte Pollard*, 40 Ala. 77; *Collins v. Collins*, 79 Ky. 88; *Coddington v. Bispham*, 36 N. J. Eq. 574; *Cargill v. Power*, 1 Mich. 369; *Malony v. Fortune*, 14 Iowa, 417; *Heyward v. Judd*, 4 Minn. 483; *Goenen v. Schroeder*, 8 Minn. 387; *Carroll v. Rossiter*, 10 Minn. 174; *Phinney v. Phinney*, 81 Me. 450; 10 Am. St. Rep. 266. If a subsequent statute extending the time of redemption impairs the obligation of the mortgage contract, surely an act passed after the execution of the mortgage, which confers upon the mortgagor power to destroy the mortgage lien by creating a lien upon the land superior to that of the mortgage, is a law impairing the obligation of a contract. The district court was right in adjudging the mortgage lien to be superior to both the liens for seed grain, and the order and the judgment of that court are therefore affirmed. All concur.

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SEED GRAIN STATUTES. — As to the constitutionality of, see *State v. Nelson County*, 1 N. D. 88; 26 Am. St. Rep. 609.

STATES — PRIORITY OF CLAIMS OF. — The claims of the state are prior to those of other creditors: *Degner v. Mayor*, 74 Md. 144. By virtue of the common law, Maryland has priority in the payment of its debts, in the course of the distribution of the debtor's property, where an individual debtor has no prior lien: *State v. Bank*, 6 Gill & J. 205; 26 Am. Dec. 561, and note with cases collected. And the taking by a state of a particular security will not deprive it of the general priority to which it is entitled by law: *Lenoir v. Winn*, 4 Desaus. Ch. 65; 6 Am. Dec. 597. A state is not bound by a statute limiting the liens of judgments to a certain period if it is not named, *Commonwealth v. Baldwin*, 1 Watts, 54; 26 Am. Dec. 33, and note.

STATUTES IMPAIRING THE OBLIGATION OF CONTRACTS. — The legislature of a state can pass no valid law impairing the obligation of a contract: *Carr v. State*, 127 Ind. 204; 22 Am. St. Rep. 624; *State v. McPeak*, 31 Neb. 139; note to *Phinney v. Phinney*, 10 Am. St. Rep. 275; note to *Cornwall v. Commonwealth*, 3 Am. St. Rep. 123, with cases collected. See also extended note to *Scobey v. Gibson*, 79 Am. Dec. 495. Nor can a state abrogate a valid contract by the adoption of a new constitution: *Ede v. Knight*, 93 Cal. 159.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**PENNSYLVANIA.**

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**PLATE'S ESTATE.**

[148 PENNSYLVANIA STATE, 55.]

**WILLS — SIGNATURE BY MARK.** — A statute authorizing the execution of a will by a mark can only mean such a mark as is made with intent to execute the will thereby.

**WILLS — SIGNING OF — SUFFICIENCY.** — When it is shown that a testator started to write his name as his signature to his will, but after making a stroke with a pen, stopped and said: "I can't sign it now," and such stroke bears no resemblance to the form of a mark ordinarily used for a signature, while two witnesses profess to recognize it as the first part of the initial of his first name, an intention on the part of the testator to execute the will either by attaching a mark or his signature is affirmatively disproved.

**WILLS — SIGNING OF — SUFFICIENCY — INTENT MUST EXIST.** — The testator's signature to his will by initials only may be a valid execution thereof, provided an intent to execute is apparent; but in the absence of any sudden incapacity to complete the signature by reason of the extremity of last sickness, it is an indispensable element to the validity of the signature actually made that it shall be full and complete according to the intent and understanding of the testator.

**APPEAL** from a decree admitting the following instrument to probate as a last will or codicil: —

"PHILA., February 6, 1890.

"I, Hermann Theophilus Plate, make this my last will. I give and bequeath the income of twenty-five thousand dollars to be paid to the widow of my former partner, George Runge, for life, in semi-annual payments."

While the testator was in his last illness, and five days prior to his death, and while he was strong mentally, a copy of the above instrument was read to him. He approved it,

but refused to sign it until a prior will made by him had been found. On the three following days his counsel and others tried to induce him to sign the paper; but he put them off by replying, "Not now," or "Some other time." On the day preceding his death, he was again asked if the paper was right, and if he would sign it, and he replied, "Yes." He was then raised up in bed, a pen placed in his hand, and he made one stroke on the paper, when he stopped and said: "I can't sign it now." Such stroke was described as the first up and down stroke of the letter "H." At the time of making this stroke he was excessively weak, and trembled so violently that, upon his saying, "I can't sign it now," he was immediately laid back upon the bed.

*Gustavus Remak, Jr., and George Junkin*, for the appellants.

*John F. Keator, N. D. Miller, H. G. Ward, and George W. Biddle*, for the appellees.

MITCHELL, J. We are obliged to differ with the learned court below, not on the principles of law, but on their application to the facts of this case.

The codicil in question was not properly executed by a mark, for the conclusive reason that the stroke of testator's pen was not put there with that intention. The act of 1848 makes all wills valid "to which the testator hath made his mark or cross, . . . provided the other requisites under existing laws are complied with." It is not necessary for us to consider that part of the argument which is founded on the supposed failure of other requisites, such as the presence of the testator's name, though in another's writing, for the identification of the mark, or the absence of two witnesses to the fact of execution. The statute, in authorizing the execution of a will by mark, can only mean a mark made with the intent to execute the will thereby. Without such intent, paraphrasing the language of Chief Justice Gibson in *Greenough v. Greenough*, 11 Pa. St. 497, 51 Am. Dec. 567, "a cross, or a scratch, or a scrawl, or a dot, or a dash, . . . imports no more than would a blot or a stain, or any other accidental discoloration of the paper at the foot of the instrument." The evidence shows beyond all doubt that the testator did not intend to execute the codicil by a mark, or make the stroke of the pen in question for that purpose. On the contrary, he started to write his name, and made a stroke, which bears no resem-

blance to the form of mark ordinarily used for such purpose, and which two witnesses profess to recognize as the first part of the initial of his first name, Hermann, and then, putting the matter beyond all controversy, he stopped and said, "I can't sign it now." The intention to execute by a mark is affirmatively disproved.

Nor is the codicil properly executed by a signature, for the signature is incomplete, and the evidence shows that the testator so regarded it. The learned court below were quite right in saying, "exactly what constitutes a signing has never been reduced to a judicial formula. . . . The principle upon which these cases proceeded was, that whatever the testator or grantor was shown to have intended as his signature, was a valid signing, no matter how imperfect or unfinished, or fantastical or illegible, or even false, the separate characters or symbols he used might be when critically judged." But even by this test nothing is a signature unless it is meant by the signer to be such, and this requirement is destructive of the present case, for the facts do not show that the testator regarded this stroke of his pen as his signature. On the contrary, they show that not only to a critical judgment, but to the testator himself, there was no signature. His expression, "I cannot sign it now," after the stroke had been made, proves conclusively that he did not consider that he had signed, and intentionally postponed doing so until a future occasion.

In *Knox's Estate*, 131 Pa. St. 220, 17 Am. St. Rep. 798, the subject of signatures was considered with much care, and cases were cited in which signatures lacking various elements of the full, formal, and complete name had been held valid, but in none of the cases there cited or since brought to our attention, was the signature incomplete to the testator's own understanding and intent. The result of the cases is thus expressed: "The English and some American cases hold that a signature by initials only, or otherwise informal and short of the full name, may be a valid execution of a will or a contract, if the intent to execute is apparent." Further consideration confirms us in the correctness of this proposition; but, barring any sudden incapacity to complete by reason of the extremity of last sickness, of which there can be no claim here, it is an indispensable element that the signature actually made shall be a full and complete signature according to the intention and understanding of the testator.

The undisputed facts in the present case show conclusively



that the completed intent to execute this codicil in any way whatever is entirely wanting.

Decree reversed at the cost of the appellees.

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**WILLS, SIGNING OF — SUFFICIENCY — INTENT:** See extended note to *Guthrie v. Owen*, 36 Am. Dec. 318; notes to *Rutherford v. Rutherford*, 43 Am. Dec. 646; *Waller v. Waller*, 42 Am. Dec. 572; *McGee v. Porter*, 55 Am. Dec. 131. Though a testator's hand be guided in writing his signature or making his mark, it is sufficient if it was his purpose to sign, and he used his best physical effort to participate in the act: *Fritz v. Turner*, 46 N. J. Eq. 515. An express direction by a testator to a third person to sign his name to his will, must be proved by the oath or attestations of two witnesses: *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567, and note; *Grabill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418. See also *In re Will of Booth*, 127 N. Y. 109; 24 Am. St. Rep. 429, and *Estate of Knox*, 131 Pa. St. 220; 17 Am. St. Rep. 798, and note, in which the questions relating to the sufficiency of the signing of wills is discussed.

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## PIERCE v. MARPLE.

[148 PENNSYLVANIA STATE, 69.]

**MECHANICS' LIENS, WHO ENTITLED TO — AGREEMENT FOR PAYMENT IN MATERIALS.** — A person who builds a house under a contract that he shall be paid for his services in lime, is entitled to the benefit of a mechanic's lien filed by him, but he has no right to demand payment in money, without showing a demand and refusal to furnish lime.

**MECHANICS' LIENS — EVIDENCE AS TO KIND OF PAYMENT — PRACTICE.** — In an action to recover on a mechanic's lien filed by a builder of a house under a contract that he shall receive his pay in lime, the defendant should be allowed to prove such contract, and a willingness to fulfill it; so that the jury may find the facts specially, and the court may control the execution, so that upon a refusal to pay in lime, it may issue for money.

*George M. Corson*, for the appellants.

*James B. Holland and John M. Dettra*, for the appellees.

**PAXSON, J.** This was a *scire facias sur* mechanics' lien. The claim was for the carpenter work, etc., of a frame house which had been constructed upon defendants' land. The defendants did not deny that the work was done, but they contended that the plaintiffs were not entitled to file this lien and to have judgment upon the *scire facias* for the reason that they had agreed to take their pay in lime. It is manifest the plaintiffs were entitled to have the benefit of the lien and the judgment upon the *scire facias*, whether they were to be paid in lime or in dollars. The character of the judgment and the

manner in which it should be enforced would necessarily depend upon the contract.

Upon the trial below counsel for defendants offered to prove by a witness on the stand that the plaintiffs entered into a contract to build this house and take their pay in lime, to be followed up by showing that the defendants have always been ready to carry out the contract. See first specification.

And in the fourth specification it is alleged that the court erred in charging the jury as follows: "In this case something has been said about the terms of the contract with reference to the manner in which the plaintiffs were to be paid; that is, the lime. For the purpose of this case the court charges you that you are to dismiss that from your minds, and even although that should have been the contract, still, of itself, it would furnish no defense in this case, and you will therefore disregard it in the consideration of this case."

The effect of the exclusion of this evidence, and the charge of the court, was a verdict for the plaintiffs which, upon its face, is payable in money. We must assume, for the purpose of this case, that the defendants could have proved a contract by which the plaintiffs were to take their pay in lime. Under such circumstances the plaintiffs would have no right to demand their pay in money without first showing that the defendants had refused to furnish lime when called for. Such refusal would, of course, entitle the plaintiffs to be paid in money. The verdict and judgment in the court below should have been in such shape that the court could have retained control over it, and under its equitable powers, do justice to the parties. As the matter now stands it would be difficult to go behind the judgment to reach the equity between the parties. We are of opinion that the evidence referred to should have been received, and if the jury found the fact that the plaintiffs were to take their pay in lime, such fact should have been found specially and incorporated into the verdict. The court would then have been enabled to control the execution, and if the defendants should refuse to pay in lime, could permit the execution to go for money.

The judgment is reversed, and a *venire facias de novo* awarded.

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**MECHANIC'S LIEN. — WAIVER OF:** See extended note to *Goble v. Gale*, 41 Am. Dec. 221-224.

**PAYMENTS MADE IN SPECIFIC PROPERTY BY AGREEMENT. —** This question is discussed in an extended note to *Roberts v. Beatty*, 21 Am. Dec. 422;

also note to *Jones v. Perkins*, 64 Am. Dec. 142. An agreement without consideration to pay a different consideration, and one of a character not more certain than originally stipulated, is not binding, nor does it discharge the original contract: *Randolph v. Perry*, 2 Port. 376; 27 Am. Dec. 659; but payment does not import the delivery of money, it may be made in property or other securities; *Ryan v. Dunlap*, 17 Ill. 40; 63 Am. Dec. 334, and note.

## COMMONWEALTH v. HESS.

[148 PENNSYLVANIA STATE, 98.]

**INTOXICATING LIQUORS — SALE OF, WHEN AND WHERE COMPLETED.**—When a liquor dealer, licensed to sell in one county, receives an order there from a customer in another county, and in pursuance of such order delivers the liquor in the usual course of business, either by his own wagon or by common carrier or otherwise, the sale, though on credit, is completed in the county where the order is received, and the dealer cannot be convicted of selling without a license in the county to which he sent the liquor.

**SALES — WHEN AND WHERE COMPLETED.** — When a person doing business in one county receives an order there for goods from a customer in another county, and in pursuance of such order sets the goods ordered apart, and charges them to such purchaser, afterwards delivering them by wagon, common carrier, or otherwise, the sale, though made on credit, is completed and the title passes, as between the vendor and vendee, when the goods are set apart and charged to the latter.

**SALES — WHEN COMPLETED.** — A sale of personal property passes the title as between the vendor and vendee when such property has been designated and set apart by the former, if such is the intent of the parties, though the vendor is not to make delivery of the goods until afterwards.

**SALES — WHEN TITLE PASSES — INTENT.** — The passing of title upon a sale of personal property depends upon the intention of the parties to be derived from the contract and its circumstances. Actual delivery, weighing, and setting aside are only circumstances from which such intention may be inferred.

*N. H. Larzelere and M. M. Gibson*, for the appellants.

*B. E. Chain, and Henry M. Brownback*, district-attorney, for the appellee.

**PAXSON, J.** The defendant was convicted in the court below of selling liquor without a license. The whole case is developed by the specification of error, which is as follows:—

“The court erred in its charge to the jury upon the following facts in the case, the whole of which charge is specified as error, and which is as follows: ‘Upon the uncontradicted facts as established by the commonwealth, and not denied by the defense, which are as follows: Francis Hess has a bottler’s license in the city of Philadelphia, doing business at No. 2440

Mascher Street, in said city; for some time within two years, and prior to June 1, 1891, Frank Cottman, a licensed hotel keeper at Jenkintown, Montgomery County, Pennsylvania, sent to Hess's place of business in Philadelphia, orders from week to week for lager beer and porter, the whole amount of said orders being about \$175; that upon the receipt of said orders by Hess, the material ordered was set apart and charged to Cottman upon the books of Hess, and was then loaded upon Hess's delivery wagon, and by him and an employee, named George Ginader, driven to Jenkintown, in Montgomery County, and delivered to Cottman; bills were afterwards made out and sent to Cottman, who paid them either by checks sent to Philadelphia, or in cash paid in person at the place of business of Hess in Philadelphia, after the delivery was made to Cottman at his place of business.

“A similar transaction took place between said Francis Hess and George Ginader and Henry J. Wilson, a keeper of a licensed hotel at Hatboro, Montgomery County, on six to eight occasions in the months of April and May, 1891; there were also orders of Cottman and Wilson filled by shipment by railroad to Jenkintown and Hatboro; Hess had no license from the court of Montgomery County.’

“The court is respectfully asked to charge the jury that there were no violations of the liquor laws as set out in said bill of indictment, and the verdict of the jury must be not guilty.

“The court: Gentlemen of the jury, I cannot instruct you as requested. The defendant undertook to deliver by the wagon of Hess, and the sale was completed in this county. If you find the facts as set forth in the above request, I charge you that they show a violation of the liquor laws as set forth and charged in the bill of indictment.

“I instruct you, however, as requested, that you are the judges of the law as well as of the facts, under the advice and direction of the court. You are to look to the court for the best evidence of the law, just as you are to look to the witnesses for the best evidence of the facts.”

It must be conceded at the outset that the defendant was pursuing a lawful business. It is not only expressly authorized by law, but he has paid a large sum of money for the privilege of carrying it on. It was not denied, and could not well be, under the act of assembly, and our decisions thereon, that he has a right to sell his liquors at wholesale, not only to cus-



tomers in the city of Philadelphia, but throughout the state, and the country at large. It is well known that the business of wholesale dealers is not limited to any particular locality, but extends in many instances over many portions of the civilized world. In the case of wholesale dealers in liquor, they are restrained by the statute and the terms of their license to sales in the county in which their license was granted. It does not follow, however, and it is not the law, that their sales are limited to persons residing in said county. It is not denied, and it is settled law, that the defendant may sell to any retail dealer in any part of the commonwealth, provided the sales are made at his place of business in the county of Philadelphia. Such sales may be made in the usual course of business. It is not necessary that a retail dealer from an adjoining county should call at the place of business of the wholesale dealer, in the county of Philadelphia, in order to make his purchase. He may order his goods by mail as in other cases. When the law licensed the wholesale dealer to carry on his business in the county of Philadelphia, it carried with it the authority to conduct it according to the usual mode of business, but it does not justify him in peddling his goods around in other counties and selling them there. So much was decided in *Commonwealth v. Holstine*, 132 Pa. St. 357, where it was held that the driver in the employ of a bottler, having a license in Philadelphia County, who took orders in Montgomery County for liquors, which were subsequently loaded upon the defendant's wagon in Philadelphia, and delivered to the purchasers in Montgomery County by said driver, who collected the money therefor, was properly convicted and sentenced for selling liquors without license in Montgomery County. It was said in the opinion of the court: "This was clearly a sale and delivery in Montgomery County. The license held by Mr. Otto authorized him to sell in Philadelphia. He had a right to sell to any person in this commonwealth, provided the sale was made at his place of business: *Commonwealth v. Fleming*, 130 Pa. St. 138; 17 Am. St. Rep. 763. But he had no right to peddle his beer through other counties not covered by his license, and make sales there." We accordingly held that, as his employer was not protected by a license, the defendant was not protected.

In the case in hand, the defendant was not peddling his beer through Montgomery County. The driver of his wagon did not solicit orders in that county. The defendant deliv-

ered liquors only upon orders which had been received in the usual course of business at his place in Philadelphia. It was urged, however, that because the delivery in Montgomery County had been made by means of his own wagon, that it was a sale in said county, and a violation of the license law. The court below so held, and sentenced the defendant to pay a fine of five hundred dollars, and to undergo an imprisonment in the Montgomery County prison for three months.

It appears from the conceded facts that the defendant was in the habit of receiving orders at his place of business in Philadelphia, from week to week, for lager beer and porter from Frank Cottman, a licensed hotel keeper at Jenkintown, Montgomery County, and from Harry J. Wilson, a licensed hotel keeper at Hatboro, in said county. Upon the receipt of such orders, the material so ordered was set apart and charged to the purchaser upon the books of the defendant, the sale in each instance being upon credit. The goods thus sold and set apart to the respective purchasers were then either loaded upon defendant's delivery wagon, and delivered by the driver of said wagon to the purchaser in the usual course of business, or were shipped by railroad to the purchaser.

It was conceded upon the argument that had the liquors in question been shipped by rail, or by any other common carrier, to the purchaser, it would have been a sale and delivery in Philadelphia, and not a violation of the license law. This is the doctrine of *Commonwealth v. Fleming*, 130 Pa. St. 138, 17 Am. St. Rep. 765, where it was held that, if a liquor dealer in Allegheny County receive an order for liquor to be shipped to the purchaser in Mercer County, C. O. D., and in pursuance of the order the liquor be delivered to a common carrier in Allegheny County for transportation to the vendee, at the latter's expense, the delivery to the carrier is a delivery to the purchaser, in such a sense as to complete the sale in Allegheny County.

If we sustain the court below in this case, we are brought face to face with this proposition: That if a wholesale dealer in liquor receives an order from a customer in an adjoining county, and in pursuance of such order delivers the liquor to a common carrier for transportation, he is a law-abiding citizen; whereas, if he delivers the liquor in his own wagon, in the usual course of business, he is a criminal, and liable to both fine and imprisonment. If this be the law, it is certainly not the "perfection of reason." On the contrary, it is

the climax of absurdity, and cannot fail to shock the common sense of every business man in the community.

The principle relied upon by the commonwealth to sustain this conviction is, that the sale of liquor was not complete until its delivery in Montgomery County to the purchaser, and a large number of authorities were cited in support of this view. The pith of the argument upon this point and the nature of the authorities cited may be gathered from four lines of the printed argument on behalf of the commonwealth. They are as follows: "Had these goods been levied upon in virtue of a creditor of Hess (defendant), could it be contended that they could not be sold under that execution? We can find no decision sustaining a contrary view." If we concede the soundness of this proposition, and that the authorities cited fully sustain it, it has no bearing upon the case. The question is not whether there was such a sale and delivery as would pass the title as against the execution creditors of the defendant. The true question is, and it has been wholly overlooked in many of the cases, whether there was a sale and delivery as between the vendor and the vendee. Our books are full of cases in which the sale has been held to be incomplete for want of a delivery to the vendee, as against creditors, but in no one of them has it ever been held that it was not good between the parties, and that the title did not pass as to them.

As before stated, when the defendant received the orders from his customer, the goods were set apart for the latter, and charged to him. Had the order been accompanied by the cash, and the goods thus set apart, no one would contend that the sale was not complete as between the parties. Can it make any possible difference that the liquors were charged to the purchasers upon the books of the defendant? The giving of a credit was as effective in passing the title as the payment of the money when the order was given. The acceptance of the order, in either case, is effective to pass the title as between vendor and vendee. In such case, the vendee has the right of property with the right of possession. Under all the authorities the vendor acts as bailee, and not owner, in carrying or delivering the goods. This is the rule where the rights of creditors, or *bona fide* purchasers without notice, do not intervene. There is abundant authority for this principle. The general rule is that it is the contract to sell a chattel, and not payment or delivery, which passes the property: Benjamin on

Sales, 357. The rule that the contract of sale passes the property immediately, before payment or change of possession has been universally recognized in the United States: Benjamin on Sales, 329. There may be a bargain and sale of goods sufficient to transfer the title, and thus to support an action for goods bargained and sold, without such transfer of delivery as will amount to a transfer of possession: *Frazier v. Simmons*, 139 Mass. 531. "When the terms of sale are agreed upon, and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale, says Chancellor Kent, becomes absolute as between the parties, without actual payment or delivery, and the property, and the risk of accident to the goods, vests in the buyer. He is entitled to the goods on payment or tender of the price, but not otherwise, when nothing is said at the sale, as to the time of delivery, or the terms of payment; but if the goods are sold on credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of property vests at once in him": *Leonard v. Davis*, 1 Black, 476, citing 2 Kent's Commentaries, 671; *Bradeen v. Brooks*, 22 Me. 470; *Davis v. Moore*, 13 Me. 427.

In *Dixon v. Yates*, 5 Barn. & Adol. 313, Baron Parke lays down the rule as follows: "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it without delivery. Where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

The same principle was recognized in Iowa, in *Dows v. Morse*, 62 Iowa, 231, where it was held that when under a contract, corn was set apart in bins, and marked with the purchaser's name, there was a designation of the corn for the purchaser. In our own case of *Garbracht v. Commonwealth*, 96 Pa. St. 449, our brother Sterrett illustrates the principle thus: "For example, a merchant in New York orders goods from a Boston house, and they are consigned thence to him, either by a carrier of his own selection, or in the usual course



of trade, the transaction is an executed Boston contract: 2 Parsons on Contracts, 586. The same principle is recognized in *Shriver v. Pittsburg*, 66 Pa. St. 446; *Finch v. Mansfield*, 97 Mass. 89. In the former case the city of Pittsburg was authorized to impose a tax 'upon all articles of trade and commerce sold in said city,' and the question was whether certain goods were sold in the city. About one sixth of the gross sales of Shriver & Co., wholesale grocers, were made directly at their store in the city without the intervention of outside agents. The other five sixths were effected through agents employed for the purpose of procuring orders and making contracts of sale outside the city. These orders were transmitted to the firm, who filled them at their store in Pittsburg, and consigned the goods to the purchasers by the most direct means of conveyance. Shriver & Co. contended that the sales, thus represented by the orders, were not made in the city, and hence they were not taxable on the amount so sold; but it was held by this court that the goods thus ordered through their agents, put up at their store and shipped thence to the customers, were sold in the city, and that the amount should be included in their account of sales returned for taxation."

Whether the title of personal property passes by a sale depends upon the intent of the parties. Hence it was said by Mr. Benjamin in his valuable treatise on sales: "But the property passes at once on the sale, if such is the intent, though the seller is afterwards to make the delivery of the goods. Such intent may be expressly declared, or may be inferred from the circumstances. Thus in *Lynch v. O'Donnell*, 127 Mass. 311, the seller was licensed to sell liquor at his store only. Liquor was ordered by a dealer in another town, under a previous arrangement, whereby the seller agreed to deliver goods so ordered at the depot addressed. Having so delivered, the seller brought an action for the price. It was contested as an illegal sale, but it was in evidence that the seller expressly declared at the time of the contract 'the sales are to be made at my store'; a verdict for the price was sustained."

In *Terry v. Wheeler*, 25 N. Y. 520, it was said by Selden, J., "No case has been referred to by counsel, nor have I discovered any in which, when the article sold was perfectly identified and paid for, it was held that a stipulation of the seller to deliver at a particular place prevented the title from pass-

ing. When the sale appears to be absolute, the identity of the thing fixed and the price for it paid, I see no room for an inference that the property remains the seller's merely because he had engaged to transport it to a given point. I think, in such case, this property passes at the time of the contract, and that in carrying it the seller acts as bailee, and not as owner." Where the sale has been made upon a credit, as in this case, the rule is the same; for when sales are made upon credit, the property identified and separated, the "legal effect then is, that there has been an actual transfer of title, and an actual right of transfer of the bargain": Benjamin on Sales, 882. It is settled law that a sale of personal property passes the title as between vendor and vendee, when such property has been designated and set apart by the former: *Dennis v. Alexander*, 3 Pa. St. 50. It was said by Gibson, C. J., in *Scott v. Wells*, 6 Watts & S. 357; 40 Am. Dec. 568: "Even where actual possession has not been taken, the ownership and risk pass by the contract, if nothing remains to be done to the property by the vendor (such as counting, measuring weighing, or filling up) to ascertain the number, quantity, or weight. Thus in *Rugg v. Minett*, 11 East, 210, turpentine had been sold at so much the hundred weight in casks, to be taken at the marked quantity, except two, out of which the others were to be filled up before delivery, and those two were to be sold as containing indefinite quantities. The buyer employed a person to do the filling, but before he completed it, the warehouse with its contents was destroyed by fire; and it was held that the property in those filled up had passed to the buyers because nothing remained to be done to them by the vendors." To the same point is *Winslow v. Leonard*, 24 Pa. St. 14, 62 Am. Dec. 354, where it was said by Lowrie, J.: "Where the lawful form of contracting is pursued, the vesting of the title always depends upon the intention of the parties, to be derived from the contract and its circumstances; and actual delivery, weighing, and setting aside the goods, are only circumstances from which the intention may be inferred as matter of fact: *Sumner v. Hamlet*, 12 Pick. 76; *Riddle v. Varnum*, 20 Pick. 280; *Smyth v. Craig*, 3 Watts & S. 14. And this is the principle of numerous cases wherein the title has been held to vest even where there has been no measurement," citing *Macomber v. Parker*, 5 Met. 452; *Sands v. Taylor*, 5 Johns. 395; 4 Am. Dec. 374; *Shindler v. Houston*, 1 Denio, 48; *Scott v. Wells*, 6 Watts & S. 357; 40 Am. Dec. 568; *Pleasants v.*

*Pendleton*, 6 Rand. 473; 18 Am. Dec. 726; *Chaplin v. Rogers*, 1 East, 192; *Hawes v. Watson*, 2 Barn. & C. 540; *Valpy v. Gibson*, 4 Com. B. 864. The learned justice also says that much of the confusion of ideas about the vesting of the title on a sale of personal property arises from the misleading influence of unsuitable analogies. I have already referred to one of those unsuitable analogies. Justice Lowrie thus refers to another: "The class of cases which has tended most powerfully to embarrass this question are those wherein the real question was not, has the title vested in the vendee, but has it so absolutely vested as to take away the lien of the vendor for unpaid purchase money, or his right to stop *in transitu*? Yet to this class belong most of the older cases, which are usually referred to as leading cases in the present question, though they have nothing to do with it; for it is very plain that the title may vest while the vendor has such remaining control over the goods as entitles him to arrest their full delivery in default of payment or in the failure of the vendee." *Gonser v. Smith*, 115 Pa. St. 452, recognized and followed *Winslow v. Leonard*, 24 Pa. St. 14, 62 Am. Dec. 354, and affirms the doctrine that the passing of the title upon a sale of chattels depends upon the intention of the parties to be derived from the contract and its circumstances; and that actual delivery, weighing, and setting aside are only circumstances from which the intention may be inferred.

We might multiply authorities upon this point without limit, were it necessary. We do not think those cited are in serious conflict with any of our own cases. Where an apparent conflict exists, it is doubtless due to inadvertence in applying a principle of law, which was only intended to protect execution creditors, *bona fide* purchasers, or the right of stoppage *in transitu*. This principle, as before observed, has no application to cases arising between vendor and vendee. In applying the law to questions of this nature, we cannot wholly ignore the accepted principles of right and justice, nor can we, in considering contract relations, ignore the usages which the necessities and wants of business have practically made a part of them. This has sometimes been called the expansive property of the common law. If the great mass of legal principles, which has descended to us under the name of the common law, were composed only of ironclad rules, it would be wholly unsuited to the present age and generation, and the great changes which have taken place, not only in the volume

of business, but in the mode of conducting it. We are constantly applying the accepted principles of the common law to new phases and modes of doing business. This is a necessity, alike dictated by common sense and the necessities of trade. The present is a striking illustration of the wisdom of this rule. Both the appellant, and his customer in Montgomery County, were engaged in a lawful business. The appellant had the right to sell, and his customer in Montgomery County had the right to buy, the liquor in question. To say that a man who may lawfully sell an article to another who may lawfully buy it cannot deliver the article sold by the usual course of business, is to assert a proposition that is absurd upon its face. It is not sustained by either authority or reason.

In this case the purchaser was licensed to retail the beer to his customers. The effect of this conviction, if sustained by this court, will be merely to compel the appellant to deliver his liquors by a common carrier, instead of by his own wagon in the usual course of trade. It cannot prevent sales, nor diminish the quantity of liquors sold and consumed. It imposes a burden upon the wholesale dealer, which is not imposed by the law, and is in violation of the usages of trade. We do not think the legislature intended, when it licensed the appellant as a wholesale dealer, to prohibit the delivery of goods sold by him, in the manner recognized in all other kinds of business. And especially ought we not to indulge in metaphysical hair splitting in the construction of a penal statute, and make men criminals by judicial construction who were not so in fact or intent.

We are of opinion that the learned judge below erred when he instructed the jury that the facts, as set forth in the specification of error, show a violation of the liquor laws of this commonwealth.

The judgment is reversed.

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SALES — WHERE DEEMED TO BE COMPLETE.: See note to *Wasserboehr v. Boulter*, 30 Am. St. Rep. 348, where this subject is discussed and the cases collected; also note to *Ford v. Buckeye State Ins. Co.*, 99 Am. Dec. 670; also note to *Commonwealth v. Fleming*, 17 Am. St. Rep. 773.



## CITY OF ALLENTOWN v. WESTERN UNION TELEGRAPH COMPANY.

[148 PENNSYLVANIA STATE, 117.]

**MUNICIPAL CORPORATIONS — LICENSE FEE FOR INSPECTION OF TELEGRAPH POLES.** — A municipality has a right and it is its duty, in the exercise of its police power, to supervise and control the erection and maintenance of telegraph poles and wires within its limits, and an ordinance imposing a license of one dollar per annum for the inspection of each telegraph, telephone, or electric-light pole within the city limits, is a reasonable exercise of such police power.

**ASSUMPSIT** to recover a license fee for the inspection and maintenance of telegraph poles. Judgment for the plaintiff and the defendant appealed.

*R. E. Wright*, for the appellant.

*John Rupp*, city solicitor, for the appellee.

**PER CURIAM.** We agree with the learned judge of the court below that this case is ruled by *Western Union Tel. Co. v. Philadelphia*, 22 Week. Not. Cas. 39, where it was held that a municipality has a right, and it is its duty, to supervise and control the erection and maintenance of telegraph poles and wires within its limits. Hence, where a municipality imposed by ordinance a license fee of one dollar per annum on each pole, and of two dollars and a half per annum on each mile of wire within its limits, the court declined to rule that the fee so charged was so obviously unjust as to authorize a revision of the action of the city councils. In the case in hand, it appears that the city of Allentown enacted an ordinance requiring every telegraph, telephone, or electric light company's poles in the city of Allentown to be inspected by the police department, and that the same should be licensed, and requiring a fee of one dollar each year to be paid for each pole. This ordinance was in the exercise of the police power of the city, and the only question was whether it was a reasonable exercise of such power. The amount of the license fee in such cases rests with the city councils in the first instance. It is only where such discretion has been abused that we are justified in interfering. We cannot say that this discretion has been abused in this instance, or that the license fee is unreasonable.

Judgment affirmed. —

**MUNICIPAL CORPORATIONS. — LICENSE TAXES, WHEN VALID AND WHEN INVALID:** See *Simrall v. Corington*, 90 Ky. 444; 29 Am. St. Rep. 398, and

note; *Magneau v. City of Fremont*, 30 Neb. 843; 27 Am. St. Rep. 436, and note; *Titusville v. Brennan*, 143 Pa. St. 642; 24 Am. St. Rep. 580; *People v. Wagner*, 86 Mich. 594; 24 Am. St. Rep. 141, and note; note to *People v. Naglee*, 52 Am. Dec. 332; note to *Robinson v. Mayor*, 34 Am. Dec. 638.

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## SPANCAKE v. PHILADELPHIA AND READING RAILROAD COMPANY.

[148 PENNSYLVANIA STATE, 184.]

**MASTER AND SERVANT — VICE PRINCIPAL — TRACK FOREMAN IS NOT. —** A railroad track foreman who has control of a gang of track repairers, is not a vice principal as to the men under him, and the railroad company is not liable for his negligence resulting in an injury to one of them.

*P. H. Reinhard*, for the appellant.

*C. H. and J. W. Killinger*, for the appellee.

Per CURIAM. The plaintiff's husband was one of a gang of men in the employ of the defendant company. At the time of the accident which caused his death he was engaged, with others, in making repairs to the roadbed. While so engaged, he was struck by a passing train and killed. This suit was brought in the court below to recover damages for his death.

It appears that one Solomon Peiffer was employed by the defendant company as a track foreman, and that he had charge of the gang with whom Adam Spancake worked. The plaintiff alleged that it was the duty of the said Peiffer to give notice of an approaching train, and that this duty had been neglected; that, by reason of this neglect, Spancake was killed. It was further contended that Peiffer represented the company, in other words, that he was a vice principal; that his neglect was the neglect of the company, and *Lewis v. Seifert*, 116 Pa. St. 628, 2 Am. St. Rep. 631, was cited in support of this proposition. We do not think that case supports this contention. There, it was held, that a train dispatcher, wielding the entire power of a railroad company in the moving of trains, in the changing of schedules, or the making of new ones, as exigencies require, is not a fellow workman or coemployee, and for his negligence, which is the proximate cause of an injury, the company is liable in damages. The difference between a train dispatcher wielding such powers, and a mere track foreman, controlling half a dozen or more men, is apparent to the dullest understanding. Under all the authorities, Peiffer was merely a coemployee, or fellow

workman of Spancake, and for the negligence of the former the company is not responsible. There being no facts in dispute, it was not error for the court to rule this point, and the nonsuit was properly entered.

Judgment affirmed.

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**MASTER AND SERVANT—RAILROAD TRACK FOREMAN WHETHER VICE PRINCIPAL.** — A foreman who has the control, direction, and supervision of a gang of railroad employees, with authority to employ and discharge them, is a fellow servant and not a vice principal, and the master is not liable for injuries to such employees through the foreman's negligence: *Ell v. Northern Pac. R. R. Co.*, 1 N. D. 336; 26 Am. St. Rep. 621, and note. The contrary doctrine to the one of the principal case and the case just cited is maintained in the following authorities: *Miller v. Missouri Pac. R'y Co.*, 109 Mo. 350; 32 Am. St. Rep. 673; *Colorado etc. R'y Co. v. Naylor*, 17 Col. 501; 31 Am. St. Rep. 335; *Sweeney v. Gulf etc. R'y Co.*, 84 Tex. 433; 31 Am. St. Rep. 71; *Sullivan v. Hannibal etc. R. R. Co.*, 107 Mo. 66; 28 Am. St. Rep. 388, and see also the notes to the above cases in which the authorities discussing this subject are collected.

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## BECK v. PENNSYLVANIA, POUGHKEEPSIE AND BOSTON RAILROAD COMPANY.

[148 PENNSYLVANIA STATE, 271.]

**WITNESSES — EXPERT EVIDENCE — DAMAGES FROM CONSTRUCTION OF RAILROAD.** — In an action to recover for damages to property arising from the location and construction of a railroad, a witness who has knowledge of the property, is competent to testify as to whether or not its value has been increased or diminished by the construction of the road, and if diminished thereby, he is competent to testify as to the amount.

**EMINENT DOMAIN — LAND INJURED BY CONSTRUCTION OF RAILROAD.** — MEASURE OF DAMAGES to land arising from the location and construction of a railroad, is the difference between the market value of the property immediately before and immediately after the construction of the road.

**TRESPASS** to recover damages arising from the construction of a railroad. Judgment for the plaintiff and defendant appealed.

*George W. Mackey*, for the appellant.

*William Mutchler*, for the appellee.

Per CURIAM. The first and ninth specifications of error do not conform to the rules of court, and will not be considered. The remaining specifications present but a single question, which is sufficiently set forth in the second specification, as follows: "The court erred in not sustaining the defendant's

objection to the following questions, put by the plaintiff to his witness, Stephen Shoemaker: Q. In your judgment did the building of this railroad increase or decrease the value of the farm? Objected to as incompetent. By the Court. The objection is overruled. Defendant excepts. Bill sealed. A. Of course it has decreased the value of the farm. Q. How much, in your judgment, has the building of the railroad decreased the value of the farm? Objected to as incompetent. Objection overruled. Bill sealed for the defendant."

We find nothing objectionable in the allowance of these questions. It was clearly competent to ask a witness, who had knowledge of the property, whether its value was increased or diminished by the construction of the railroad through it. And if its value was lessened by such construction, we see no reason why he may not say how much, provided he has knowledge. It is true, the measure of the damages is the difference between the market value of the property, immediately before and immediately after such construction. We think the questions referred to bore directly upon this question, and were, at least, competent to go to the jury. It is not always possible to fix with certainty the market value of a farm. At most, it can only be done approximately, and evidence which tends to show that its value has either been increased or diminished by the construction of the road, is some evidence to enable the jury to determine this question.

Judgment affirmed.

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**RAILROADS—EMINENT DOMAIN.—EXPERT EVIDENCE AS TO VALUE OF PROPERTY TAKEN:** See *Jones v Erie etc. R. R. Co.*, 151 Pa. St. 30; 31 Am. St. Rep. 722, and especially note at page 734, where the cases discussing this subject are collected.

**RAILROADS.—MEASURE OF DAMAGES IN EMINENT DOMAIN PROCEEDINGS** for a railroad, is the difference between the value of the land as a whole before and after the construction of the road built according to the plan proposed: *Wabash etc. R'y Co. v. McDougall*, 126 Ill. 111; 9 Am. St. Rep. 539, and note. The proper measure of damages in such a case, is the depreciation in the market value of the property caused by the location and construction of the railroad: *Kersey v. Schuylkill etc. R. R. Co.* 133 Pa. St. 234; 19 Am. St. Rep. 632, and note; or it is the difference between the value of the entire lot just before the taking and the value of what is left after the taking: *Harris v. Schuylkill etc. R. R. Co.*, 141 Pa. St. 242; 23 Am. St. Rep. 278 and note; note to *Currie v. Waverly etc. R. R. Co.*, 19 Am. St. Rep. 459.



## VALLEY NATIONAL BANK v. CROWELL.

[148 PENNSYLVANIA STATE, 284.]

**NEGOTIABLE INSTRUMENTS — COLLATERAL SECURITY AS AFFECTING.** — The giving of collateral security with a note does not destroy its negotiability.

**NEGOTIABLE INSTRUMENTS — COLLATERAL AS AFFECTING.** — Although a note states on its face that it is accompanied by collateral security, its negotiability is not thereby destroyed.

*W. R. Gillan, A. G. McLanahan, and O. C. Bowers, for the appellants.*

*W. U. Brewer, Rowe and Stewart, and H. Gehr, for the appellees.*

Per CURIAM. The only question in this case was whether the note in controversy was negotiable. It is in the usual form of negotiable paper, but it is contended that its negotiability is destroyed by reason of the following provision contained therein: "Having deposited herewith a like amount of Crowell Company mortgage bonds as collateral security, which we authorize the holder of this note, upon the nonperformance of this promise at maturity, to sell either at the brokers' board, or at public or private sale, without demanding payment of this note or the debt due thereon, and without further notice, and apply proceeds, or as much thereof as may be necessary, to the payment of this note and all necessary charges, holding us as makers and indorsers responsible for any deficiency."

We find nothing in this to destroy the negotiability of the note. While it has been truly said that a promissory note is a courier without luggage, we find nothing in the language quoted beyond the statement that the note is accompanied with certain collateral. The mere giving of collateral security with a promissory note does not destroy its negotiability: *Arnold v. Rock River etc. R. R.*, 5 Duer, 382; *Towne v. Rice*, 122 Mass. 67. In *Woods v. North*, 84 Pa. St. 407; 24 Am. Rep. 201; *Johnston v. Speer*, 92 Pa. St. 227; 37 Am. Rep. 675; the amounts of the notes were held to be uncertain. In *Citizen's Nat. Bank v. Piollet*, 126 Pa. St. 195, 12 Am. St. Rep. 860, the court refused to hold the indorser liable, because the time of payment was not fixed, and in *Iron City Nat. Bank v. McCord*, 139 Pa. St. 52, 23 Am. St. Rep. 166, the payment was made dependent upon certain conditions. In the case in hand, the amount of the note is not uncertain, nor is there any question about the time of payment. And the payment is

not made dependent upon any condition whatever. The agreement, that if the collateral proves insufficient for the payment of the note, and all necessary expenses and charges, the makers will be responsible for any deficiency, neither increases nor decreases the responsibility of the makers. It merely requires them to do what the law would compel them to do without such an agreement.

We are of opinion that the affidavit of defense was insufficient and the judgment properly entered.

Judgment affirmed.

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**NEGOTIABLE INSTRUMENTS. — WHETHER COLLATERAL SECURITY AFFECTS NEGOTIABILITY:** See note to *Mead v. Small*, 11 Am. Dec. 67. The fact that a promissory note given for the purchase price of land is secured by a lien on the land does not affect its negotiability: *Duncan v. Louisville*, 13 Bush, 378; 26 Am. Rep. 201; *Webb v. Hoselton*, 4 Neb. 308; 19 Am. Rep. 638. Nor is a promissory note given for the payment of a certain article rendered non-negotiable from the fact that it recites that the title, ownership, and possession of the article does not pass until the note and interest is paid in full: *Heard v. Dubuque Co. Bank*, 8 Neb. 10; 30 Am. Rep. 811. But see *Continental Nat. Bank v. McGeoch*, 73 Wis. 332, and *Kimball v. Mellon*, 80 Wis. 133.

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## TAYLOR v. MURPHY.

[148 PENNSYLVANIA STATE, 337.]

**MECHANICS' LIENS — TITLE OF OWNER AS AFFECTING CONTRACTOR. —** All persons furnishing labor or materials for the erection of a building are bound to take notice of the title of the apparent owner. If he is an intruder without right, the lien of the contractor or subcontractor must alike fall, and if he holds an equitable title only, the lien will bind only such title as he has, and no more.

**MECHANICS' LIENS — SUBCONTRACTOR, HOW AFFECTED BY CONTRACT OF CONTRACTOR. —** When a contractor for the construction of a building has stipulated with the owner that no mechanic's lien shall be filed against it, he can confer no right upon his subcontractor to file such lien.

**MECHANICS' LIEN — AGREEMENT NOT TO FILE. —** An agreement by a contractor to provide labor and materials for the erection of a building, and look for his security solely to the personal responsibility of the owner, leaving the building unencumbered by liens, is valid and binding.

**MECHANICS' LIENS — CONTRACT TO RELEASE AND DISCHARGE. —** An agreement by a house builder with the owner that the former will "release and discharge the said houses from the operation of all liens, either for materials furnished or work done in the construction of the same," is not a waiver of the right to file a lien, nor a covenant that none shall be filed, but a mere promise to release and discharge such liens as may be filed prior to a demand for the payment of the balance due on his contract.

**MECHANICS' LIENS — RIGHTS AND DUTIES OF SUBCONTRACTOR. —** A subcontractor engaged in the construction of a building must take notice of the

title of the apparent owner, and of the general character of his agreement with the principal contractor. He must also take notice of the general character of the building and of the materials and labor proper to be used in its construction. He must see that the materials he supplies are such as may be reasonably needed for and used about such a building, both as to quantity and quality. Subject to such qualifications and conditions he may bind the building for what his materials or labor may be reasonably worth, although the liens filed against the building may exceed the contract price agreed upon between the principal contractor and the owner.

**MECHANICS' LIENS — PRACTICE. — AN AFFIDAVIT OF DEFENSE** against a mechanic's lien stating that the material furnished was not such as the building contract required, and in consequence of the defective character of such materials, the house was worth a sum less than it otherwise would have been, and claiming a defense to that amount, but not stating wherein such material was defective, is insufficient, as being too general, and will not prevent the rendition of judgment for plaintiff for the amount claimed.

**SCIRE FACIAS on a mechanic's lien.** One Christy, a builder, contracted with the defendants Murphy and Williams, jointly, to erect a house for each. Christy defaulted, and persons who had been employed by him, or who had furnished materials or labor, filed their liens, exceeding in amount the contract price. Judgment for plaintiff, for want of a sufficient affidavit of defense, and the defendants appealed.

*E. S. Miller*, for the appellants.

*Joseph J. Broadhurst*, for the appellees.

**WILLIAMS, J.** The plaintiff furnished lumber and manufactured woodwork, for the erection of defendant's dwelling house, on the order or direction of Christy, the contractor. The mechanics' lien, on which the writ of *scire facias* in this case issued, was entered for the amount of material so furnished. The defendant interposed an affidavit of defense, in which several reasons were urged as sufficient to prevent the entry of a judgment and carry the case to a jury for trial. These may be stated as follows: —

1. That the house was erected under a written contract, in which Christy was bound to provide all material and labor, and complete the house, for the sum of \$3,750, to be paid when the building was finished; that he did not finish it, and, for that reason, nothing was due to him, or to a subcontractor under him.

2. That the aggregate amount of the liens entered against the building, together with the cost of completing it, would exceed the contract price, and that the liens, if sustained,

should abate proportionately, in order to bring the total cost down to the contract price.

3. That no liens could be entered, under the express stipulations of the contract with Christy, the builder.

4. That the material furnished was not such as the contract required, and, in consequence of its defective character, the house was worth \$125 less than it otherwise would have been, for which sum, at least, there was a good defense.

It is urged that the principle announced in *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, is broad enough to cover all the propositions contained in the affidavit, and makes a reversal of the judgment entered in the court below necessary. In *Weaver v. Sheeler*, 118 Pa. St. 634, we held, that all persons furnishing labor or materials for the erection of a building were bound to take notice of the title of the apparent owner. If he was an intruder without right the lien of contractor and subcontractor must alike fall. If he held an equitable title only, the lien would bind such title as he had, and no more. In *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, we went a step further, and held that, where the contractor had stipulated that no lien should be filed, he could not confer a right upon his subcontractor that he did not possess. The contract between the owner and the contractor is the source from which the right of the subcontractor is derived, under the provisions of the law, and it is self-evident that a stream cannot rise higher than its source. The agreement of the builder, to provide all the labor and materials for the erection of a building, and look for his security solely to the personal responsibility of the owner, leaving the building unencumbered by liens, is a valid and binding one. It violates no rule of public policy. A statute that should disregard its obligation, and authorize the entry of a lien for work or materials, in violation of its terms, would seem to be within the prohibition of the constitution, article 1, section 17, which declares that no law impairing the obligation of contracts shall be passed. It might also be within the limitation on the powers of the several states, found in article 1, section 10, of the constitution of the United States. We are thoroughly satisfied, therefore, with *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, and our only inquiry is, whether this case falls within the rule there laid down.

The third ground of defense, stated in the affidavit, puts



the case in the precise condition of *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, but, on turning to the clause in the contract relied on to raise the question, it will be seen that it is insufficient. It contains the express promise of the contractor, "to release and discharge the said houses from the operation of all liens, either for materials furnished, or work done in the construction of the same." This is not a waiver of the right to enter a lien, or a covenant that none shall be entered. It is merely a promise to "release and discharge" such liens as may be entered, prior to the day when payment in full shall be made to the contractor. He cannot demand the payment of the balance due upon his contract, until he has performed the undertaking to release and discharge the liens that may have been entered against the building. This does not fall within the rule invoked. Neither do the first and second grounds of defense.

It would be unreasonable to require one who was called on to furnish material for the foundation or walls of a house to anticipate the cost of all the materials to be furnished by others, and of all the labor to be done, in order to the full completion of the structure. He can know, and he must take notice, as we have seen, of the title of the apparent owner, and of the general character of the agreement under which the contractor is proceeding to build. He can know, and must take notice of, the general character of the building, and of the materials and labor proper to be used in its construction. He must see to it that the materials he supplies are such as may be reasonably needed for and used about such a building, both as to their quantity and quality; but here his responsibility ends. Subject to these qualifications and conditions he may bind the building for what his materials or labor may be reasonably worth.

This brings us to the last position taken by the defendant, viz., that he is entitled to set off the sum of \$125 upon the plaintiff's demand, for the reason that the materials were not such as the contract required. The only provision in the contract on which this averment can rest is that which follows: "The construction, workmanship, and materials furnished are to be similar to that used and performed in the construction of house No. 139 Lafayette Street, Germantown." The materials furnished by the plaintiff included doors, sash, shutters, and ornamental woodwork, as well as flooring, shingles, joists, and other rough lumber, amounting in the aggregate

to nearly nine hundred dollars. If the affidavit had alleged a deficiency in the quality of the doors, or any other portion of the materials furnished, as compared with similar materials used in No. 139 Lafayette Street, a different question would have been raised. As it is, the allegation of a deficiency in quality relates to the materials generally, and the extent of the deficiency is measured, not by a difference in the value of the articles furnished as compared with those contracted for, but by an alleged difference in the value of the house as a whole, on account of defectiveness in the material generally. The court below was right in treating this averment as altogether too general.

Judgment affirmed.

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**MECHANIC'S LIENS — TO WHAT INTEREST LIMITED.** — A mechanic's lien is ordinarily limited to the interest of the person for whom or at whose instance the materials were furnished or the labor performed: *Henderson v. Connelly*, 123 Ill. 98; 5 Am. St. Rep. 490 and note; *Paulsen v. Manske*, 126 Ill. 72; 9 Am. St. Rep. 532, and note; *Lyon v. McGuffey*, 4 Pa. St. 126; 45 Am. Dec. 675, and extended note; *Chisholm v. Williams*, 128 Ill. 115; see also extended note to *Loonie v. Hogan*, 61 Am. Dec. 688.

**MECHANIC'S LIENS — SUBCONTRACTOR HOW AFFECTED BY CONTRACT OF CONTRACTOR.** — A subcontractor is chargeable with notice of all the terms of the contract between the original contractor and the owner and is bound by them: *Bevin v. Thackara*, 143 Pa. St. 182; 24 Am. St. Rep. 529, and note with cases collected; note to *Benedict v. Hood*, 19 Am. St. Rep. 699; *Murphy v. Morton*, 139 Pa. St. 345; *Tebay v. Kirkpatrick*, 146 Pa. St. 120. The contrary doctrine is maintained in *Henry v. Evans*, 97 Mo. 47. But a subsequent agreement between the owner and the contractor cannot be set up to the subcontractor's disadvantage: *Shaw v. Stewart*, 43 Kan. 572. Where the contractor has received full payment in advance of the agreement with the subcontractor for materials, the subcontractor cannot have a lien against the owner or his property: *Mallory v. City of Marion Water Works Co.*, 77 Iowa, 715.

**MECHANIC'S LIENS. — VALIDITY OF AGREEMENT BY CONTRACTOR NOT TO FILE LIEN:** See note to *Benedict v. Hood*, 19 Am. St. Rep. 699.

**MECHANIC'S LIENS. — EFFECT OF AGREEMENT TO RELEASE:** See *Brown v. Williams*, 120 Pa. St. 24; 6 Am. St. Rep. 689, also extended note to *Groble v. Hale*, 41 Am. Dec. 221, where the subject of waiver of mechanic's liens is discussed.

## COMMONWEALTH v. ALLEN.

[148 PENNSYLVANIA STATE, 358.]

**HIGHWAYS — USE OF BY TRACTION ENGINE — NUISANCE.** — The running of a traction engine over a public highway upon a single occasion when necessary, as in moving it from one location to another, is not a nuisance.

**HIGHWAYS — NUISANCE IN.** — Any obstruction which unnecessarily incommodates or impedes the lawful use of a highway by the public, is an indictable nuisance.

**HIGHWAYS — RIGHT TO REASONABLE USE — NUISANCE.** — Any person may lawfully use a public highway in the transaction of his legitimate business, either for travel or for transportation, but he must use it in a reasonable manner and not interfere with its reasonable use by other citizens, and whether or not a particular use is an unreasonable use and a nuisance, is a question of fact to be submitted to the jury.

**HIGHWAYS — USE OF BY TRACTION ENGINE — NUISANCE.** — The daily and continued use on a public highway of a traction steam engine, which, by its noise and appearance, frightens horses and makes the highway dangerous to persons riding or driving, and by reason of the unusually heavy loads which it draws, injures the highway and endangers the safety of bridges, as well as impedes travel, is an indictable nuisance.

**HIGHWAYS AND BRIDGES — DUTIES OF TOWNSHIP.** — Highways and bridges are generally constructed for ordinary use in an ordinary manner and not for an unusual or extraordinary use, either by crossing at great speed, or by the passing of a very large and unusual weight, such as that drawn by a traction engine; and a township is not bound to do more than to so construct its bridges as to protect the public against injury by a reasonable, proper, and probable use thereof, in view of the surrounding circumstances, such as the extent, kind, and nature of the travel and business over them.

*Rodney A. Mercur*, for the appellant.

*John C. Ingham, D. A. Overton, and John W. Coddington*, district attorney, for the appellee.

PER CURIAM. The defendants were convicted in the court below of maintaining a nuisance. They now allege that the indictment does not charge an indictable offense. The first count thereof sets forth that the defendants "set up, established, maintained, kept up and continued, an obstruction in said public road and common highway aforesaid, leading from Rummerfield, in Standing Stone township, up the Rummerfield creek by Philip Grace's, towards Herrickville, by running back and forth several times a day, over said highway, an engine propelled by steam, commonly known as a traction engine, which, by its smoke, steam, noise, and appearance, frightens the horses driven over said road, or common highway, and endangers the safety and lives of people using said road in an ordinary manner, and obstructs and hinders travel

thereon, whereby the public road and common highway aforesaid was then and there obstructed and straitened so that the citizens of said commonwealth could not then and there go, return, pass, and repass, ride and labor, on foot and on horseback, with their horses, coaches, carts, carriages and wagons, in, upon, through, and along said public road and common highway, as they ought and were wont and accustomed to do, without great danger of their lives, and also their goods, to the great damage and common nuisance of all citizens of said commonwealth of Pennsylvania, going, returning, passing, and repassing, riding and laboring with horses, coaches, carts, carriages, wagons, on foot and on horseback, upon, through, and along said public road and common highway, contrary to the form of the act of general assembly, in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania."

Upon the trial below, it appears that the defendants had been operating a stone quarry for several years. This quarry is situated on a public road about three miles from Rummerfield station. It is a narrow road with four bridges between the stone quarry and the station. For several years the defendants hauled the stone from the quarry in the ordinary manner by horses. Sometime during the year 1891, Charles A. Allen, one of the defendants, procured a traction engine, and put it on the road for the purpose of drawing heavier loads of stone. Behind the engine they hitched two wagons, one behind the other, making a train from fifty to fifty-five feet long, and, when loaded, weighing from thirteen to fourteen tons. They made two trips a day from the quarry to the station. It took from an hour to an hour and a half to go over the road one way. There was evidence that the train would sometimes stop for half an hour to get up steam. The steam would blow off frequently and make a good deal of noise; that it hindered and obstructed travel over the road; that people took other roads several miles out of their way to avoid it; that women and children accustomed to drive to the station for different purposes were afraid to do so; that farmers who had contracted to deliver produce to Rummerfield refused to do so because of the obstruction, and cars partly loaded had to be unloaded on that account; that parties at the station and on the road had been hindered and delayed, sometimes for half an hour or more, waiting for this train to get out of the way; that persons who had met it in the road



had been obliged to unhitch their horses and go off behind schoolhouses, into the woods and lanes, and wait until it had gone by.

We are not prepared to say that the indictment does not set forth a public nuisance, and that the jury were not justified in finding in the evidence the existence of such nuisance. The running of a traction engine over a public highway upon a single occasion would not constitute a public nuisance. That may be necessary to remove it from one location to another, as in the case of a steam threshing machine, which is at certain seasons removed from one farm to another for the purpose of threshing out the farmer's crops. Indeed, the act of June 30, 1885, seems to recognize such necessity, and prescribes the conditions and manner in which machinery propelled by steam may be moved over a public road or highway. This, however, we regard as restrictive legislation. It was not intended to license the unrestricted use of steam upon the public highways of the commonwealth. While a man may have a right under this act of assembly to run a traction engine over a public road for a necessary purpose, by complying with the terms of the act, yet, if he uses that privilege in an unreasonable and in an unusual way, it may constitute a public nuisance. At common law, any obstruction which unnecessarily incommodes or impedes the lawful use of a highway by the public, is a nuisance: Angell on Highways, 255, sec. 223; 4 Bla. Com. 167; *Commonwealth v. Milliman*, 13 Serg. & R. 404. Any such obstruction of a public road as materially interferes with the public convenience is indictable as a nuisance: 2 Wharton's Criminal Law, 15. A man may lawfully use a public highway in the transaction of his legitimate business either for travel or for transportation; but it is common law and common sense that he must use it in a reasonable manner, and not interfere with its reasonable use by other citizens; and whether a particular use is an unreasonable use and a nuisance is a question of fact to be submitted to a jury: *Allegheny v. Zimmerman*, 95 Pa. St. 287; 40 Am. Rep. 649. While each citizen is protected in the enjoyment of his own rights, he must so exercise them as not to interfere with the rights of others. We can understand that it may be sometimes necessary to move a traction engine from one place to another in the reasonable pursuit of a lawful business. It is quite another matter to occupy a particular road continuously for such purpose, to the inconvenience of the public,

and peril to persons using such road. The jury have found such continuous user to be a nuisance, and we cannot say such finding was not justified by the evidence. In the American and English Encyclopædia of Law, volume 16, page 962, the learned editor mentions, among other indictable nuisances: "The use on a highway of a traction steam engine, which by its noise and appearance frightens horses, and makes the highway dangerous to persons riding or driving."

Aside from this, it was alleged on the part of the commonwealth that this traction engine, with the unusual load that it drew, injured the highway, and endangered the safety of the bridges. As a general rule, highways and bridges are constructed for ordinary use in an ordinary manner, and not for an unusual or extraordinary use, either by crossing at great speed, or by the passing of a very large and unusual weight. A township is not bound to do more than to so construct its bridges as to protect the public against injury by a reasonable, proper, and probable use thereof, in view of the surrounding circumstances, such as the extent, kind, and nature of the travel and business over them. There was evidence upon the trial below that the bridges on this road were built only for the usual and ordinary loads drawn over them, and that such loads were not more than one third or one fourth of the weight of the loads drawn by this traction engine.

An examination of the respective specifications fails to disclose error. The case was submitted to the jury under proper instructions as to the law.

Judgment affirmed.

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**HIGHWAYS, NUISANCE IN—TRACTION ENGINE.**—A steam engine as a means of locomotion on a public highway is not necessarily a nuisance: *Macomber v. Nichols*, 34 Mich. 212; 22 Am. Rep. 522, and especially note, discussing the use of highways by traction engines; also note to *Ayer v. Norwich*, 12 Am. Rep. 400.

**HIGHWAYS—OBSTRUCTION.**—**NUISANCE:** See notes to *Woodman v. Metropolitan R. R. Co.*, 14 Am. St. Rep. 429, and *State v. Berdett*, 38 Am. Rep. 127. An act done in a highway is a nuisance if it detracts from the safety of travelers: *Dyggert v. Schenck*, 23 Wend. 445; 35 Am. Dec. 575, and note; *State v. Mayor*, 5 Port. 279; 30 Am. Dec. 564. Objects within the limits of a highway, which in their nature are calculated to frighten horses of ordinary gentleness may be nuisances: *Ayer v. Norwich*, 39 Conn. 376; 12 Am. Rep. 396, and note; *Forshay v. Glen Haven*, 25 Wis. 288; 3 Am. Rep. 73. But persons are not liable for obstructing a highway where the obstruction is temporary and necessary to their reasonable use of it: *Davis v. Winslow*, 51 Me. 264; 81 Am. Dec. 573. See also *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893.

**HIGHWAYS — LIABILITY FOR DEFECTS IN.** — Township officers are only bound to anticipate and provide against the ordinary needs of travel conducted in the ordinary manner on ordinary country roads: *Township of Jackson v. Wagner*, 127 Pa. St. 184; 14 Am. St. Rep. 833, and note with cases collected, and in which this liability in regard to bridges is discussed.

**BRIDGES — LIABILITY FOR DEFECTS IN.** — A town is not bound to keep its bridges absolutely safe; and where a bridge breaks down under an extraordinary load, which reasonable care could not have anticipated, the town is not liable: *Wilson v. Town of Granby*, 47 Conn. 59; 36 Am. Rep. 51.

## BROWN v. PITCAIRN.

[148 PENNSYLVANIA STATE, 387.]

**SPECIFIC PERFORMANCE — CONTRACT OBTAINED BY DECEIT.** — One who asks specific performance of a contract in the procurement of which he has practiced deceit is always an unwelcome suitor in a court of equity and will generally be denied relief.

**SPECIFIC PERFORMANCE — WHEN REFUSED — DEGREE OF PROOF.** — A much less degree of proof is required to induce a court of equity to refuse specific performance of a contract for the sale of land than is required to reform it or to set it aside.

**SPECIFIC PERFORMANCE — GROUNDS FOR REFUSING.** — Omission or mistake in a contract for the sale of land, or that it is unconscientious or unreasonable; or that there has been concealment, misrepresentation, or unfairness, are some of the causes which will induce a court of equity to refuse specific performance.

**SPECIFIC PERFORMANCE — WHEN WILL BE REFUSED.** — Though a contract is valid at law, equity will not enforce it specifically unless the transaction is free from fraud or surprise.

**SPECIFIC PERFORMANCE — WHEN REFUSED — CONTRACT OBTAINED BY DECEIT.** — When a contract for the sale of land is obtained by deceitful representations made by and on behalf of the vendee that he intends to use the property for the erection of dwelling houses when in fact he intends to use it for a blacksmith shop, specific performance of the contract will be refused.

**SPECIFIC PERFORMANCE — PARTIES.** — A decree for specific performance which includes the wife of the defendant who is not a party to the proceeding is erroneous and will be reversed.

**BILL** to enforce specific performance of a contract for the sale of land. Decree in favor of plaintiff, and defendant appealed.

*Sheldon Potter and Leoni Melick*, for the appellant.

*Michael J. Ryan*, for the appellee.

**STERRETT, J.** In drawing the conclusions on which this decree is based, the learned master and court below appear to have attached little, if any, importance to principles of equity,

which ought to have controlling effect in cases like this, viz., He who comes into equity must do so with clean hands, or, as otherwise expressed, "He that hath committed iniquity shall not have equity": 1 Pomeroy's Equity Jurisprudence, 434-443; Bispham's Equity, 60-62. Specific performance is of grace, and not of right: *Pennock v. Freeman*, 1 Watts, 409; *Henderson v. Hays*, 2 Watts, 148; *Orne v. Kittanning Coal Co.*, 114 Pa. St. 172; *Datz v. Phillips*, 26 Week. Not. Cas. 512.

It necessarily follows, from these and other cardinal principles, that one who asks specific performance of a contract, in the procurement of which he has practiced deceit, is always an unwelcome suitor in a court of equity.

The circumstances leading up to the execution of the contract in question are so fully set forth in the master's report that brief reference to some of the more salient points will be sufficient.

After referring to the fact that Brown testified he sent Byers to the office of Glenn and Son, defendant's agents for sale of the property, to make inquiry in regard thereto; also, to what was suggested by Byers as to Brown's intention to improve the lot by erecting thereon four side-yard houses, etc., and the discrepancy between the testimony of Brown and that of Byers as to what occurred prior to execution of the contract, the learned master says: "Brown certainly wanted this place for that single purpose, and that was the purpose he had in view when he commenced negotiations looking to the ultimate purchase of this lot." That purpose, as stated by the master, in same connection, was as a location for a blacksmith shop.

Again, after referring to Brown's assertion that he never told Glenn and Son what he wanted the lot for, the master says: "But all the evidence given by plaintiff shows dwelling houses were discussed, and sketches made to show how such dwellings could be built on the lot, either to utilize all of it, or make it pay, or command a larger price," etc., and then concludes thus: "There certainly must have been a prearranged understanding between Brown and his friend Byers about the Baldwin story; they both made use of it at different times; they knew it was untrue, and they certainly had some object in view; that object was to deceive Glenn; and Brown, being a blacksmith, would, by his appearance, give color to the statement, and induce Glenn not to inquire further into his business."



This finding of fact, that falsehood and deceit were resorted to by the plaintiff and his go-between, for the purpose of misleading defendants' agents, and thus procuring the contract of sale, is fully warranted by the evidence.

A few days after the contract was signed, Glenn and Son addressed the following self-explanatory letter to Brown: "We have been told that you have an intention to use the lot . . . for a blacksmith shop. As you had stated to us that you would build on it four side-yard dwellings, and the sale was made to you with that understanding, you can see our principals would not be willing to convey the property to you for the purpose named, that is, to be used for a blacksmith shop or other objectionable purpose. We trust that our informant has been mistaken, and we will be glad to hear from you in relation to the matter."

Brown happened to call at Glenn's office before this letter was mailed, and it was read to him. When charged by the writer of the letter with having deceived him, Brown, instead of denying the accusation, said "he had bought the lot, and had a right to have it, and meant to try and get it anyhow, and that there was no need of bad feeling between them about it." Further reference to the evidence is unnecessary. It clearly establishes the fact that the contract was procured by deceitful misrepresentations, made by and on behalf of plaintiff, for the purpose of securing the property.

That fact, as we have seen, is substantially found by the master; but, in summing up his findings of fact, it appears to have been omitted, presumably, for the reason that it was not regarded as necessary to a proper disposition of the case. The substance of his third, fifth, and sixth findings is, that at the time the agreement was signed, no promises were made or agreement entered into between Brown and those who represented the defendant; that Brown did not then or at any time "make any promises to, or enter into any agreements with, Robert Glenn or any other person as to what he would erect on the property he proposed to buy."

These findings are not inconsistent with the fact that plaintiff and his friend Byers practiced falsehood and deceit in procuring the contract, as above stated. If the defense had been grounded solely on reformation of the contract by incorporating therein a building restriction alleged to have been omitted by accident or mistake, etc., the conclusion drawn by the learned master and court below would have been correct;

but it is one thing to furnish such proof as will move a chancellor to reform a contract for the sale of land, and quite another to prove such unfairness or deception in its procurement as will induce him to withhold his aid, and thus refuse specific performance of the tainted contract.

There is also a marked difference between that degree of unfairness which will induce a chancellor to set aside a contract and that which will induce him to withhold his aid in enforcing it: *Cathcart v. Robinson*, 5 Pet. 276. It is there said: "A defendant may resist a bill for specific performance by showing that, under the circumstances, the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation, or any unfairness, are enumerated among the causes which will induce the court to refuse its aid."

It is well settled that, though a contract is valid at law, equity will not enforce it specifically unless the transaction be free from fraud or surprise. As was said in *Orne v. Kittanning Coal Co.*, 114 Pa. St. 172: "The doors are shut against one who, in his prior conduct in the very subject-matter at issue, has violated good conscience, good faith, or fair dealing." All these were done by the plaintiff in the procurement of the contract which he asked the court below to enforce. He was unworthy of its aid, and his bill should have been dismissed. The decree is also erroneous, in that it includes defendant's wife, who does not appear to have been a party to the proceeding.

Decree reversed and bill dismissed, with costs to be paid by the plaintiff.

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**SPECIFIC PERFORMANCE, WHEN REFUSED.** — Specific performance will be refused unless the contract is free from all imputation of fraud or deceit. The contract of the party seeking specific performance must be free from all blame: *Kelly v. Central Pac. R. R. Co.*, 74 Cal. 557; 5 Am. St. Rep. 470, and note; *Datz v. Phillips*, 137 Pa. St. 203; 21 Am. St. Rep. 864, and note with cases collected; *Byars v. Stubbs*, 85 Ala. 256; *Dodd v. Home etc. Ins. Co.*, 22 Or. 1; *Cooper v. Chittenden*, 33 Neb. 313; *Grizzle v. Sutherland*, 88 Va. 584; *Hicks v. Turck*, 86 Mich. 214. See extended notes to *Kelley v. Caplice*, 33 Am. Rep. 182, and *Boyd v. Barclay*, 34 Am. Dec. 765.

**WHITMORE v. DWELLING HOUSE INSURANCE Co.**

[148 PENNSYLVANIA STATE, 405.]

**INSURANCE — NOTICE OF LOSS SENT BY MAIL — PRESUMPTION.** — When a prepaid letter, properly addressed, containing a statement of loss under a fire insurance policy, is deposited in the post office, it is presumed that it reached its destination by due course of mail, but this presumption may be rebutted by evidence showing that it was not received. The question is one of fact for determination by the jury.

**INSURANCE — PROOF OF LOSS, SUFFICIENCY OF.** — When a statement of loss under a policy of fire insurance is furnished the insurer within the time stipulated in the policy, and there is nothing to show that it was not in good faith, intended as a compliance therewith, it is the duty of the insurer, if he means to rely upon a failure by the insured to comply with the terms of the policy in respect to notice of loss, to give prompt notice of his objection to the statement received, specifying the defects therein, so that the insured may have an opportunity to correct them. A failure to return such statement, or to notify the insured of defects therein, is sufficient evidence of a waiver of strict compliance with the terms of the policy.

**INSURANCE — OWNERSHIP OF PROPERTY.** — When payment of a loss, under a policy of fire insurance, is resisted on the ground that the insured was not the sole and unconditional owner of the land on which the house stood, as provided in the policy, and the evidence as to whether he was or was not such owner is conflicting, the question must be determined by the jury, and a finding that he was such owner will not be disturbed on appeal.

**ASSUMPSIT** to recover upon a policy of fire insurance, for the total loss of a dwelling house described therein. Judgment for the plaintiff, and defendant appealed.

*W. W. Watson, C. S. Patterson, and W. S. Diehl, for the appellant.*

*John F. Scragg, Everett Warren, and Edward N. Willard, for the appellee.*

**STERRETT, J.** There is no question as to the validity of the policy in suit, nor that the property insured was totally destroyed by fire on April 15, 1888, during the life of the policy. It was clearly shown, by undisputed evidence, that the value of the house and personal property destroyed considerably exceeded the amount for which they were respectively insured. The right of plaintiff to recover was resisted on two grounds: —

1. That he failed to comply with the provision of the policy requiring him, within thirty days after the fire, to furnish the company with the statement of proof of loss therein specified.

2. That the house in question was "on ground not owned by

the insured in fee simple," and his interest therein was "other than unconditional and sole ownership."

Considerable testimony, bearing more or less directly on each of these propositions, was introduced and submitted to the jury, under instructions, which constitute the subjects of complaint in several of the specifications of error.

It was clearly shown that, within a day or two after the fire, notice of the total destruction of the house and contents was given to the company. Testimony on behalf of plaintiff tended to prove that, within ten days thereafter, he prepared an itemized statement of his loss, inclosed it in an envelope, properly stamped, and addressed to the "Dwelling House Insurance Company, Boston, Massachusetts," and placed it in the post office, at Carbondale, Pennsylvania; that, before mailing the package, he showed it to the company's local agent at Carbondale, informed him that it was a statement of his loss, which he was about forwarding by mail to the company, etc., and, in reply to the inquiry whether that was right the agent assented. These matters were all testified to in detail by the plaintiff himself, and he was corroborated therein by a disinterested witness.

The testimony also tended to prove that, after waiting in vain, several weeks for a reply from the company, plaintiff caused to be prepared and mailed to its home address, as before, a second itemized statement of loss. Pursuant to notice to produce both statements, etc., at the trial, the company brought into court the last mentioned paper, and denied receiving the other. In connection with the evidence tending to prove the preparation and mailing of the first statement, plaintiff offered in evidence the second statement or proof of loss, but being objected to by the company, as incompetent and irrelevant, because not furnished within thirty days after the fire, it was, for that reason, excluded.

For the purpose of rebutting the inference that might be drawn from mailing the first statement within the thirty days, the company undertook to prove, by Mr. Melchert, one of its employees, that he had charge of its mail matter, and that the statement was never received by him.

The testimony of both parties relating to the mailing of the first statement, etc., was fairly submitted to the jury, and they must have found as a fact that it was properly deposited in the post office, as alleged by plaintiff, and duly received by the company. There appears to be no error in admitting the tes-



timony bearing on that question, or in the instructions which accompanied its submission to the jury. It is well settled that the fact of depositing, in the post office, a properly addressed, prepaid letter, raises a natural presumption, founded in common experience, that it reached its destination by due course of mail. In other words it is *prima facie* evidence that it was received by the person to whom it was addressed; but that *prima facie* proof may be rebutted by evidence showing that it was not received. The question is necessarily one of fact, solely for the determination of the jury, under all the evidence: *Folsom v. Cook*, 115 Pa. St. 529; *Susquehanna etc. Ins. Co. v. Tunkhannock Toy Co.*, 97 Pa. St. 424; 39 Am. Rep. 816; *Huntley v. Whittier*, 105 Mass. 391; 7 Am. Rep. 536, and cases there cited; *Briggs v. Hervey*, 130 Mass. 186.

For the purpose of this case, therefore, it must now be accepted as true, that the first statement was received by the company within the required time.

It is, however, contended that the itemized statement in question was not shown to have been in accordance with the requirements of the policy, and hence it amounted to nothing, whether received or not. We cannot assent to that proposition. Assuming, as in view of the verdict we must, that the statement was duly received, the company could not in good faith treat it as a mere nullity. If it was found to be informal or defective, as proofs of loss, and the company was unwilling to accept it as such, it was its duty to return the paper, with specification of defects, so that plaintiff might have an opportunity of correcting them. When such statement of loss is furnished within the stipulated time, and there is nothing to show that it was not in good faith intended as a compliance with terms of policy, it is the duty of the underwriter, if it means to rely upon failure to comply, to give prompt notice of its objection, pointing out defects, etc. Such provisions in policies of insurance are intended for the information and protection of the underwriter, and cannot, with impunity, be used to ensnare the unwary and confiding. In such circumstances, the failure of the company to return statement of loss, or to notify the insured of defects therein, is some evidence for the jury of a waiver of strict compliance: *Gould v. Dwelling House Ins. Co.*, 134 Pa. St. 570; 19 Am. St. Rep. 717, and cases there cited. In that case, our brother Mitchell, after reviewing the authorities, said: "The result of the decisions may therefore be formulated in the following rule: If the insured, in good

faith and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy, good faith equally requires that the company shall promptly notify him of their objections, so as to give him an opportunity to obviate them; and mere silence may so mislead him, to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel."

Every reputable and trustworthy insurance company recognizes the propriety of this rule, and acts upon it.

The evidence in this case indicates that, in doing what he did, the insured intended in good faith to comply with the requirements of his policy. Self-interest could not have prompted him to do anything else. The defendant company, on the other hand, was so identified with the case above cited as to be somewhat familiar with the rule therein stated.

The further objection that plaintiff was not the sole and unconditional owner of the land on which his house stood, etc., involved questions of fact, which were also determined in his favor. There was some evidence tending to show that, by an amicable agreement with his coheirs, plaintiff became sole owner of that portion of the land on which he afterwards erected the house in question. The testimony was conflicting, but we are not prepared to say that it was not proper for the consideration of the jury. It was fairly submitted to them, and they must have found that there was a family arrangement or agreement whereby plaintiff became entitled in severalty to the land on which his house stood.

There appears to be nothing in either of the fifteen specifications of error that requires a reversal of the judgment.

Judgment affirmed.

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**INSURANCE — PROOFS OF LOSS — WAIVER.** — If the insured in good faith, and within the stipulated time, does what he plainly intends as a compliance with his policy, as to proofs of loss, a failure by the company to promptly notify him of any objections thereto, so as to give him an opportunity to obviate them, and mere silence may so mislead him, to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel: *Welsh v. London Ass. Corp.*, 151 Pa. St. 607; 31 Am. St. Rep. 786, and especially note, where the cases are collected.

**EVIDENCE — PRESUMPTION THAT LETTER MAILED REACHED ITS DESTINATION.** — When a letter is sent through the mails properly addressed and with the postage prepaid, it is to be presumed that it duly reached its destination: *De Jarnette v. McDaniel*, 93 Ala. 215; *German Nat. Bank v. Burns*, 12 Col. 539; 13 Am. St. Rep. 247, and note; *Huntley v. Whittier*, 105 Mass. 391; 7

**Am. Rep. 536; Commonwealth v. Jeffries, 7 Allen, 548; 83 Am. Dec. 712; Russell v. Buckley, 4 R. I. 525; 70 Am. Dec. 167, and note; Hartford Bank v. Hart, 3 Day, 491; 3 Am. Dec. 274.** The contrary doctrine is maintained in the following cases: *First Nat. Bank v. McManigle*, 69 Pa. St. 156; 8 Am. Rep. 236; *Sullivan v. Kuykendall*, 82 Ky. 483; 56 Am. Rep. 901; *Freeman v. Morey*, 45 Me. 50; 71 Am. Dec. 527.

**EVIDENCE OF RECEIPT OF NOTICE OF LOSS FROM DULY MAILING.** — Evidence that notice and proof of loss were mailed, properly addressed, to the insurer raises the presumption that they were duly received by him: *Penny-packer v. Capital Ins. Co.*, 80 Iowa, 56; 20 Am. St. Rep. 395; *Susquehanna etc. Ins. Co. v. Tunkhannock Toy Co.*, 97 Pa. St. 424; 39 Am. Rep. 816, and note.

## SAYRE BOROUGH v. PHILLIPS.

[148 PENNSYLVANIA STATE, 482.]

**MUNICIPAL CORPORATIONS — ORDINANCES — POLICE POWER.** — By the organization of a city or borough within its borders, the state imparts to such municipality the powers necessary to the performance of its functions, and to the protection of its citizens in their persons and property, and the police power is one of these. Ordinances passed by cities and boroughs in the legitimate exercise of this power are therefore valid.

**MUNICIPAL CORPORATIONS — POWER TO LICENSE PEDDLING.** — An ordinance prohibiting the business of peddling within the municipal limits without a license from the proper municipal officer is a valid exercise of the police power, but such regulation must be directed against the whole business, and not against one or some of the persons engaged in it. If an ordinance is in reality directed only against certain persons who are engaged in a given business or certain commodities, in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such ordinance is not a police, but a trade regulation, and void.

**INTERSTATE COMMERCE — TRADE REGULATION — DISCRIMINATION BETWEEN CITIZENS OF DIFFERENT STATES.** — A statute or ordinance permitting all persons to peddle goods manufactured or produced within the state, but prohibiting the same persons from peddling goods of the same character if manufactured or produced in other states, is a trade regulation discriminating between the productions of different states, and void as an attempt to regulate interstate commerce.

**INTERSTATE COMMERCE — PEDDLER'S LICENSE — DISCRIMINATION.** — A statute or ordinance authorizing the grant of a peddler's license to any citizen of the state, but prohibiting a grant of such license to any person resident in another state, is a trade regulation discriminating between citizens of different states, and void as an attempt to regulate interstate commerce.

**MUNICIPAL CORPORATIONS — EXTENT OF POLICE POWER.** — When the state creates a city or borough, it cannot confer upon the municipality powers that the state does not possess, nor can the municipality have any better right to adopt discriminating trade regulations than the state has.

**MUNICIPAL CORPORATIONS — PEDDLER'S LICENSE — DISCRIMINATING ORDINANCE.** — A city ordinance prohibiting all persons not residents of the

municipality from engaging in the business of peddling or selling goods from house to house, by sample or otherwise, without a city license, is void, for the reason that it is a trade regulation discriminating against nonresidents.

**MUNICIPAL CORPORATION — PROHIBITORY LICENSE — DISCRIMINATION.** — An ordinance prohibiting all persons from engaging in the business of peddling without a city license, and fixing the price of such license at a figure so high as to make the ordinance amount to a prohibition and destruction of such business, is valid so long as it operates upon all persons impartially; but if it exempts all residents of the city from its operation, it is void, because it then becomes a trade regulation discriminating against nonresidents.

**MUNICIPAL CORPORATIONS — POLICE POWER — TRADE REGULATION — DISCRIMINATION.** — A city cannot by ordinance and under pretense of police control regulate trade in the interest of resident dealers, by making the same business lawful to all who live within the city limits, and unlawful as to all who reside outside thereof.

*H. F. Maynard, J. B. Niles, Deloss Rockwell, and J. C. Horton*, for the appellant.

*Rodney A. Mercur, D'A. Overton, and John C. Ingham*, for the appellee.

**WILLIAMS, J.** The business of peddling has been treated as a proper subject for police regulation and control in this state since 1784. The legislature has forbidden it to all unlicensed persons, and has prescribed the conditions on which licenses may be obtained from the courts. The necessity for such legislation is a question for the lawmakers. The validity of any particular statute, relating to the subject, is a question for the courts. The act of 1784, and the supplementary acts relating to the business of peddling, have been held to be valid, as an exercise of the police power, in many cases, among the more recent of which are *Warren Borough v. Geer*, 117 Pa. St. 207; *Borough of Sharon v. Hawthorne*, 123 Pa. St. 106; *Commonwealth v. Gardner*, 133 Pa. St. 284; 19 Am. St. Rep. 645; *Titusville v. Brennan*, 143 Pa. St. 642; 24 Am. St. Rep. 580. By the organization of a city or borough within its borders, the state imparts to its creature, the municipality, the powers necessary to the performance of its functions, and to the protection of its citizens in their persons and property. The police power is one of these. Ordinances of cities and boroughs, passed in the legitimate exercise of this power, are therefore valid. An ordinance prohibiting the business of peddling within the municipal limits, without a license from the proper municipal officer, would seem to be as clearly justified by the police power as a statute prohibiting the same business



throughout the commonwealth. But it is very clear that a police regulation must be directed against the business or practice that is harmful, not against one or some of the persons who may be engaged in it. The laws of the state are so framed. They are directed against the business of peddling. The ordinances of cities and boroughs must, in order to be supported as an exercise of the police power residing in the municipality, be directed in like manner at the business. If a statute, or a municipal ordinance, is in reality directed only against certain persons who are engaged in a given business, or against certain commodities, in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such statute or ordinance is not a police, but a trade regulation; and it has no right to shelter itself behind the police power of the state or the municipality.

A law that should prohibit all persons peddling goods manufactured or produced in other states, and permit the same persons to peddle goods of the same character manufactured or produced in this state, would be a trade regulation discriminating between the productions of this and sister states, and would be incapable of enforcement, because in violation of the constitution of the United States. So a law that should forbid the court to grant a peddler's license to any person resident in any other state, but should authorize the granting of licenses to citizens of this state, would be bad for the same reason. When the state creates a city or borough it cannot confer upon the municipality powers that the state does not possess. It cannot give its creature immunity from the settled limitations that bind its own action. The municipality remains a part of the state after its creation, as truly as the town or village was a part of the state before it acquired a corporate character. Only in matters of local government is its situation changed. It can have no better right to adopt discriminating trade regulations than the state has.

We come now to consider the ordinance on which this case depends. It professes to prohibit all persons from engaging in the business of peddling or selling goods from house to house, by sample or otherwise, without a borough license, and it fixes the price of a license at a figure that makes, as it was evidently intended to make, the ordinance amount to prohibition. So long, however, as it bears upon all persons impartially, it may fairly claim to be a police regulation intended to

destroy a business that was regarded as injurious; but at the end of the prohibiting section of the ordinance a proviso may be found which exempts all residents of the borough of Sayre from its operation. The proviso converts the police regulation into a trade regulation. The ordinance, taken as a whole, does not prohibit an injurious business, but injurious competition. That the resident dealer and peddler may enjoy a larger trade, the nonresident peddler is shut out. If the borough authorities may lawfully regulate the business of peddling for the benefit of residents, we see no reason why they may not lay their hands in like manner on every department of trade and of professional labor, and protect the village lawyer and doctor as well as the village grocer and peddler.

We are reminded by the appellant that this ordinance is like that which came into notice in *Warren Borough v. Geer*, 117 Pa. St. 207; and it is urged that the question now under consideration ought, therefore, to be regarded as ruled by that case. That case was well decided on the only issue presented by it.

The plaintiff set out in the declaration the ordinance of the borough, and charged that the defendant had violated it by canvassing from house to house within the borough. The defendant demurred, thus admitting the acts charged and denying the power of the borough to require one engaged in canvassing to take a license. The court below held that the defendant was entitled as of common right to pursue his business, and that the borough was without the power to forbid it. The question came to this court in the form that it had been disposed of in the court below, as a question of power in the borough to require a license from peddlers and canvassers, and we held that the power existed under the act of incorporation, and under the general borough law of 1851. Our brother Green, who delivered the opinion of this court, stated the point in controversy thus: "The only question, therefore, is, whether the borough of Warren possesses, by either express grant or necessary implication, the right to enact the ordinance," forbidding the exercise of defendant's employment without a license. We adhere to the doctrine of that case. The present question is whether, under the pretense of police control, trade may be regulated in the interest of resident dealers by making the same business a lawful one to all who live on one side of a municipal line, and an unlawful one to all who live on the other side. We are very clear in our convictions that this cannot be done, and for this reason the judgment is affirmed.

**MUNICIPAL CORPORATIONS — POLICE POWER. — ORDINANCES:** See note to *Magneau v. City of Fremont*, 27 Am. St. Rep. 445, on the power of municipal corporations to pass ordinances, also note to *Neogass v. New Orleans*, 21 Am. St. Rep. 373. Pursuant to the authority delegated to it, a municipal corporation may pass ordinances, and such ordinances have the same force within the corporate limits as a statute passed by the legislature: *Village of Carthage v. Frederick*, 122 N. Y. 268; 19 Am. St. Rep. 490, and note; note to *Huesing v. Rock Island*, 15 Am. St. Rep. 137. See also extended note to *Robinson v. Mayor*, 31 Am. Dec. 632. Police power may be delegated to municipal corporations under the general power of the legislature to establish such corporations: *St. Paul v. Collier*, 12 Minn. 41; 90 Am. Dec. 278, and especially note.

**MUNICIPAL CORPORATIONS. — POWER TO LICENSE PEDDLERS:** See *Titusville v. Brennan*, 143 Pa. St. 642; 24 Am. St. Rep. 580; *State v. Emert*, 103 Mo. 241; 23 Am. St. Rep. 874.

**MUNICIPAL CORPORATIONS — ORDINANCES VOID AS ATTEMPTED REGULATION OF INTERSTATE COMMERCE. —** A city ordinance requiring an agent for a wholesale house in another state to pay a license fee when soliciting for orders within the city is void as an attempt to regulate commerce between the states: *Bloomington v. Bourland*, 137 Ill. 534; 31 Am. St. Rep. 382, and note; note to *State v. French*, 26 Am. St. Rep. 595; extended note to *People v. Wemple*, 27 Am. St. Rep. 561.

**MUNICIPAL CORPORATIONS — ORDINANCES DISCRIMINATING AGAINST NON-RESIDENTS. —** An ordinance imposing a tax upon agents of insurance companies not located within the city which is not imposed on agents of companies located therein is void as an unjust discrimination against non-residents: *Simrall v. Covington*, 90 Ky. 444; 29 Am. St. Rep. 398, and note with the cases collected.

## KECK v. BIEBER.

[148 PENNSYLVANIA STATE, 645.]

**PENALTIES OR LIQUIDATED DAMAGES. —** When a lump sum is named by the parties to a contract as compensation for loss suffered, the presumption is that the sum named is intended as a penalty and not as liquidated damages, no matter what it is called in the contract, the controlling elements being the intent of the parties and the circumstances of the case, and if the contract contains several matters of different degrees of importance and yet the sum named is payable for the breach of any of them, even the least, it is a penalty.

**DAMAGES UNDER INDEMNITY BOND. —** When an assignee of a mining lease has given an indemnity bond in a certain amount in which he covenants to indemnify the assignor against the claims of a third party and against damages by the operation of washing, the recovery will not be limited to the amount named in the bond.

**DAMAGES UNDER INDEMNITY BOND. —** When an assignee of a mining lease has given an indemnity bond in a certain amount in which he covenants to fill up holes made in prospecting for ore, and to keep gates in repair and closed, a recovery for a breach of the covenant cannot be had for the whole amount named in the bond, but will be limited to the damages actually sustained.

**DAMAGES—INDEMNITY ON FORFEITED LEASE.**—When an assignee of a mining lease has allowed it to become forfeited, and thus disabled himself from performing covenants contained in a bond given to his assignor, the latter may sue, from time to time, for royalties due and for other damages arising from breach of the covenants or he may treat the contract as rescinded and claim damages in one action for the entire breach.

**ASSUMPSIT** on a bond of indemnity for two thousand dollars. It appeared from the bond that one Kemmerer had granted a lease to Keck to mine for ore on certain land. Keck had granted to one Neiser certain mining rights under his lease. These rights he terminated upon executing an assignment of the lease under seal to the defendant, Bieber, who allowed the lease to be forfeited. The conditions of the bond are stated in the opinion. Judgment for plaintiff for the sum named in the bond and defendant appealed.

*Edward Harvey and James S. Biery, for the appellant.*

*C. J. Erdman and R. E. Wright's Sons, for the appellee.*

MITCHELL, J. The general principle upon which the law awards damages is compensation for the loss suffered. The amount may be fixed by the parties in advance; but where a lump sum is named by them, the court will always look into the question whether this is really liquidated damages or only a penalty, the presumption being that it is the latter. The name by which it is called is but of slight weight, the controlling elements being the intent of the parties, and the special circumstances of the case. The subject has always presented difficulties in the formulation of a general rule, and especially in its application. The books are full of in-harmonious decisions. In no state, however, have the difficulties been more successfully minimized than in Pennsylvania, and in no case that I have seen is there a better generalization than that by Agnew, J., in *Streeper v. Williams*, 48 Pa. St. 450: "In each case we must look at the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case." The only criticism to which this would seem to be fairly open is, that it does not perhaps give sufficient prominence to the intention of the parties as the controlling element, and it should therefore be read in connection with the restatement



of it by our late brother Clark in *March v. Allabough*, 103 Pa. St. 335: "The question . . . is to be determined by the intention of the parties, drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings; and in this examination we must consider the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or necessarily inherent in the transaction."

The intent of the parties being, therefore, the principal object of ascertainment, Greenleaf lays down certain rules as the result of the cases, and, among them, that the sum is to be taken as a penalty, "where the agreement contains several matters of different degrees of importance, and yet the sum named is payable for the breach of any, even the least": 2 Greenleaf on Evidence, sec. 258. This rule is approved in *Shreve v. Brereton*, 51 Pa. St. 175, and the present case falls exactly within it. The conditions of the appellant's bond are two: 1. He is to "save, defend, keep harmless, and indemnify the said Emelina C. Keck" from liability by reason of the assignment to him over the head of Neiser, and the termination of the latter's mining rights. This is clearly a covenant for indemnity only, and, as no breach was assigned, need not be further discussed; but 2. He is to pay the royalty accruing in the future, and "keep and perform all the covenants, conditions, and stipulations of the said lease and assignment." Turning now to the lease, we find that plaintiff's covenants with Kemmerer, which appellant thus bound himself to keep and perform, were to save harmless, and indemnify him against all costs and damages to his neighbors from the washing of the ore, to run the water in such places as the lessor should order, to pay a stipulated royalty, to fill up holes made and left in the search for ore, to produce or pay royalty upon a minimum of one thousand tons a year, "to use the old wagon road for hauling said iron ore, and, in case there are gates or bars on said road, . . . to keep said gates and bars in repair, . . . and keep them shut when through," etc. The assignment adds to these a covenant to pay plaintiff, the assignor, an additional royalty upon a sliding scale of the price of ore per ton. No better illustration of the propriety of the rule referred to could be stated. Here are numerous covenants of the most varied kinds and importance. The

covenants to indemnify against claims by Neiser and against damages to the neighbors by the operation of washing are undertakings which may be of serious magnitude; and under *Dick v. Gaskill*, 2 Whart. 184, *Shreve v. Brereton*, 51 Pa. St. 175, *Moore v. Colt*, 127 Pa. St. 289, 14 Am. St. Rep. 845, and similar cases, the recovery for a breach would probably not be limited by the sum named in the bond. On the other hand, the covenants to fill up the holes made in prospecting for ore and to keep the gates on the old wagon road in repair and shut are against such trivial inconveniences that it would savor of absurdity to suppose that the parties meant to stipulate for two thousand dollars damages for the breach of any one of them.

We are therefore of opinion that defendant's fourth point, that the contract of the parties was for a penalty, should have been affirmed. It will not follow, however, as appellee seems to fear, that her recovery must be limited to the loss of the royalty due her at the time of bringing suit, and that she must bring repeated suits for future failures to pay. The defendant has by his acts disabled himself absolutely and permanently from performance of his covenants. Under such circumstances, the plaintiff may sue on the contract from time to time for the royalties due, and for such other damages as she may suffer; or she may, at her election, treat the contract as rescinded, and claim damages in one action for the entire breach.

Judgment reversed, and *venire de novo* awarded.

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**PENALTIES AND LIQUIDATED DAMAGES — DISTINCTION BETWEEN:** See *Carey v. Mackry*, 82 Me. 516; 17 Am. St. Rep. 500; *Moore v. Colt*, 127 Pa. St. 289; 14 Am. St. Rep. 845, and note; extended note to *Graham v. Bickham*, 1 Am. Dec. 331; also note to *Tode v. Gross*, 24 Am. St. Rep. 480; *Bagley v. Peddie*, 16 N. Y. 469; 69 Am. Dec. 713, and note.

**ACTIONS ON INDEMNITY BONDS — DAMAGES RECOVERABLE.** — The measure of damages on an attachment bond is the natural and proximate damages resulting from the attachment: *State v. Thomas*, 19 Mo. 613; 61 Am. Dec. 580; to the same effect see *Valentine v. Wheeler*, 122 Mass. 566; 23 Am. Rep. 404. On a penal bond an action for the sum actually due may be maintained without reference to the penalty: *Holley v. Holley*, Litt. Sel. Cas. 505; 12 Am. Dec. 342. *Contra*, see *Cherry v. Mann*, Cooke, 268; 5 Am. Dec. 696; *Warden v. Nielson*, 1 Murph. 275; 3 Am. Dec. 691, and note; but in such cases interest beyond the penalty may be recovered: *Smedes v. Hooghtaling*, 3 Caines, 48; 2 Am. Dec. 250. This question is discussed at length in a note to *Graham v. Bickham*, 1 Am. Dec. at page 338.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**RHODE ISLAND.**

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**HERRESHOFF v. BOUTINEAU.**

[17 RHODE ISLAND, 8.]

**TRADE, RESTRAINT OF.** — An agreement in restraint of trade is not absolutely void on the ground of public policy because it extends throughout the state.

**TRADE, RESTRAINT OF.** — An agreement by a teacher with his employer that he will not for a year, after the end of his service, teach the German or French language or any part thereof, nor be in any way connected with any persons or institutions that teach them in the state of Rhode Island, is void because it is unreasonable and extends beyond anything apparently necessary for the protection of such employer.

*Amasa M. Eaton*, for the complainant.

*Albert A. Baker*, for the respondent.

**STINESS, J.** The complainant, director of a school of languages in Providence, employed the respondent to teach French, from January 7, 1889, to July 1, 1889. The contract in writing provided that the respondent would not, during the year after the end of his service, "teach the French or German language or any part thereof, nor aid to teach them, nor advertise to teach them, nor be in any way connected with any person or persons, or institutions that teach them in the said state of Rhode Island." The respondent's service ended July 1, 1889; after which time he gave lessons in French in Providence. This suit is brought to restrain him from so doing within the time covered by this contract. The respondent demurs to the bill, contending first, that the contract is void on the ground of public policy, because it imposes a general restraint throughout the state; and secondly, because it is unreasonable.

Is the contract void? For a long time, beginning with the Year Books, contracts limiting the exercise of one's ordinary trade or calling met with much disfavor in the courts. Any limitation whatever was considered, in the first reported case, Year Book 2, Hen. V. Pasche, fol. 5, case 26, so far contrary to law that a plaintiff suing thereon was sworn at by the judge, and threatened with a fine. But it was soon found that to some extent at least, such contracts help rather than harm both public interests and private welfare; that they are necessary to trade itself, in order to secure the sale, at fair value, of an established business, by protecting it against the immediate competition of the seller; also to enable one to learn a trade or get employment from another, free from the risk of having the knowledge and influence thus gained used to the employer's damage; to encourage investment in business enterprises under reasonable safeguards; and for other equally evident reasons. Accordingly, exceptions to the early doctrine were recognized from time to time, until the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181, when the court established the rule that a contract in restraint of trade, upon consideration which shows it was reasonable for the parties to enter into it, is good; "that wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained, but with this constant diversity, viz., where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive." It is to be observed that the contract in this case was limited in time to five years, the term of the lease of a bakehouse which the plaintiff had bought of the defendant; and also limited in space to the parish of St. Andrew's, Holborn. The case therefore did not call for decision upon a contract running throughout the kingdom. Nevertheless, it has since been commonly assumed as the settled rule of law that such a restraint is contrary to public policy and void. The principle upon which this rule is put is, that the public have the right to demand that every person should carry on his trade freely, both for the prevention of monopoly, and of unprofitable idleness. The argument is, if the restraint is general throughout the realm, the public interest is interfered with, since the party restrained can only



resort to his trade for a livelihood by expatriation. But if the restraint be local and partial, the party and the public may still have the benefit of his services in his own land, in some other place. While this distinction has frequently been recognized, the cases in which it has had the sanction of a decision have been few. In *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, Fry, J., mentions only two, and these, he says, seem to have been decided upon the ground of unreasonableness, rather than upon the ground of universality. In other words, the universality was held to be unreasonable. This case, following *Whittaker v. Howe*, 3 Beav. 383; *Jones v. Lees*, 1 Hurl. & N. 189; and *Leather Cloth Co. v. Lersont*, L. R. 9 Eq. 345; expressly holds there is no absolute rule that a covenant in restraint of trade is void if it is unlimited in regard to space. The respondent urges that *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, has been overruled by the recent case of *Davies v. Davies*, L. R. 36 Ch. Div. 359; but we do not think this is so. While Cotton, L. J., showing great willingness, if not anxiety to overrule it, based his opinion upon the ground that the restriction was void because unlimited in space, Bowen, L. J., did not put his decision on that ground, and Fry, L. J., adhered to his opinion in *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351. That *Davies v. Davies*, L. R. 36 Ch. Div. 359, was not received in England as overruling the last-named case, see note to the case in *Law Quarterly Review*, vol. 4 p. 240. In view of these cases we do not think it is now the rule in England that restraint throughout the kingdom is absolutely void. In this country the cases have been quite similar to those in England. In the recent case of *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, Andrews, J., says: "It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial. The same is generally true of the American cases." In that case the defendant covenanted, for the period of ninety-nine years, not to engage in the manufacture or sale of friction matches within any of the states or territories of the United States, except Nevada and Montana. The complainant sought to restrain a breach of that covenant in New York, the respondent claiming that the covenant, being general as to New York, was void. But the court declared it to be valid, in a strong and thorough opinion, showing the history of litigation, and

the tendency of recent judicial decision upon this subject. Taking this case in connection with *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, we think it cannot be said here, any more than in England, that a restraint is absolutely void, upon grounds of public policy, because it extends throughout a state. Public policy is a variable test. In the days of the early English cases one who could not work at his trade could hardly work at all. The avenues to occupation were not as open nor as numerous as now, and one rarely got out of the path he started in. Contracting not to follow one's trade was about the same as contracting to be idle, or to go abroad for employment. But this is not so now. It is an everyday occurrence to see men busy and prosperous in other pursuits than those to which they were trained in youth, as well as to see them change places and occupations without depriving themselves of the means of livelihood, or the state of the benefit of their industry. It would therefore be absurd, in the light of this common experience, now to say that a man shuts himself up to idleness or to expatriation, and thus injures the public, when he agrees, for a sufficient consideration, not to follow some one calling within the limits of a particular state. There is no expatriation in moving from one state to another; and from such removals a state would be likely to gain as many as it would lose. We do not think public policy demands an agreement of the kind in question to be declared void, and we do not think such a rule is established upon authority. We therefore hold that the agreement set out in the bill is not void simply because it runs throughout the state.

Is the contract unreasonable? Courts should be slow to set aside as unreasonable a restriction which has formed a part of the consideration of a contract. Yet when it is a restriction upon individual and common rights, which only oppresses one party without benefiting the other, all courts agree that it should not be enforced. In determining the reasonableness of a contract, regard must be had to the nature and circumstances of the transaction. For example, if one has sold the good will of a mercantile enterprise, receiving pay for it upon an agreement not to engage in the same business in the same state for a certain time, such a stipulation would stand upon quite a different footing from the similar stipulation of a mere servant in an ordinary local business. In many undertakings, with modern methods of advertising and facilities for ordering by telegraph or mail and sending

goods by railroad or express, it would matter little whether one was located at Providence or Boston or some other place. In such cases a restriction embracing the state or even a larger territory could not be said on that account to be unreasonable, for without it the seller might immediately destroy the value of what he sold and was paid for. But it is unreasonable to ask courts to enforce a greater restriction than is needed. So it has been uniformly held that restrictions which go too far are void. As was said in the note of the *Law Quarterly Review* above cited: "Covenantees desiring the maximum of protection have no doubt a difficult task. When they fail it is commonly because, like the dog in the fable, they grasp at too much, and so lose all." Beside the matter of protection, the hardship of the restriction upon the party and the public should also be considered.

In the present case we think the restriction is unreasonable; not, as a rule of law, because it extends throughout the state, but because it extends beyond any apparently necessary protection which the complainant might reasonably require, and thus, without benefiting him, it oppresses the respondent and deprives people in other places of the chance which might be offered them to learn the French and German languages of the respondent. The complainant urges that he has established a school in Providence, at great expense, to teach languages by a new method, where scholars come from all parts of the state; and that by reason of the small extent of the state and the ease of passing to and fro within it, such a restriction is reasonable and necessary to keep teachers from setting up similar schools and enticing away his scholars. All this may be true with reference to Providence and its vicinity. But while, as is averred, many pupils from all parts of the state may come to Providence as a center, for the same reason few would go to other places. For example, a school in Westerly or Newport would not be likely to draw scholars from Providence or places from which Providence is more easily reached. Indeed, the complainant says he offered, after the contract was made, and now offers, to allow the respondent to teach in Newport, thereby admitting that the restriction is greater than the necessity. The people of Newport, Westerly, and other places have the right to provide for education in languages without coming to Providence. It is hard to believe, and the bill does not aver, that losing the few, if any, from some such place, who might leave the com-

plainant if the respondent were to teach there, would seriously affect the complainant's school. Teaching in Providence, or in any place from which the complainant receives a considerable number of pupils, might affect it, and a restriction limited accordingly might be reasonable, but we think it is unreasonable to go further.

The complainant bought nothing of the respondent whose value he now seeks to destroy. He hired the latter as a teacher at no more than fair wages. He needs and has the right only to be secured against injury to his school from teachers who may entice away his scholars after leaving his employ. The contract clearly goes beyond this. The demurrer must be sustained.

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**CONTRACTS IN RESTRAINT OF TRADE WITHIN THE STATE — WHETHER VALID.** — An agreement in restraint of trade throughout the entire area of a state is unreasonable and void: *Wright v. Ryder*, 36 Cal. 342; 95 Am. Dec. 186, and note; *Taylor v. Blanchard*, 13 Allen, 370; 90 Am. Dec. 203, and note; *More v. Bonnet*, 40 Cal. 251; 6 Am. Rep. 621. But see *Newell v. Meyendorff*, 9 Mont. 254, 18 Am. St. Rep. 738, for a case in which such a contract was held valid. For a collection of the notes and cases discussing the subject of contracts in restraint of trade, see note to *Chapin v. Brown*, 32 Am. St. Rep. 301.

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## FERGUSON v. NEILSON.

[17 RHODE ISLAND, 81.]

**MARRIED WOMAN IS NOT ANSWERABLE FOR THE NEGLIGENCE OF A SERVANT** employed by her while living separate and apart from her husband because, notwithstanding such separation, she is not competent to make a valid contract for the employment of a servant.

*Francis B. Peckham and Patrick J. Galvin*, for the plaintiff.

*Samuel R. Honey* for the defendant.

**STINESS, J.** The plaintiff brings this action to recover damages for the negligence of the defendant's servant in driving. The defendant, now a widow, pleads coverture at the time of the alleged negligence; to which the plaintiff replies that at said time the defendant was living separate and apart from her husband, who was then a resident of New York and never a domiciled inhabitant of Newport; that the defendant maintained herself separately in Newport, hiring her own servants and paying them from her own income, including the servant whose negligence is complained of; and that such



servant was under her direction and control. To this replication the defendant demurs. The replication does not set out facts to bring the case within Public Statutes of Rhode Island, c. 165; and therefore the question is, simply, whether a married woman is liable for the negligence of a servant employed by her apart from her husband. At common law a married woman is incapable of making a contract, and consequently incapable of holding the relation of master to servant. If she hired domestic servants or others whose service the husband accepted, it was held she did so as her husband's agent and on his behalf. They were his servants and not hers, and he alone was responsible to and for them. But the plaintiff contends that as a married woman is liable jointly with her husband during coverture, and solely after his death, for her own torts, this action can be maintained against the defendant, and that her liability under a contract of hiring is not the test of his right to sue.

That a married woman is liable for her torts, as claimed by the plaintiff, is a general rule, which has been recognized by this court in *Curry v. Allen*, 14 R. I. 343. But whether this rule embraces negligence, we need not now decide, since this case, as presented, does not involve the negligence of the defendant, but only that of a servant, while she was a *feme covert*. If she is liable at all, her liability must rest upon the same ground as that of any master or principal for the act of a servant or agent. The foundation of the rule *respondent superior* is contract, express or implied, by means of which the servant stands in the place of the master, so that his act is regarded as the master's act. If, therefore, there is not and cannot be a contract of hiring, there can be no representation of one by the other, and no ground for the application of the rule. There is no substantial difference between holding a married woman liable directly on a contract, or indirectly for breach of a duty imposed upon her by the contract. Although the plaintiff is not a party to a contract with her, yet when he asserts a relation based upon a contract, as the foundation for a consequent breach of duty, his position is essentially the same as that of one who sets up the same contract, in order to recover directly for its breach. If we should say she is liable for the tort because of the relation, we should say there was a contract which made her liable; for if the driver was her husband's servant, and not hers, of course she is not responsible for him; but if he was her servant, and not

the husband's, how could a court, for example, refuse him judgment if he were to sue for wages upon the contract? The same thing is true of married women which was held in regard to infants, in *Jennings v. Rundall*, 8 Term Rep. 335, that there is no liability for torts dependent upon a contract. Lord Kenyon said: "If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants." We have been somewhat surprised that neither the diligence of counsel, nor our own research, has brought to light any cases like the one before us; and yet the absence of authority, on a case so likely to have occurred before, is perhaps the best authority for the conclusion that a married woman has never been thought to be liable for tort based upon a contract relation. There are cases where a married woman has made false representations in matters of contract; but in these it has been held that an action will lie neither against the husband nor wife. In *Liverpool Adelphi Loan Ass'n v. Fairhurst*, 9 Ex. 422, Pollock, C. B., said: "A *feme covert* is unquestionably incapable of binding herself by a contract; it is altogether void, and no action will lie against her husband or herself for the breach of it. But she is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person, as for any other personal wrongs. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible and the husband be sued for it together with the wife." See, also, *Keen v. Hartmann*, 48 Pa. St. 497; 88 Am. Dec. 472; *Woodward v. Barnes*, 46 Vt. 332; 14 Am. Rep. 626; *Owens v. Snodgrass*, 6 Dana, 229; *Curd v. Dodds*, 6 Bush, 681. If, then, a married woman is not liable for a positive fraud connected with a contract, much less is there reason to hold her liable for the negligence of a third person for whose acts she can only be answerable under a contract relation.

The incapacity of a wife to enter into a contract on her own behalf arises from the fact of marriage, and does not depend upon the other circumstances under which she may seek to act. In some states the incapacity has been removed or modified by statute, but in this state there has been no change sufficient to cover the claim made in this case. Hence the

fact set up by the plaintiff in his replication, that the defendant was living separate from her husband, does not affect the question at issue; since it does not alter her character or condition, nor relieve her from the disability which the law imposes upon married women: *Marshall v. Rutton*, 8 Term Rep. 545.

While there are cases which have gone far towards treating a married woman, living apart from her husband, as a *feme sole*, yet such decisions, it will be found, have generally been induced by circumstances which do not appear in this case. Where the husband had been banished, or had abjured the realm and was an alien, or was so situated that he might be treated as civilly dead, the courts in England long ago relaxed the rules to meet apparent necessities, and practically treated the wife as a widow: *Marsh v. Hutchinson*, 2 Bos. & P. 226. In this country courts have followed the same course: *Gregory v. Paul*, 15 Mass. 31; even to the extent, in one case, of holding that where a husband, leaving his family without providing for them, went to another state, it was equivalent to abjuring the realm, and enabled the wife to sue and be sued as a *feme sole*. Other cases have been very liberal with married women in the matter of their capacity to act separate from their husbands, when circumstances seemed to require it, but we need not consider them in this case. The same arguments which are urged in behalf of a wife whose husband lives abroad or in another state apply with almost equal force to one abandoned by her husband while he remains in the same state; and yet, in the latter case, aside from statutory provisions, no one would claim that the wife could act alone. In trying to mitigate hardships, courts sometimes illustrate the maxim that extreme cases are the quicksands of the law. But wherever the line of the law may be elsewhere, we think our statutes, relating to married women and their property, go as far as it has been intended to go in the way of removing their disabilities in this state. To adopt the plaintiff's claim in this case would be judicial legislation, ingrafting a new provision upon the statute which is substantially an adoption of the principle of the English rule. The same claim was pressed upon the court in *Mason v. Jordan*, 13 R. I. 193, in the case of a deed, but it was not allowed there; nor do we think we should allow it here in the case of a contract. The demurrer to the replication must therefore be sustained.

**HUSBAND AND WIFE — CONTRACTS OF WIFE.** — A married woman can in no case be sued upon a mere personal contract made by her during coverture, although she lives apart from her husband: *Harris v. Taylor*, 3 Sneed, 536; 67 Am. Dec. 576, and note; *Rogers v. Philips*, 8 Ark. 366; 47 Am. Dec. 727, and note. The contracts of married women were void at the common law and in equity, so far as imposing personal obligations is concerned: *Snell v. Snell*, 123 Ill. 403; 5 Am. St. Rep. 526, and note; *Dolbin v. Hubbard*, 17 Ark. 189; 65 Am. Dec. 425, and note with the cases discussing this subject collected; *Burton v. Marshall*, 4 Gill, 487; 45 Am. Dec. 171, and note. The common-law rule that the wife during coverture is incapable of entering into an executory contract is unchanged in Indiana: *Stevens v. Parish*, 29 Ind. 260; 95 Am. Dec. 636, and note. See especially the extended note to *Haywood v. Barker*, 36 Am. Rep. 764, discussing the liability of a wife on her contracts where she has been deserted by her husband.

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## ADAMS v. FLETCHER.

(17 RHODE ISLAND, 187.)

**NUISANCES — LANDLORD AND TENANT.** — A HOLE CONSTRUCTED IN A SIDEWALK to be used for putting coal into a cellar, and provided with a suitable cover, though no license has been given for its construction or maintenance, is not a nuisance, and therefore the landlord of the premises on which such a hole is maintained is not answerable for injuries received by a pedestrian in falling through the hole because of the negligence of the lessee or his agents in leaving it open and unguarded while putting coal into the cellar.

*Charles Bradley and Walter F. Angell*, for the plaintiff.

*Nicholas Van Slyck and Cyrus M. Van Slyck*, for the defendant.

**MATTESON, J.** This is an action of trespass on the case to recover for injuries received by the plaintiff on May 27, 1889, from falling into a coal hole in the sidewalk adjoining the defendant's premises on Dorrance Street, in Providence. It appeared in evidence that Dorrance Street was a public highway, and that the defendant was and had been for several years prior to the accident the owner of a building known as the Narragansett Hotel building, adjoining said street. The cellar of the building extended under the sidewalk on Dorrance Street, and opened into the street through the hole, into which the plaintiff fell. The hole was constructed and used for putting coal into the cellar. No license or other authority was shown by the defendant for maintaining the hole or the cellar under the highway. At the time of the accident that part of the building adjacent to the sidewalk in question



was leased to one Lewis H. Humphrey, who was in occupation. The lease contained a covenant by the defendant to keep the exterior of the building in repair. At the time of the demise the coal hole was provided with a suitable cover, which fitted down into the sidewalk, so that it could not be raised without considerable effort. At the time of the accident the cover had been removed and the hole left open and unguarded by the agents of the lessee while they were putting coal into the cellar for his use. At the trial the court ruled: 1. That the hole in the sidewalk and the cellar under it did not constitute a nuisance as long as they were properly covered; and 2. That the defendant was not liable for an injury to the plaintiff resulting from the removal of the cover by the lessee or his agents, for the purpose and in the manner shown by the testimony as above stated; and accordingly instructed the jury to return a verdict for the defendant. To these rulings and this instruction the plaintiff duly excepted, and now petitions for a new trial, alleging that said rulings and instructions were erroneous.

It was agreed at the hearing that the coal hole in question was constructed prior to any legislation, state or municipal, relating to vaults under sidewalks and coal holes. To entitle the plaintiff to recover against the defendant as the owner of the property, it must appear that the coal hole was a nuisance at the time the property was leased to the tenant: *Joyce v. Martin*, 15 R. I. 558; *Owings v. Jones*, 9 Md. 108; *Rich v. Basterfield*, 4 Com. B. 783, 801. The case does not show that the coal hole was faulty in its construction, or that it had become defective or out of repair, so as to be dangerous to persons passing over it at the time of the demise. The plaintiff, however, claims that it was a nuisance, because no license or authority from the public was obtained for its construction and maintenance. He cites several cases which apparently support this claim: *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, 18 N. Y. 84; 72 Am. Dec. 495; *Wendell v. Mayor etc.*, 39 Barb. 329; *Clifford v. Dam*, 81 N. Y. 52. The doctrine of these cases is, that the public are entitled to the street in the condition in which they have placed it, and whoever without special authority materially obstructs it or renders its use hazardous by doing anything upon, above, or below the surface, is guilty of a nuisance; and, as in all other cases of public nuisance, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action

against the author or person continuing the nuisance; that no question of negligence can arise, the act being wrongful. He argues that as a sidewalk with a coal hole in it is necessarily less safe than a sidewalk without such a coal hole, it is, in the absence of special authority for its construction and maintenance, a nuisance, and therefore the landlord is bound at his peril to keep such opening covered, so that the highway will be as safe as if it were not there. We infer from the cases cited, although the cases themselves do not show it, that in New York there had been, prior to the earliest decisions, some legislation placing the entire control over the streets in the municipal authorities, and forbidding the abutting owner from exercising, without special license or authority, the usual rights of such owner. If this inference be correct, the cases were not like the present, since in the present, as was conceded at the hearing, no such legislation existed when the coal hole was constructed. If in the cases cited there had been such legislation, the reasoning of the courts seems unobjectionable; but if not, we think that they unduly restrict the rights of the abutting owner in the street. In *Fisher v. Thirkell*, 21 Mich. 1, 20, 4 Am. Rep. 422, the court, after commenting on these New York cases, says: "We are satisfied that at common law the making of such excavations under sidewalks in cities, and the scuttles therein, for such purposes as this was made and used for, were not treated as nuisances in themselves, or in any respect illegal, unless the walk was allowed to remain broken up for an unreasonable length of time, or the work was improperly or unsafely constructed, though it would afterwards become a nuisance if not kept in repair. Judging from the reported cases, the usage or custom of constructing such works in cities seems to have been in England for a long period as general as we know it has been in this country. And, though we find many decided cases in the English books for private injuries caused by these structures being out of repair, and indictments for obstructing highways and streets in a great variety of ways, we have been cited to no English cases, and have discovered none, in which such works have been held illegal in themselves, when properly and safely made, without any legislative permission, or that of the municipal authorities. Their legality seems, in all the cases, to have been assumed by the courts without any showing of such special authority or any authority. They have been treated as nuisances when allowed

to be out of repair, and private actions have frequently been sustained for injuries received in consequence; but we find no intimation of their original illegality when safely and properly constructed."

In 2 Dillon on Municipal Corporations, sec. 656b, the rights of the abutting owner and of the public in streets are thus defined: "The abuttor is entitled as of right, subject to municipal and public regulation, to make any beneficial use of the soil of the street which is consistent with the prior and paramount rights of the public therein for street purposes proper. The right of the public to use the streets not only for travel and passage, but for sewer, gas, water, and steam pipes and the like purposes, is, of course, paramount to any proprietary rights of the abuttor. The abuttor may, as a logical and necessary result, it is believed, whether the fee is in him or in the public, build as of right underground house vaults in the streets, subject, of course, to the paramount right of the public for street uses proper where the two rights come in competition, and subject also to reasonable legislative, municipal, or police regulations as to location, mode of construction, and use of such vaults." And in a recent New Jersey case, *Weller v. McCormick*, 52 N. J. L. 470, it is said: "The public right is paramount, and includes the right to have the street safe for travel. That of the abutting owner is subordinate to this public right. He may use the highway in front of his premises, when not restricted by positive enactment, for loading and unloading goods, for vaults and shutes, for awnings, for shade trees, etc., but only on condition that he does not unreasonably interfere with the safety of the highway for public travel." And see also 3 Kent's Com. \*443; *McCarthy v. City of Syracuse*, 46 N. Y. 194.

We are of the opinion that the want of a special license or authority to construct and maintain the coal hole in question did not constitute it a nuisance; and we are also of the opinion that the rulings and instruction of the court to the jury at the trial were correct, and that a new trial should be denied and the petition dismissed.

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**LANDLORD AND TENANT — LANDLORD'S LIABILITY FOR DEFECTIVE CONDITION OF PREMISES.** — Where a coal hole has been excavated in the sidewalk of a city and was so used by a lessee of the premises for the benefit of which it was made, and in consequence of its defective covering a person passing along the street was injured, the lessee may be sued separately or jointly with the owner for the injuries sustained. "The landlord rented a

nuisance and took rent for it. The tenants used it and paid rent, so they must all be considered as continuing and responsible for the nuisance": *Irvine v. Wood*, 51 N. Y. 224; 10 Am. Rep. 603; but see *Fisher v. Thirkell*, 21 Mich. 1; 4 Am. Rep. 422. Where a coal hole is constructed by a tenant in the sidewalk in front of the leased premises in a usual and proper manner, but by the act of a stranger it is put in a dangerous condition, the landlord will not be liable for injuries caused thereby when he has no notice or knowledge of the defect: *Wolf v. Kilpatrick*, 101 N. Y. 146; 54 Am. Rep. 672. As to whether an unfenced opening in a sidewalk is a nuisance for which the landlord will be liable, see *King v. Thompson*, 87 Pa. St. 365; 30 Am. Rep. 364, and the extended note to *McAlpin v. Powell*, 26 Am. Rep. 562. See also extended note to *Milarky v. Foster*, 25 Am. Rep. 533, on what obstructions to highways are nuisances and the liability of those maintaining them. In the absence of fraud or deceit a landlord is not liable to a tenant or his guest for obvious defects in the leased premises, which do not constitute a nuisance: *Eyre v. Jordan*, 111 Mo. 424; *ante*, 543, and especially note.

## SHERRIBLE v. CHAFFEE.

[17 RHODE ISLAND, 195.]

**EXEMPTION OF PROPERTY FROM EXECUTION IS THE DEBTOR'S PERSONAL PRIVILEGE.** — If he does not claim it, no one else can have the benefit of it. Hence his mortgagee cannot make the claim when he does not.

*Ambrose E. West*, for the plaintiff.

*Herbert B. Wood and William Fitch*, for the defendant.

Per CURIAM. This is replevin for goods and chattels taken by the defendant, a deputy sheriff, in attachment on a writ against one Joseph F. Breitschmidt, a hairdresser, who was in possession of them when attached. The plaintiff claims them by virtue of a mortgage given on them and duly recorded long before the attachment. The defendant claims that the mortgagor being left in possession, his interest was attachable under Public Statutes, Rhode Island, c. 208, sec. 4. The plaintiff replies that the goods and chattels were the working tools of the mortgagor, necessary in his own practice, and as such exempt from attachment, under Public Statutes, Rhode Island, c. 209, sec. 4, cl. 2.

The court of common pleas where the case was tried ruled that the question of exemption could not be raised, in this suit, by the plaintiff. The plaintiff excepted. The question is whether the ruling was right. The decisions on the matter are discordant: Freeman on Executions, secs. 211, 212. We think the better view is that the exemption is the debtor's



personal privilege, and that, when the property is attached while in the debtor's possession, it is for him to assert the exemption if he wishes to claim it, and if he does not claim it, no one else can have the benefit of it. There is no reason, in legal contemplation, why a mortgagee under a mortgage duly recorded should have the benefit of it, if the mortgagor does not claim it, since it is the mortgagor's interest, not his, that is attached, his interest being primarily payable out of the proceeds in case of sale under the attachment. In the case at bar it does not appear that the plaintiff offered proof of any claim to the exemption by the mortgagor.

Exceptions overruled.

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**EXECUTION — EXEMPTION PERSONAL PRIVILEGE.** — The right of exemption is a personal privilege and cannot be assigned or sold by the debtor: *Eberhart's Appeal*, 39 Pa. St. 509; 80 Am. Dec. 538, and note. See extended note to *Bowman v. Smiley*, 72 Am. Dec. 741, where this question is discussed.

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## METCALF v. SWEENEY.

[17 RHODE ISLAND, 213.]

**MASTER AND SERVANT.** — ONE IS NOT A SERVANT OF A TESTATOR AND ENTITLED TO PARTICIPATE AS SUCH in a bequest in favor of the servants in his employ at his death, if he did not serve such testator continuously, though he was employed for several years, two days and more each week, at jobs of housecleaning and the like, and in otherwise assisting the regular servants, and was in fact so employed at the time of the testator's death.

*Charles P. Robinson*, for the complainant.

*George J. West*, for the respondents, Crosby and wife.

*Edwin D. McGuinness and John Doran*, for the other respondents.

**DURFEE, C. J.** The late Henry J. Steere died October 28, A. D. 1889, leaving a will dated January 2, A. D. 1889, subsequently proved, the third clause of which is as follows: "I direct my said executor to transfer and pay over to such servants as shall be in my employ at my death, the sum of twelve thousand dollars in such manner that each of said servants shall receive equal portions of said sum." There were six persons employed by Mr. Steere regularly and continuously as his servants, when he died. That they are entitled to share in the bequest is not denied. They claim to be solely

entitled. This is contested by a Mrs. Annie Crosby, who claims to be entitled equally with them.

Mrs. Crosby served, not continuously, but sometimes two days a week from week to week, as laundress; occasionally more than two days a week; sometimes at irregular intervals, at jobs of house cleaning and the like; and sometimes her services were intermitted for months. The most trustworthy testimony as to the extent of her employment comes from a Mrs. Arnold, housekeeper for Mr. Steere, who testifies from memoranda made for purposes of payment. She testifies that Mrs. Crosby worked 37 days in 1885, 131 in 1886, 65½ in 1887, 34 in 1888, and 35 in 1889; that as a rule, she was not employed more than two days a week, and then to help the regular servants. She appears to have been a woman in whom trust was reposed. She was trusted to go to Mr. Steere's country house at Nayatt in advance of the household, to open it and put it in order for summer occupancy; and one summer she was intrusted with the city house, having charge to look after it. She was at work at Mr. Steere's house in the city at the time of his death, and was present when he died.

The other servants contend that Mrs. Crosby is not entitled to share with them in the bequest, because she was not regularly and continuously in Mr. Steere's employ. They cite *Townshend v. Windham*, 2 Vern. 546. There the Duke of Bolton by his will bequeathed as follows: "Item. I give and bequeath unto such of my servants as shall be living with me at the time of my death, one year's wages"; and the Lord Keeper, holding that stewards of courts were not entitled, said: "Stewards of courts and such who are not obliged to spend their whole time with their master, but may also serve any other master, are not servants within the intention of the will; but I will not narrow it to such servants only that lived in the testator's house, or had diet from him." The point of this decision was, not that stewards of courts were not servants, within the legal meaning of the word, when employed, but that they were not servants "within the intention of the will," because they were "not obliged to spend their whole time with their master," but might "also serve another master." The case is clearly in point for the servants here who cite it.

The counsel for Mrs. Crosby cites *Bulling v. Ellice*, 9 Jur. 936, where a farm bailiff was held to be a servant within the meaning of a will by which the testator gave one year's wages

to each of his servants in his service at his death, who should have lived with him five years. The bailiff had been in the testator's service twenty-eight years, living rent free on the home farm, receiving a yearly salary, and being all the time in service, though with his master's permission he took pupils to instruct in agriculture. The case seems to us to be entirely consistent with *Townshend v. Windham*, 2 Vern. 546, since the bailiff did spend his whole time in his master's service.

We do not doubt that Mrs. Crosby was, in the legal sense of the word, Mr. Steere's servant while she was actually rendering service for him at either of his houses; but the question is, whether she was such within the meaning of the will; i. e., to use his own words, a servant "in my employ at my death." It appeared in evidence that Mrs. Crosby had an assistant, hired in to help her in the work she was doing at the time of Mr. Steere's death. Such assistant was for the time as much Mr. Steere's servant as she; but the assistant makes no claim to share in the bequest, and her claim could not be allowed if she did. Why could it not be allowed? Because she was not then a servant in Mr. Steere's employ within the intention of his will, because the words "such servants as shall be in my employ at my death" import, by clear intendment, by reason of their testamentary character, something more than casual employment for a day or a job; for, when we go back in thought to Mr. Steere's act, and the nature of his act, when he wrote those words, we see that he must have had something else in mind, namely, a more permanent service. The question is, whether the service rendered by Mrs. Crosby comes up to the requirement. We are far from putting her on a footing with the person just referred to. There are many considerations that weigh in her favor. But while we feel the force of them, our minds still stop short of the conclusion that she is one of those who are entitled to share in the bequest. It seems to us that the service rendered by her lacks the continuity, the fixity, and permanence of relation, that are needed to give validity to her claim.

Our decision is that she is not entitled to share in the bequest.

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MASTER AND SERVANT—WHEN THE RELATION EXISTS: See note to *Gosnor v. Withers*, 50 Am. Dec. 105; extended note to *Brown v. Smith*, 22 Am. St. Rep. 459.

## SMITH v. BORDEN.

[17 RHODE ISLAND, 220.]

**JUDGMENT AGAINST A MARRIED WOMAN** sued without her husband is not void, but is a complete justification to an officer acting in the enforcement of process issued upon and authorized by it.

*Charles H. Page and Franklin P. Owen*, for the plaintiff.

*Charles M. Salisbury*, for the defendant.

MATTESON, J. This is an action of trespass *de bonis asportatis*. The trespass complained of consisted in the removal, on December 5, 1889, of the household goods of the plaintiff, Abby Smith, from a tenement which she had hired from the defendant, and had occupied for several months prior to such removal. The defendant pleaded in justification of the alleged trespass, in substance, that prior thereto the said Abby was his tenant, and had suffered the stipulated rent for the tenement to fall in arrears, and to remain due and unpaid for more than fifteen days after demand made upon her therefor; that thereafterwards he sued out of a special court of common pleas a writ of trespass and ejectment against her, and had the same duly served upon her, and duly entered the same with the declaration accompanying it in said court; that thereafterwards he obtained a judgment against her by default for the recovery of possession of said tenement, and that execution was ordered to issue and did issue on said judgment, directed to the sheriff and his deputies, commanding them to eject the said Abby from said tenement; that he delivered said execution to a deputy sheriff for service, and that said sheriff proceeded to execute the same, and that this was the supposed trespass of which the plaintiffs complain. At the trial in the court of common pleas, the defendant offered in evidence the papers in the suit in the special court of common pleas referred to in the plea. The plaintiff's counsel admitted that these papers proved a judgment in favor of the defendant against the plaintiff Abby, and it appearing that the goods, for the injury to which this suit is brought, were put out of the tenement by the deputy sheriff under the process of the special court of common pleas, the court ruled that the defendant could not be held liable therefor, and that this action could not be maintained, and accordingly directed the jury to return a verdict for the defendant. To this ruling and direction the plaintiffs excepted.



The question raised by the exceptions is whether a judgment against a married woman, sued without her husband, is to be regarded as void or as merely erroneous and voidable; for if void, it was a nullity, and afforded no protection to the defendant. If, however, on the other hand, it was merely erroneous and voidable, it would be valid until set aside, and having never been set aside, it was a valid subsisting judgment at the time of the service of the execution, and was a complete justification to the defendant for all acts done under its authority. We think that it was voidable, and not void. The rule is, that the judgment of a court having jurisdiction of the subject-matter and of the person, though erroneous, is not void, but is binding and conclusive upon the parties until it is set aside; that it cannot be impeached in any collateral suit or proceeding, but only on appeal, by writ of error, or by some appropriate proceeding operating directly upon it, instituted for that purpose. Nor does the fact that the judgment was against a married woman, sued without her husband, take the case out of the rule. In Gould on Pleading, c. 5, secs. 88, 89, it is said: "When a *feme covert* is sued alone she can plead the coverture only in abatement; for the defense does not deny the right of action; and therefore, if she omits to plead it as a dilatory plea, she waives it, so far as regards her own privilege, and tacitly admits that she is liable to be sued alone; . . . but she can by no admission or omission waive any right of her husband; and therefore, if she omits to plead her coverture, he may at any time come in and plead it in bar; and if both of them omit to plead it, and judgment is given against her, the judgment may be reversed by writ of error, in which they must both join as plaintiffs in error." Until reversed, then, the judgment, though erroneous, stands as a valid judgment. The same doctrine has been recognized and maintained by numerous authorities, which hold that, in cases where the defense of coverture has not been interposed, judgments against married women founded upon contracts even, which they are incompetent to make, are nevertheless binding upon them until set aside upon appeal or by some appropriate method: *Gambette v. Brock*, 41 Cal. 78, 82, 83; *Burk v. Hill*, 55 Ind. 419; *Hinsey v. Feeley*, 62 Ind. 85, 87; *Spalding v. Wathen*, 7 Bush 659, 663; *Vantilburg v. Black*, 3 Mont. 459, 467, 468; *Green v. Branton*, 1 Dev. Eq. 504, 508; *Vick v. Pope*, 81 N. C. 22, 26, 27; *Sheppard v. Kendle*, 3 Humph. 81, 82; *Chatterton v. Young*, 2 Tenn. Ch. 768, 770;

*Howell v. Hale*, 5 Lea (Tenn.) 405, 410; *Howard v. North*, 5 Tex. 290, 298; 51 Am. Dec. 769; *Phelps v. Brackett*, 24 Tex. 236, 237; *Moses v. Richardson*, 8 Barn. & C. 421. See also note to *Caldwell v. Walters*, 55 Am. Dec. 599, 600. If this doctrine be applicable to a judgment against a married woman founded upon a contract which she is incapable of entering into, we can perceive no reason why it should not apply with at least equal force to a judgment against her founded upon her tort.

We are of the opinion that the ruling and direction of the court of common pleas were correct, and that the exceptions should be overruled.

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**JUDGMENTS AGAINST MARRIED WOMEN—VALIDITY OF.**—A judgment against a married woman is not void: *Shupp v. Hoffman*, 72 Md. 359; 20 Am. St. Rep. 476, and note; but in *White v. Foote Lumber etc. Co.*, 29 W. Va. 385, 6 Am. St. Rep. 650, it was held that a judgment against a married woman on a contract made while she is living with her husband is absolutely void; and see note to that case. A judgment against a married woman on a claim not authorizing a personal judgment against her is void: *Spencer v. Parsons*, 89 Ky. 577; 25 Am. St. Rep. 555, and note. For a thorough discussion of this subject see note to *Caldicell v. Walters*, 55 Am. Dec. 599; but see especially page 600 of this note, where the authorities holding that judgments against married women are valid until reversed, and cannot be collaterally impeached, are collected.

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## PARKER v. PROVIDENCE AND STONINGTON STEAM-BOAT COMPANY.

[17 RHODE ISLAND, 376.]

**PLEADING—NEGLIGENCE.**—A declaration averring that the defendant's servants so negligently and carelessly managed and navigated its steamer that it ran upon and sunk a vessel of the plaintiff's testator, sufficiently states a cause of action. The details which prove the negligence need not be set forth if it sufficiently appears that a duty existed of which there has been a breach.

**EXECUTORS AND ADMINISTRATORS** had, at the common law, power to compromise and submit to arbitration disputed claims in favor of or against the estates which they represented.

**EXECUTORS AND ADMINISTRATORS, POWERS OF TO COMPROMISE CLAIMS IN FAVOR OF THE NEXT OF KIN.**—If a statute imposes a liability upon common carriers when the life of a passenger is lost by negligence, and authorizes an action to be brought and a recovery to be had for the benefit of the husband or widow and next of kin of the deceased, an executor or administrator entitled to maintain such action for the benefit of such parties is authorized to compromise to the same extent as if the claim were in favor of the estate of the decedent.

*Stephen A. Cooke, Jr., Louis L. Angell, W. C. Parker and W. M. Butler, for the plaintiff.*

*Walter B. Vincent, for the defendant.*

**PER CURIAM.** The court is of opinion that the declaration sufficiently states a cause of action, by setting forth that the defendant's servants so negligently and carelessly managed and navigated its steamer that it ran upon and sank the vessel of the plaintiff's testator. This is the usual form of charging negligence in cases of highway collisions. The essential facts with reference to negligence are: 1. Plaintiff's right to the highway; 2. In the exercise of due care; and 3. Defendant's interference with plaintiff's right by running into him. The defendant objects to this declaration upon the ground that it does not state in what the negligence consisted, and so does not inform him of the particular case he is called upon to answer, nor sufficiently protect him for the future in case of judgment. Undoubtedly a full statement to this extent is generally necessary, for in most cases there would be no case stated without it. Negligence consists in omitting to do a duty, or in doing it so carelessly as to bring injury to another. Ordinarily, therefore, unless the particular duty and its breach are set forth in the declaration, no negligence appears. These are the backbone of the declaration, without which it cannot stand.

The details which prove the negligence need not be set forth, but there must be an averment of facts showing the duty and the general manner of its breach, or else no case is stated. But in collisions the force and injury are direct, and except where the injury is caused by the carelessness of a servant, an action of trespass may generally be maintained, in which the averment of the force alone would be sufficient: 1 Chitty on Pleading, \*127; 2 Chitty on Pleading, \*713, \*860. In collisions, it is almost impossible to do more than state the fact that, while upon a highway, in the exercise of due care, the plaintiff was run into by the defendant. This raises a presumption of negligence, nothing appearing to the contrary, because of the defendant's control of the agent of the injury, and because such accidents do not occur without negligence. The plaintiff can seldom know or state just how it was done, whether by carelessness in one way or another, or even by design.

In the case at bar, the plaintiff can neither be expected nor

required to state in what particular way the defendant's servants on another boat were negligent. It is enough to state facts which naturally or necessarily raise a presumption of negligence. In *Chase v. American Steamboat Co.*, 10 R. I. 79, the declaration, substantially the same as the one before us, was considered by this court and finally carried to the supreme court of the United States: 16 Wall. 522, but no suggestion appears that it was insufficient. The defendant cites in support of its demurrer to the declaration *Woodward v. Oregon R'y & Nav. Co.*, 18 Or. 289, but in this case the plaintiff was employed by the defendant as a locomotive engineer, and sued for injuries sustained by a collision. In such a case, clearly it would be necessary to set forth in what the defendant's breach of duty consisted, for no presumption of negligence on the part of the company, so far as the plaintiff was concerned, would naturally or necessarily arise from the fact of a collision. The company may have given proper rules and directions, provided proper tracks, turnouts, etc., and still the accident have been caused by the negligence of some fellow servant; as, for instance, a switchman turning the wrong switch, or another engineer running his train contrary to orders.

In *Thompson v. Flint etc. R'y Co.*, 57 Mich. 300, the point passed upon by the court was that the declaration was defective in not setting forth that the plaintiff was in the exercise of due care.

In *Missouri Pac. R'y Co. v. Hennessy*, 75 Tex. 155, for an accident at a street crossing, the point decided was, that an omission of duty, different from those set forth in the declaration, could not be proved at the trial. The remarks of the court in that case are in harmony with those of this court in *Cox v. Providence Gas Co.*, 17 R. I. 200, to this effect: "The rule of certainty in pleading is not too rigid to be reasonable, and does not require the statement of facts undiscovered by the plaintiff. It permits much generality when the facts lie more in the knowledge of the opposite party than in the pleader." Nevertheless, enough must appear to give the defendant notice of the character of the case which the plaintiff will undertake to prove.

Demurrer overruled.

Subsequently the case came on for hearing on the plaintiff's demurrer to a plea in bar filed by the defendant.



**TILLINGHAST, J.** After the overruling of the defendant's demurrer to the plaintiff's declaration, in this case, the defendant pleaded the following release in bar of said action:—

NEW BEDFORD, MASS., July 16, 1889.

Received from the Providence & Stonington Steamship Co. the sum of one (1) thousand dollars, the same being in full settlement of all claims and demands which I, as executrix of the last will and testament of Charles W. Parker, deceased, and as legatee named in said will, may have against the Providence & Stonington Steamship Co., its agents and servants, for loss of life in consequence of the collision on the fourteenth day of May, 1889, between the schooner "Nelson Harvey" and the steamer "Nashua," owned by the said Providence & Stonington Steamship Co., and I do hereby covenant and agree to and with said company that no suit shall at any time be brought or prosecuted against said company therefor.

ARABELLA T. PARKER, Executrix.

Witness, Frank N. Howes.

To this plea the plaintiff has demurred as follows:—

"And the said plaintiff as to the first plea, or plea of settlement of said cause of action, comes, etc., when, etc., and says:—

"That the said plea and the matter therein contained, in manner and form as therein set forth, are not sufficient in law for a bar to said action and the said plaintiff is not bound by law to answer the same, because said right of action is given to said plaintiff in her said capacity, as a representative of her children as well as herself, and is not included in the powers given by statute to administrators to compromise claims such as appear in favor of ordinary estates, and is such a claim as cannot be compromised or settled by her as administratrix without concurrence of her children, if of age, or their duly qualified guardians of such of them as are minors, and this she is ready to verify. Wherefore, for want of a sufficient plea in this behalf, she prays judgment of this court, and that said defendant may further answer the said declaration."

The only question raised by the demurrer is, whether an executrix has the power to compromise and settle such a cause of action as is set out in the plaintiff's declaration, without the assent of the next of kin: Public Statutes of Rhode Island, c. 184, sec. 32, provides as follows:—

"Executors and administrators may submit to arbitration, or may adjust by compromise, any claims in favor of or

against the estates by them represented, in the same manner and with the same effect as the testator or intestate might have done."

The defendant contends that this statute authorizes the plaintiff in her said capacity to compromise and settle a claim like the one in suit, and that having done so as set up in the plea in bar, she is precluded from maintaining her action. The defendant further contends that said statute is simply intended to afford executors and administrators additional protection, and not in any manner to take away or abridge their common-law powers, amongst which is that of compromising and adjusting disputed claims in favor of or against the estates which they represent.

The plaintiff, on the other hand, contends that said statute does not confer any authority upon her to make said compromise, and also that it has no bearing upon the case at bar because she is merely a representative of the widow and next of kin, and sues exclusively for their benefit, the damages to be recovered not being assets in her hands, with which to pay the debts or liabilities of the testator, but to go to the widow and next of kin under the statute. She further contends that the action is brought under the provisions of Public Statutes of Rhode Island, c. 204, sec. 15, and that sec. 20 of said chapter has no application. Said sections are as follows:—

"Sec. 15. If the life of any person, being a passenger in any stagecoach or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not in the care of proprietors of, or common carriers by means of, railroads or steamboats, or the life of any person crossing upon a public highway with reasonable care, shall be lost by reason of the negligence or carelessness of such common carriers, proprietor or proprietors, or by the unfitness, or negligence, or carelessness of their servants or agents, in this state, such common carriers, proprietor or proprietors shall be liable to damages for the injury caused by the loss of life of such person, to be recovered by action of the case, for the benefit of the husband or widow and next of kin of the deceased person, one half thereof to go to the husband or widow, and one half thereof to the children of the deceased."

"Sec. 20. In all cases in which the death of any person ensues from injury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at the common law had death not ensued, the person

inflicting such injury shall be liable to an action for damages for the injury caused by the death of such person, to be recovered by action of the case for the use of the husband, widow, children, or next of kin, in like manner and with like effect as in the preceding five sections provided."

The power of an executor or administrator at common law to compromise, or submit to arbitration, disputed claims in favor of or against the estate which he represents, is undoubted: *Chadbourn v. Chadbourn*, 9 Allen, 173; *Bean v. Farnam*, 6 Pick. 269; *Chase v. Bradley*, 26 Me. 531; *Chouteau v. Suydam*, 21 N. Y. 179, 184; *Wood v. Tunnicliff*, 74 N. Y. 38; *Murray v. Blatchford*, 1 Wend. 583, 616; 19 Am. Dec. 537; *Rogers v. Hand*, 39 N. J. Eq. 270, 271, and note.

It is also well settled that a statute like the one under consideration does not change the power of the executor or administrator existing at common law, but simply reinforces and affirms the same. If, in the exercise of this power, the executor or administrator, by reason of negligence, or any serious error in judgment, obtains a less sum than he would clearly be entitled to recover at law, he may be held to be guilty of a *devastavit*, and be required to make up the loss out of his own estate; but still, the compromise, if made in good faith, would be binding upon the parties thereto.

In *Rogers v. Hand*, 39 N. J. Eq. 270, 275, which was a case in which the executors compromised and settled a claim against the estate without suit, the court says: "When they act in good faith, those who would impeach their conduct must show fraud or mistake, or that they have acted without authority or contrary to law." "They may compromise a lawsuit, may buy the peace of the estate, and extinguish even doubtful claims against it, provided they act discreetly and in good faith": See also *Meeker v. Vanderveer*, 15 N. J. L. 392.

It will be seen that what we have said thus far relates to the power of executors and administrators generally to compromise claims in favor of and against the estate which they represent, as that term is ordinarily understood; and the question which now presents itself is, whether the law, as above stated, is applicable to a case like the one before us, in which the cause of action is purely statutory, and where the damages do not accrue to the estate of the deceased, properly so called, but to the widow and next of kin. We fail to see, upon principle, that any distinction can properly be made

between the two classes referred to. The reasons which underlie and support the law above laid down in its application to executors and administrators generally are equally applicable and cogent in a case in which the claim arises by statute.

The plaintiff, in her capacity as executrix, had a claim against the defendant corporation growing out of its alleged negligence and wrongful acts in causing the death of her husband. She could prosecute this claim or not at her option. No one else had any power to prosecute it: *Goodwin v. Nickerson*, 17 R. I. 478. If suit is brought upon said claim, it is her suit, and she may discontinue, compromise, or settle the same at her pleasure; and if she has power to compromise the suit after it is brought, why should she not also have power to compromise the claim upon which it is based without bringing a suit? We cannot see that any reason can be urged in support of the existence of the power in the former case, which does not apply with equal, if not added, force to the existence thereof in the latter.

In *Greenlee v. East Tennessee etc. R. R. Co.*, 5 Lea (Tenn.), 418, which was a case brought by a widow, under a statute quite similar to the one under which this suit is brought, it was held that she had power to control the suit by compromise or otherwise. The court says: "The question is, can the widow, under the statutes authorizing this suit, dismiss it against or without the consent of the children? . . . It is true, as argued, that the suit is for the benefit of the widow and children. It is also true the widow alone has the right to sue in the first instance. The children have the right only when there is no widow. The widow may sue or not, at her option. We have holden that if she fail to sue for the period of twelve months, the suit is barred, even as to minors. Having then the right to sue, to be exercised at her own election, it follows as a necessary incident to that right that she may control the suit by compromise, abandonment, prosecution, or dismissal."

In *Stephens v. Nashville etc. R'y Co.*, 10 Lea (Tenn.), 448, which was a suit for the benefit of the widow and children of deceased, it was held that she had the right to compromise or settle the suit as she saw fit, without the consent of the guardian of the child of the deceased, and against the consent of her own attorney, who managed the case. As to the contention of the plaintiff that the action is brought under



the provisions of the Public Statutes of Rhode Island, c. 204, sec. 15, and hence that section 20 of said chapter has no application, two answers suggest themselves: 1. The second count in the declaration is evidently framed upon both of said sections, as it not only charges that the deceased came to his death by reason of the carelessness and negligence of the defendant, but also by the "wrongful acts of said defendant"; and 2. That even though the declaration were framed solely upon section 15, as contended, yet so long as the two sections give but one remedy, and the declaration might as well have been framed under the one section as under the other, or even under both together, we think that they should clearly be construed together in determining the question whether the plaintiff had power to compromise the claim upon which this suit is based before any suit was brought. If the injury had not resulted in the death of the plaintiff's testator, he would undoubtedly have had power to compromise and adjust the claim against the defendant.

Furthermore, the injury here complained of was not occasioned by the mere passive neglect of the defendant, as was the case in *Bradbury v. Furlong*, 13 R. I. 15, 43 Am. Rep. 1, cited by the plaintiff, but might properly be described as an injury "inflicted by a wrongful act." See also *Chase v. American Steamboat Co.*, 10 R. I. 79 and *McCaughey v. Tripp*, 12 R. I. 449.

Furthermore, the law favors the compromise of disputed claims: 1 Bouvier Law Dictionary, 15th ed. title "Compromise," and cases cited; and will sustain the same as far as possible when fairly made.

But the plaintiff argues that the settlement in question, if allowed to stand, will have the effect to bind living parties, who are competent to act for themselves, which is very different from the settlement of claims in favor of or against the estate of a person who is dead, and which are necessarily represented by the executor or administrator as the only one who can represent them.

We do not think that this is so. There are no parties to this suit excepting the plaintiff and defendant. The next of kin are not and cannot be made parties thereto. And while the settlement made, if allowed to stand, will doubtless incidentally affect their interest, still it is not a proceeding in which they have any rights as parties thereto. Nor is the case materially different in this respect from that of an ordinary

claim in favor of an estate in the hands of an executor and administrator. For, as we have already seen, they have power to compromise claims, and by so doing they incidentally affect the interest of the heirs or devisees, as the case may be, in the estate. If a large amount is realized, it inures to their benefit, assuming, of course, that the estate is solvent, while if only a small amount is realized, they will suffer the loss, if such it may properly be called. In other words, the executor or administrator has full power to settle the estate in conformity to law, and this being done, the heirs or devisees have no legal cause of complaint whether they receive much or little therefrom. But no one would contend that, because of their interest, they either are, or have the right to be made, parties to a suit, or a proceeding of compromise.

In conclusion, we think that the statute in question, being evidently intended to facilitate the settlement of disputed claims growing out of or appertaining to the estates of deceased persons, should be liberally construed in favor of the object sought to be attained, and that, thus construed, it may fairly be held to include such a compromise as the one under consideration. The demurrer to the defendant's said plea in bar must therefore be overruled.

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**NEGLIGENCE — SUFFICIENCY OF COMPLAINT.** — A complaint charging negligence in general terms is good upon demurrer: *Mississinewa Min. Co. v. Patton*, 129 Ind. 472; 28 Am. St. Rep. 203. A complaint in an action to recover for personal injuries caused by negligence, need only allege that the injuries were so caused, and the facts from which the negligence may be reasonably inferred by the jury: *Mudden v. Port Royal etc. R'y Co.*, 35 S. C. 381; 28 Am. St. Rep. 855, and especially the note where the cases discussing this subject are collected.

**EXECUTORS AND ADMINISTRATORS — POWER TO COMPROMISE OR ARBITRATE.** — An executor or administrator may compromise actions pending in favor of or rights of action belonging to the testator if he acts *bona fide*: *Woolfork v. Sullivan*, 23 Ala. 548; 58 Am. Dec. 305; *Murray v. Blatchford*, 1 Wend. 583; 19 Am. Dec. 537; *Jacobs v. Jacobs*, 99 Mo. 427; *Grece v. Helm*, 91 Mich. 450; but in order to make such a compromise he must have the approval of the probate court: *Lurich v. Medin*, 3 Nev. 93; 93 Am. Dec. 376; *Hartigan v. Southern Pac. Co.*, 86 Cal. 142. An administrator may as a general rule submit claims against the estate to the award of arbitrators: *Crum v. Moore*, 14 N. J. Eq. 436; 82 Am. Dec. 262, and note; *Bailey v. Dilworth*, 10 Smedes & M. 404; 48 Am. Dec. 760. See also note to *Hutchins v. Johnson*, 30 Am. Dec. 632.

## FANNING v. CHACE.

[17 RHODE ISLAND, 288.]

**SLANDER. — WORDS WHICH IMPUTE A CRIMINAL INTENTION to another are not actionable.** Hence an action cannot be sustained for saying of the plaintiff that he is going to start and maintain a house of ill-fame.

**SLANDER. — LANGUAGE WHICH AMOUNTS TO A MERE ASSERTION OR OPINION AS TO WHAT WILL BE THE FUTURE CONDUCT or character of another is not actionable.**

*George J. West*, for the plaintiff.

*James M. Ripley and George A. Littlefield*, for the defendant.

**TILLINGHAST, J.** This is an action of trespass on the case for slander. The declaration, to which the defendant demurs, sets out that the plaintiff is a licensed retail liquor dealer in the city of Providence, and has been such for a long time. That anticipating a renewal of his license for the year 1890, 1891, he made large purchases of liquor in advance, and also refitted and refurnished his saloon at large expense. That the defendant, well knowing the premises, but intending to injure him, the plaintiff, and prevent him from again procuring a license for carrying on his said business, in the presence and hearing of divers good citizens, uttered, declared, and published the following false, scandalous, and malicious words of and concerning the plaintiff, viz., "He (meaning the plaintiff) is going to start a house of ill-fame (meaning a house to be kept for the purposes of prostitution), so sign a protest against him" (meaning the plaintiff), meaning and intending thereby that said plaintiff was going to start a house to be kept and maintained for the purposes of prostitution, and that said plaintiff ought not to be granted a license to carry on the business of a retail liquor dealer as he desired, in accordance with his application on file in the office of the license commissioners in said city, and therefore that they should sign a written remonstrance protesting that said plaintiff ought to be refused a license, which said defendant then and there presented to said people.

The declaration further sets out that in consequence of the uttering and publishing of said words by the defendant, the majority of persons owning the greater part of the land within two hundred feet of the said saloon, or who were occupants of the land, signed a remonstrance protesting that a license should not be granted to the plaintiff to carry on said busi-

ness, whereupon said license commissioners refused to grant such license, and were rendered unable to grant the same. The declaration also alleges special damage.

The principal ground urged in support of the demurrer is, that the words complained of, since they do not amount to an imputation of the commission of an offense, but only to a charge of an intention to commit one, are not actionable either *per se*, or from having caused special damage.

The main question raised by the demurrer, therefore, is this, viz.: Are words actionable which merely impute a criminal intention to another? We think this question must be answered in the negative. Words which falsely charge a person with the commission of a criminal offense are actionable, upon the familiar ground that they may endanger him by subjecting him to the penalties of the law, and render him infamous in the community. But the charge, in order to be obnoxious to the law, must be of an offense actually committed or attempted, a punishable offense, and not of an offense existing in contemplation or intention merely, for the law does not take cognizance of one's intentions merely, however malicious or wicked they may be, but only takes cognizance thereof when coupled with and giving significance to his acts. So that, in order to render one's intent of any importance in the eye of the law, it must be combined with his act.

It therefore follows that, as mere intent to commit a crime is not a violation of law, and hence not punishable, to accuse one of having such an intent is not to accuse him of any crime or offense.

The language which the plaintiff complains of as being slanderous is this: "He is going to start a house of ill-fame." This language, if indeed it is anything more than the expression of an opinion on the part of the defendant, does not amount to a charge of any crime or offense, or even of an attempt to commit one. At the most, it is only a charge that the plaintiff intends at some future time to commit one.

That such a charge is not actionable is one of the few things in the law of slander which is evidently settled beyond controversy.

The law upon this point is well stated in the American Encyclopædia of Law, vol. 13, p. 353, as follow: "Words which merely impute a criminal intention not yet put into action are not actionable. Guilty thoughts are not a crime. But as soon as any step is taken to carry out such intention,



as soon as any overt act is done, an attempt to commit a crime has been made; and every attempt to commit an indictable offense is at common law a misdemeanor, and in itself indictable."

To impute such an attempt is, therefore, clearly actionable.

In *Cornelius v. Van Slyck*, 21 Wend. 70, 71, the court, in speaking of the sense in which words should be taken, say: "Where they plainly import a charge of mere intention to do a criminal act, or only amount to an assertion that the plaintiff will do it at a future time, they are not actionable."

In *Seaton v. Cordray*, Wright (Ohio) 101, the court say: "An action may be sustained for charging another with being a thief, or with having stolen, but not for imputing a mere intention to steal, or with having an evil disposition. The foundation of the slander is, that the charge, if true, would subject the accused to infamous punishment; and evil disposition, without act, cannot so subject any one." See, also, Townshend on Slander and Libel, 3d ed., 161; *McKee v. Ingalls*, 5 Ill. 30; *Harrison v. Stratton*, 4 Esp. 218; *Wilson v. Tatum*, 8 Jones, 300; *Stoner v. Audely*, Cro. Eliz. 250; *Dr. Poe's Case*, cited in *Murrey v. —*, 2 Bulst. 206; *Sillars v. Collier*, 151 Mass. 50, 53, 54; Odgers on Libel and Slander, 57; 1 Viner's Abridgment, 440.

But the plaintiff contends in support of his declaration, that any defamatory or disparaging words spoken of another, which cause special damage, are actionable.

While we cannot subscribe to quite so broad a statement of the law as this, yet we think that the proposition is substantially correct. That is to say, that false, defamatory words, spoken of another, are either actionable *per se*, or by reason of having caused special damage.

We do not think, however, that the words relied on in the declaration are defamatory within the legal meaning of that term.

To defame another, by language, is to harm or destroy his good fame or reputation, or to disgrace or calumniate him. In order to have this evil effect, however, it is evident that the language used concerning him must relate to his conduct or character as they now are, or have been in the past, and not be the mere opinion of the speaker, as to what they will be at some indefinite period in the future.

In other words, that language which amounts to a mere assertion or opinion as to what will be the future conduct or

character of another is not actionable; but that it is only actionable when it relates to what the person now is or has been in the past, or to what he is doing, or attempting to do, or has done, or attempted to do in the past; that is, when it relates to something which is actual, instead of something which is merely imaginary or conjectural.

The character of a man is what he now is, and not what he may be at some future time.

Amongst the multitudes of different forms of expression found in the books, which have been held to be actionable, we have been unable to find any case, nor have we been referred to any, in which language analogous to that relied on in the plaintiff's declaration has been held sufficient to maintain an action for slander.

Demurrer sustained.

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SLANDER. — Charging one with being in a suspicious place under suspicious circumstances is not actionable: *Waters v. Jones*, 3 Port. 442; 29 Am. Dec. 261. For a further discussion of this proposition, see the cases cited in the opinion to the leading case.

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## BALLOU v. EARLE.

[17 RHODE ISLAND, 441.]

**COMMON CARRIERS — PRESUMPTION AS TO KNOWLEDGE OF LIMITATION UPON LIABILITY OF.** — In the absence of fraud, concealment, or improper practice, the legal presumption is, that stipulations limiting the common-law liability of carriers contained in a receipt given by them for freight, were known and assented to by the party receiving it.

**COMMON CARRIERS. — A STIPULATION LIMITING THE LIABILITY** of a common carrier, in the event of loss of goods through his negligence, to an amount specified in the receipt, unless the value of the property is therein stated to be of a greater amount, measures the amount of his responsibility, and no recovery can be had against him in excess of such amount.

**COMMON CARRIER — LIMITING LIABILITY FOR NEGLIGENCE.** — While a common carrier cannot by contract limit its liability for negligence, it may, by contract with the shipper, fix the value of goods intrusted to it for shipment, and estop him from claiming that they were of a greater value, in an action to recover compensation for their loss through such negligence.

*Stephen A. Cooke, Jr., and Louis L. Angell, for the plaintiffs.*

*Arnold Green, for the defendants.*

TILLINGHAST, J. This is *assumpsit* to recover the sum of \$579, being the value of a box of diamonds which the plaintiff

delivered to the servant and agent of the defendants, to be by them transported by express to New Bedford, in the state of Massachusetts. Jury trial is waived, and the case is tried to the court on the law and the facts. The defendants, who are common carriers of merchandise for hire, received from the plaintiff at Providence, on the twenty-sixth day of July, 1890, a package containing diamonds of the value aforesaid, to be by them delivered to C. W. Haskins, at New Bedford, Massachusetts.

The plaintiff had, and for a considerable time previous to the above named date had had, in his possession and constant use, a book of the defendants' contract receipt blanks, at the top of each page of which was printed what purports to be a mutual agreement between the shipper and the common carrier, which agreement, in so far as it is material for our present consideration, provides that the defendants "are not to be held liable or responsible for any loss or damage to said property: . . . unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company or their servants, nor in any event shall the holder hereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them and so specified in this receipt, which insurance shall constitute the limit of the liability of Earle and Prew's Express."

One of these blanks the plaintiff filled out for the addressed package in question, but gave no value thereof, although there was a blank column in said receipt marked "value." This receipt was signed by the defendants' agent when the plaintiff gave the package to the agent.

The defendants had no knowledge of the contents or value of said package except as stated in said receipt at the time of its delivery to them, nor did they make any inquiry of the plaintiff concerning the same.

This package was lost by the negligence of the defendants' servant before it reached their office, and said defendants admit their liability therefor, under said agreement, and offer to pay the said sum of fifty dollars, which, they contend, is the limit of their liability. The plaintiff testifies that his reason for not giving any value to the package was because the expressage was to be paid by the consignee. The defendants, on the other hand, testify that the reasons given them by the plaintiff for not giving any value to the package in said

receipt were, that it cost more money, and that the consignee had previously complained of the charges of expressage in cases where the values had been given, and that he adopted this mode to lessen said charges.

We think it is very evident that the purpose of the plaintiff in not giving any value to the package, was to save, either to himself or to the consignee, and it matters not which, the additional expressage which would have been charged by the defendants if the real value had been given; for it must be presumed from the terms of the receipt that, as the defendants assume a liability only to the extent of the valuation therein named, the rate of expressage is graduated by said valuation.

Under this state of facts, the plaintiff's final contention, which logically should be the first, and hence we will consider it first, is, that the express assent of the owner of the goods to the restrictions of the carrier's liability must be found, to give effect to it in any case.

We think the decided preponderance of the authorities is to the contrary; and that the well-settled rule now is, that in the absence of fraud, concealment, or improper practice, the legal presumption is, that stipulations limiting the common-law liability of common carriers, contained in a receipt given by them for freight, were known and assented to by the party receiving it: *Belger v. Dinsmore*, 51 N. Y. 166; 10 Am. Rep. 575; *Steers v. Liverpool etc. Steamship Co.*, 57 N. Y. 1; 15 Am. Rep. 453; *Harris v. Great Western R'y Co.*, L. R. 1. Q. B. D. 515; *Germania Fire Ins. Co. v. Memphis etc. R. R. Co.*, 72 N. Y. 90; 28 Am. Rep. 113; *Quimby v. Boston etc. R. R. Co.*, 150 Mass. 365; *Burke v. South Eastern R'y Co.*, L. R. 5. C. P. D. 1; *Maghee v. Camden etc. R. R. Co.*, 45 N. Y. 514; 6 Am. Rep. 124; *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117; 1 Am. Rep. 131; *Monitor Mut. Fire Ins. Co. v. Buffum*, 115 Mass. 343; *Hill v. Syracuse etc. R'y Co.*, 73 N. Y. 351; 29 Am. Rep. 163. For a full discussion of the contrary doctrine, see *Holister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455, and cases cited.

In the case at bar, a printed facsimile of the receipt in question is before us, which shows that the terms and conditions upon which the defendants received the goods in question must have been well known to the plaintiff.

And more especially is this to be taken for granted from the fact that a book of the defendants', filled with receipt



blanks, indential with this, was in the plaintiff's possession, and in almost daily use by him.

From an examination of said facsimile, it is evident that there was not only no attempt to conceal the terms and conditions of the bailment on the part of the defendants, but on the other hand that it had been their purpose to make the same specially prominent and noticeable.

It is all printed on one side of the paper, and at the top thereof it is headed by the caution, printed in bold type, "Read the conditions of this receipt," and all the printed matter precedes the signature of the agent of the defendants.

We think, therefore, that the receipt in question ought to be regarded as having received the assent of the plaintiff, and as being, as its language purports, the mutual agreement of the parties touching the package in question.

Having found, then, that there was an agreement between the parties as to the limit of the defendants' liability in case of loss, we come to the main question in the case, viz., Was said agreement valid and binding upon the parties thereto? Or, to state the question more broadly: To what extent is a common carrier entitled to contract in limitation of his common-law liability? This is a question, in so far as it applies to carriers by land, upon which there has been great contrariety of opinion in different courts, the earlier cases holding that it was against public policy, and hence impossible for common carriers to guard themselves by any stipulations whatever, against liability from loss arising from any other cause than the act of God or the public enemy. This question is discussed in Edwards on Bailments, sec. 552, and cases cited in note 5, while the later cases have materially modified this rule in the carrier's favor, and permitted him not only to contract so as to change the extent of his liability as fixed by the common law, but such contracts, when made with his employer, became almost entirely the measure of his responsibility. "And this custom," says Hutchinson on Carriers, sec. 119, "has become so universal in transactions with carriers, that his liability may now be said to depend almost exclusively upon contract. He still stands, however, in the relation of common carrier to the goods intrusted to him, notwithstanding his contract, however much it may lessen his common-law liability, and he cannot, even by the most express contract, divest himself of that character and change it to that of a mere private carrier or ordinary bailee": *David-*

*son v. Graham*, 2 Ohio St. 131, 140; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11; 85 Am. Dec. 211; *Christenson v. American Express Co.*, 15 Minn. 270; 2 Am. Rep. 122; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 180; *Kirby v. Adams Express Co.*, 2 Mo. App. 369; but see *American Express Co. v. Sands*, 55 Pa. St. 140; *Grogan v. Adams Express Co.*, 114 Pa. St. 523; 60 Am. Rep. 360.

Without attempting a review of the conflicting authorities upon the question before us, which would answer no useful purpose here, we will only say that upon an examination thereof we have come to the conclusion that the decided weight of the authorities, as well as the better reason, favors the rule that a common carrier may, to a great extent at least, contract in limitation of his common-law liability, "provided," as stated in *Express Co. v. Caldwell*, 21 Wall. 264, "the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy."

The shipper and the common carrier are thus authorized to enter into an express agreement within certain limits, as to the terms upon which the latter will transport and convey for the former a certain article of personal property of an agreed value to a designated place for an agreed price. We fail to see that the recognition of the validity of such an agreement is violative of any sound rule of public policy. Indeed, it seems to us that public policy requires the upholding of such an agreement as tending to the honest disclosure of value on the part of the shipper, and the exercise of that degree of diligence on the part of the carrier which is commensurate with the value of the particular article conveyed, and the price paid for such conveyance. To illustrate:—

A has a box of tinware of the value of five dollars, which he wishes to send to Boston by B, a common carrier. The box is delivered to B under an agreement similar to the one before us, no information being given as to the contents of said box.

What is the degree of care which B is expected to exercise in the transportation of this box? Manifestly, that degree of care which is commensurate with a box whose value does not exceed that stipulated in the contract, to wit, fifty dollars.

B's maximum liability in case of loss being known to him beforehand, he will naturally exercise such a degree of care as would ordinarily insure the safe delivery at its destination of an article of this value. Moreover, he is only paid for as-

suming a risk to the extent of fifty dollars, and he has graduated his charge for carriage accordingly.

Such an agreement certainly strikes one as eminently fair and reasonable. Neither party is deceived or misled thereby. The shipper, on the one hand, is insured of the safe delivery of his goods at their destination, or their value in money, in case of loss, and the carrier, on the other hand, proportions his care to the liability which he has assumed.

Both parties thus act understandingly and intelligently; there is little opportunity for fraud on the part of the shipper, and none for overcharge on the part of the carrier.

To illustrate again: A wishes to send a box of diamonds, valued at five hundred dollars, to Boston, Massachusetts, and employs B, a common carrier, to transport the same thence under an express agreement, which stipulates, amongst other things, that the value thereof is fifty dollars, the charge for expressage being based upon that valuation.

As in the former case, B assumes, and has the right to assume, that the value of this package does not exceed the sum of fifty dollars, and he therefore proportions his care accordingly.

The package is lost by B, whereupon A seeks to hold him liable for the actual value of said package, which was many times larger than that agreed upon.

B was only paid for the care and transportation of a package of the value of fifty dollars, and the degree of care which he used was sufficient for a transaction of that sort, while it was quite insufficient for a transaction of the sort which he was induced by misrepresentation on the part of A to undertake.

Had he been apprised of the actual value of this package, he would have exercised that degree of care which was commensurate therewith, and would also have graduated his charge accordingly.

To allow A to repudiate his contract with B in case of loss, and hold the latter to his strict common-law liability, under the circumstances, is little less than to permit him to perpetrate a fraud under the guise of enforcing a legal right.

If this illustration fairly represents the case at bar, and it seems to us that it does, it shows the unreasonableness and injustice of the rule of liability contended for by the plaintiff. But the main contention of the plaintiff is that an express company cannot limit its liability for loss of goods occasioned by its own negligence, and in support thereof he cites the following

**cases:** *Grogan v. Adams Express Co.*, 114 Pa. St. 523; 60 Am. Rep. 360; *Brown v. Adams Express Co.*, 15 W. Va. 812; *Maslin v. Baltimore etc. R. R. Co.*, 14 W. Va. 180, 191; 35 Am. Rep. 748; *Newborn v. Just*, 2 Car. & P. 76; *New Jersey Steam Nav. Co. v. Merchant's Bank*, 6 How. 344; *Snider v. Adams Express Co.*, 63 Mo. 376, 383; *Union Express Co. v. Graham*, 26 Ohio St. 595, 598; *Michigan Cent. R. R. Co. v. Hale*, 6 Mich. 243; *Western Trans. Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760; *Graham v. Davis*, 4 Ohio St. 362; 62 Am. Dec. 285; *Muser v. American Express Co.*, 1 Fed. Rep. 382; *Southern Express Co. v. Seide*, 67 Miss. 609.

These cases undoubtedly sustain the position of the plaintiff in this respect; and we are not only not disposed to question their authority upon this point, but to agree entirely therewith.

We do not think that it is competent for a common carrier to stipulate for exemption from loss occasioned by his own negligence or that of his servants. Such an exemption is not just and reasonable in the eye of the law. Nor is it necessary for us to so hold in order to sustain the contract under consideration. For, as stated by Blatchford, J., in *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 340, "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carriers the measure of care due to the value agreed on. The carrier is bound to respond to that value for any negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing, and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

The case from which we have thus quoted was one in which the loss happened from the negligence of the defendant.

The court had previously declared in the same case, p. 338,



that "It is the law of this court that a common carrier may, by special contract, limit his common-law liability; but he cannot stipulate for exemption from the consequences of his own negligence, or that of his servants," thus expressly affirming the doctrine previously laid down by that learned court in *New Jersey Steam Nav. Co. v. Merchant's Bank*, 6 How. 344; *York Co. v. Central Railroad*, 3 Wall. 107; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Express Co. v. Caldwell*, 21 Wall. 264; *Railroad Co. v. Pratt*, 22 Wall. 123; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Railway Co. v. Stevens*, 95 U. S. 655.

But, although the loss did occur from the negligence of the defendant, the court upheld the agreement as to the value of the property, on the ground, as forcibly stated in the opinion, that "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume.

"The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract."

The rule laid down in *Grogan v. Adams Express Co.*, 114 Pa. St. 523, 60 Am. Rep. 360, a case much relied on by the plaintiff, that "an express company cannot, by special contract or special acceptance, limit its liability for loss of goods, resulting from the negligence of the company or its servants," is not in conflict with the case just quoted from upon this point. And with all due respect to the learned court which rendered this decision, we think that it misapprehended the decision in *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 340, in declaring that that case had decided that a common carrier could limit its liability, even as against its own negligence. The real distinction between these two cases, as it seems to us, is not in the rule adopted by each, but in the application thereof.

In the *Grogan* case the court holds that an agreement as to

value in case of loss by negligence is not binding on the parties, on the ground as we understand the decision, that to hold the contrary would be to uphold the carrier in stipulating against his own negligence, although it holds, at the same time, that an agreement as to value "would be a protection against liability beyond that amount except for negligence."

In this respect the court followed the case of *American Express Co. v. Sands*, 55 Pa. St. 140, and *Farnham v. Camden etc. R. R. Co.*, 55 Pa. St. 53. That is to say, these cases hold that an agreement as to value in case of loss is valid and binding, excepting only where the loss is occasioned by the negligence of the common carrier or his servant. While in the Hart case, before referred to, the court holds that the agreement as to value is also valid and binding where the loss is occasioned by the negligence of the common carrier, and that so to hold "has no tendency to exempt from liability for negligence."

The reasoning in the last-named case is cogent and convincing, and we are disposed to adopt the same in preference to the authorities which hold to the contrary. See also *Oppenheimer v. United States Express Co.*, 69 Ill. 62; 18 Am. Rep. 596; *Kallman v. United States Express Co.*, 3 Kan. 205; *Brehme v. Adams Express Co.*, 25 Md. 328; *Snider v. Adams Express Co.*, 63 Mo. 376; *Levy v. Southern Express Co.*, 4 S. C. 234; *Boorman v. American Express Co.*, 21 Wis. 154.

We therefore decide that it was competent for the parties to agree as to the value of the package in question, in case of loss by negligence, and that, having thus agreed, they are bound thereby. Judgment must therefore be entered for the plaintiff for the sum of fifty dollars.

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**CARRIERS — CONTRACT OF SHIPMENT.** — A shipper who fills out a blank receipt contained in a book previously furnished by a carrier for his use, and obtains the signature of the company's agent upon delivering him a package for transportation, will be presumed to know the contents of the receipt, and if he receives such receipt without objection, his assent to its conditions will, in the absence of fraud, be conclusively presumed: *Pacific Express Co. v. Foley*, 46 Kan. 457; 26 Am. St. Rep. 107, and note with cases collected. As between a carrier and its customers who have notice of its rules before shipments are made, the presumption is that the parties contracted with reference to such rules, and they will be operative: *Miller v. Georgia R. R. etc. Co.*, 88 Ga. 563; 30 Am. St. Rep. 170. See also extended note to *Hill v. Syracuse etc. R. R. Co.*, 29 Am. Rep. 166.

**CARRIERS — POWER TO LIMIT LIABILITY FOR NEGLIGENCE.** — Although a carrier cannot stipulate for absolute exemption from liability for his negli-

gence, he may limit such liability to an amount stated in a written receipt, provided such contract is freely and fairly entered into by the parties, and is just and reasonable in its terms: *Pacific Express Co. v. Foley*, 46 Kan. 457; 26 Am. St. Rep. 107, and note. See extended note to *Chicago etc. R'y Co. v. Chapman*, 23 Am. St. Rep. 593, on the power of a common carrier to limit the amount of his liability in case of loss to a sum less than the injury sustained; also extended note to *Cole v. Goodwin*, 32 Am. Dec. 495. For a further discussion of the question of a carrier's power to limit his liability for negligence, see *Terre Haute etc. R. R. Co. v. Sherwood*, 132 Ind. 129; 32 Am. St. Rep. 239 and note.

## CAPWELL v. SIPE.

[17 RHODE ISLAND, 475.]

**PRIVILEGES OF SUITORS.** — A NONRESIDENT ATTENDING A COURT AS A WITNESS in a suit to which he is a party is not exempt from the service of process in another suit.

**PRIVILEGE OF WITNESSES.** — A NONRESIDENT IN ATTENDANCE IN COURT AS WITNESS in a suit to which he is not a party is exempt from the service of process in another suit.

**PLEADING.** — DILATORY PLEAS are regarded with disfavor, and therefore the matter pleaded must be stated with the highest degree of certainty attainable in a plea, namely, with that degree which is known in law as "certainty to a certain intent in every particular," and must anticipate and exclude all such supposable matter as would, if alleged on the opposite side, defeat the plea.

**PLEADING — PRIVILEGE OF WITNESSES.** — A dilatory plea alleging that the defendants in the action were served with process while they were in attendance upon the court as witnesses in the suit of *A v. B* is not sufficient if it fails to state that they were not parties to such suit as well as witnesses therein.

*Charles A. Wilson and Thomas A. Jenckes*, for the plaintiff.

*Nicholas Van Slyck and Cyrus M. Van Slyck*, for the defendants.

**Per CURIAM.** The writ in this case is a writ of summons. The defendants have filed three pleas in abatement. The first sets forth that, at the time of the service of the writ upon them, the defendants were residents and citizens of the city of Cleveland, in the state of Ohio, and were in attendance upon this court in a suit in which *Atwood & Co.* were plaintiffs and these defendants were defendants, and that these defendants were in the state of Rhode Island solely for the purpose of being in attendance upon said suit. The second plea is like the first, except that it sets forth that the defendants were in attendance upon this court in a suit in

which Atwood & Co. were plaintiffs and these defendants were defendants and material witnesses. The third plea is also like the first, except that it sets forth that the defendants were in attendance upon this court as witnesses in a suit at law entitled *Atwood & Co. v. Sipe and Sigler*, numbered 3690, and omits the allegation at the close that the defendants were in the state of Rhode Island solely for the purpose of being in attendance upon said suit. To these pleas the plaintiff has filed a general demurrer.

In *Baldwin v. Emerson*, 16 R. I. 304, 27 Am. St. Rep. 741, we held that a nonresident suitor attending court in relation to his suit was not exempt from the service of a writ of summons against him in another suit, not being within the reason of the rule adopted in New York and Minnesota, and perhaps in some other states, which exempts witnesses from such service. Perhaps if it appeared that the party to the suit was a merely nominal party, without any personal interest in the suit, and was in attendance merely as such for the purpose of testifying, he would be entitled to exemption from the service of process by summons; for the same inducement might then be necessary to procure his attendance as though he was merely a witness. But we do not think that an ordinary suitor who is personally interested in the result of the suit, though he may also testify in the trial as a witness, is on that account entitled to exemption. We are of the opinion, therefore, that the first and second pleas are insufficient.

The third plea sets forth that the defendants, at the time of the service of the writ upon them, were in attendance upon the court in the case of *Atwood & Co. v. Sipe and Sigler*, numbered 3690, as witnesses. We think this plea would be good if it were sufficiently certain to answer the requirement of the rule relating to pleas in abatement. In regard to these the greatest strictness is insisted upon. The matter pleaded must be stated with the highest degree of certainty attainable in pleading, namely, with that degree which is known in law as "certainty to a certain intent in every particular." The reason for this rigorous requirement is, that pleas of this sort, dilatory pleas as they are now denominated, the object of which is to defeat suits upon grounds other than the merits, are regarded with disfavor. Whenever, therefore, a person seeks to avail himself of the benefit of such a plea, he must bear in mind that, as he is taking advantage of merely technical defects, he must do so in a technically accurate manner.



Says Gould in his Treatise on Pleading, c. 3, sec. 57: "Certainty of the third sort, or 'to a certain intent in every particular,' requires the utmost fullness and particularity of statement as well as the highest attainable accuracy and precision, leaving on the one hand nothing to be supplied by intentment or construction, and on the other no supposable special answer unobviated." "The rule requiring this degree of certainty is a rule, not of construction only, but also of addition, i. e., it requires the pleader not only to answer fully what is necessary to be answered, but also to anticipate and exclude all such supposable matter as would, if alleged on the opposite side, defeat his plea." Lord Kenyon, Ch. J., in *Roberts v. Moon*, 5 Term Rep. 487, remarks: "The court cannot hold too strict a hand over these sort of pleadings, which are calculated to defeat the justice of the case. If, indeed, a plea in abatement be drawn correctly, the court cannot deprive the defendant of the benefit of it. But if there be the least inaccuracy in it, it cannot be supported." And see, also, Chitty on Pleading, 473; 1 Comyns' Digest, 139; *Chetham v. Sleigh*, 3 Lev. 67; *Parsons v. Ely*, 2 Conn. 377, 381; *Adams v. Hodsdon*, 33 Me. 225; *Tweed v. Libbey*, 37 Me. 49. And so great is the disfavor with which pleas in abatement are regarded, that it is not necessary to file a special demurrer to such a plea, but a general demurrer reaches all defects, not only of substance, but of form as well: Gould on Pleading, c. 9, secs. 11, 12; *Ellis v. Ellis*, 4 R. I. 110; *Hoppin v. Jenckes*, 9 R. I. 102; *Bullock v. Bolles*, 9 R. I. 501. Tried by the principles we have stated, laid down in the authorities cited, it is evident that the third plea is also insufficient, and that its insufficiency may be taken advantage of by the general demurrer filed. Though the defendants, as it sets forth, were in attendance upon the court in the suit named as witnesses, they may also have been in attendance as parties to the same suit directly and personally interested in the result of the litigation. If these additional facts had been alleged by the plaintiff by way of replication to the plea, and, admitted by demurrer or upon issue joined, had been proved, it is clear in our opinion that the defense set up in the plea could not have been maintained. It is defective, therefore, in that it does not anticipate and exclude all such supposable matter as would, if alleged, defeat the plea, or, in other words, in that it does not negative the attendance of the defendants in any other

capacity than as witnesses, or as nominal parties merely, not personally interested in the result of that suit.

We are of the opinion that the demurrer should be sustained and the pleas in abatement overruled.

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**SUITORS — PRIVILEGE OF.** — In *Baldwin v. Emerson*, 16 R. I. 304, 27 Am. St. Rep. 741, it was held that a nonresident suitor attending court in the prosecution of a suit is not exempt from the service of a summons against him in another suit; but the contrary doctrine is maintained by the following cases: *Parker v. Marco*, 136 N. Y. 585; 32 Am. St. Rep. 770; *Thornton v. American etc. Machine Co.*, 83 Ga. 288; 20 Am. St. Rep. 320, and note; *Andrews v. Lembeck*, 46 Ohio St. 38; 15 Am. St. Rep. 547.

**WITNESSES — PRIVILEGE OF.** — A resident of one state who comes into another as a witness in a cause pending there is exempt from process for the commencement of a civil action against him in the latter state: *Bolyiano v. Gilbert Lock Co.*, 73 Md. 132; 25 Am. St. Rep. 582, and note; *Parker v. Marco*, 136 N. Y. 585; 32 Am. St. Rep. 770, and note. See also extended note to *In re Healey*, 38 Am. Rep. 717-722.

**PLEADING — DILATORY PLEAS.** — Errors relating to the form of the process and not to the cause of action are in the nature of dilatory pleas, and are not favored: *Wilms v. White*, 26 Md. 380, 90 Am. Dec. 113. The greatest accuracy and precision are required in framing pleas in abatement, as they delay the trial of the merits of the action: *Southard v. Hill*, 44 Me. 92; 60 Am. Dec. 85.

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## CENTRAL BAPTIST CHURCH AND SOCIETY v. MANCHESTER.

[17 RHODE ISLAND, 492.]

**JUDGMENT — WHO BOUND BY.** — ONE NOT A PARTY TO A RECORD, but whose counsel is present and participates in the trial of an action against his servant, agent, or employee, is not bound by the judgment therein, though the action is in trespass *quare clausum*, and the defendant relies upon the title of such third person, and the verdict is against such title.

**JUDGMENT — WHO BOUND BY.** — TO BIND ONE NOT A PARTY OF RECORD by a former judgment it is essential that he should have openly intervened in the former suit, assuming its direction and control, to the knowledge of the opposite party, for the prosecution or defense of some interest in the subject of the suit, or to avoid a liability he may be under to indemnify the defendant against an adverse judgment.

*William P. Sheffield and Francis B. Peckham*, for the plaintiff.

*Charles Acton Ives and Frank F. Nolan*, for the defendant.

**MATTESON, C. J.** This is an action of trespass and ejectment to recover possession of a parcel of land, situated in Tiverton, known as "The Fort Point Lot."

The defendant pleads the general issue, and also an additional plea, in which he sets forth that in a suit of trespass *quare clausum* brought by him in this court against one James B. Church, the defendant therein, said Church pleaded in bar to the suit that the soil and freehold in the *locus*, which was the same described in the declaration in the present suit, was in the Central Baptist Church, the present plaintiff, and justified the doing of the alleged trespasses as the servant, agent, and employee of the said Central Baptist Church; that to this plea he replied, traversing the allegation of title to the close in the said Central Baptist Church, and that upon issue joined, and a trial before a jury, a verdict was returned that the property named in the declaration was not the soil and freehold of the Central Baptist Church, and that at the March term, 1891, of this court, judgment in said action was rendered in favor of the defendant; which judgment is in full force and effect, and is unreversed, unappealed from, and in every respect finally binding upon all the parties who actively participated as nominal or actual parties interested in said action. The additional plea further avers "that, in said action, it, the said Central Baptist Church, the plaintiff herein, was present and participating at the trial, both in the person of the defendant, James B. Church, and by counsel, and is bound by the judgment therein; and that said judgment is an adjudication in favor of the present defendant as between him and said Central Baptist Church as to the title to the said close."

To this additional plea the plaintiff has demurred. The question raised by the demurrer is the validity of the plea of estoppel by the judgment. The material allegation in the plea in this respect is, "that the plaintiff herein was present and participating at the trial of the former suit, both in the person of the defendant, James B. Church, and by counsel." The allegations that the plaintiff is bound by the judgment, and that the judgment is an adjudication in favor of the defendant as between him and the plaintiff as to the title to the close, are not averments of fact, but the conclusions of the pleader as to the law. Precisely what is the meaning of the allegation that the plaintiff herein was present and participating at the trial of the former suit in the person of the defendant is not clear. We understand it to be, that the plaintiff is to be deemed to have been so present, because the defendant, James B. Church, was its servant, agent, and employee; he having justified the acts complained of as tres-

passes, as such servant, agent, and employee. If this construction be correct, the question comes down to this: Is a person, not a party to the record, whose counsel is present and participates in the trial of a suit against his servant, agent, or employee, bound by the judgment rendered in the suit.

Wells, in his treatise on *Res Adjudicata*, sec. 16, in discussing the question who are parties between whom a prior judgment is a bar to further litigation, says that these may or may not be the ostensible parties whose names stand on the record in the primary case, and quotes Greenleaf's definition, that parties are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies. He further states that it has been held that these characteristics may sufficiently exist without making a party an actual party to the record.

In *Wood v. Ensel*, 63 Mo. 193, the record produced in evidence in behalf of the plaintiff, by which he sought to preclude the defendant, did not show the plaintiff's name as a party in the former suit. The plaintiff testified that he was, nevertheless, an active participator in the former trial respecting the same subject-matter, claiming the property in dispute as his own, appearing as a witness in the case, and in the absence of the record plaintiff, who claimed the property only as bailee of the plaintiff, assuming control and direction of the case, and employing and paying the attorneys for its prosecution. The court held that such facts brought the plaintiff clearly within the definition of a party to the former action, notwithstanding the nonappearance of his name on the record.

In *Cecil v. Cecil*, 19 Md. 72, 80, 81 Am. Dec. 626, the court commenting on Greenleaf's definition of parties, declares that the definition is an aggregate, and that all the enumerated qualities must meet in order to constitute a party. The court says: "All these privileges, not any one of them, are essential to the assertion and protection of private rights, and the investigation of the truth. Only, therefore, those who have enjoyed them collectively should be concluded by a decision, judgment, or decree."

In *Black on Judgments*, sec. 540, the conditions requisite to conclude a person, not a defendant of record, by the result of the litigation are stated to be: 1. That the person inter-



vening should come in for the assertion or protection of some claim or interest of his own, either in the subject-matter of the litigation or consisting in a responsibility over to the defendant which will attach if judgment goes against him, and resting either on some covenant or an implied obligation to indemnify him; 2. That he must have defended the action avowedly, and with notice to the opposite party, and not upon a secret understanding; and 3. That his interposition must have been so complete that he was practically substituted for the defendant in the management and control of the case. And it is said that it is not enough to conclude him that he employed the attorney who appeared for the defendant of record, or testified as a witness, or was present and aided in the conduct of the trial, or cross-examined the witnesses, or lent assistance in money or service to the defendant, or joined in taking an appeal: *Shroeder v. Lahrman*, 26 Minn. 87; *Cannon Riv. etc. Ass'n v. Rogers*, 42 Minn. 123; 18 Am. St. Rep. 497; *Brady v. Brady*, 71 Ga. 71; *Majors v. Cowell*, 51 Cal. 478; *Lownsdale v. Portland*, 1 Or. 381.

It is evident from these authorities that it is not sufficient to conclude a party by a judgment in a former suit against his servant, agent, or employee, to which he was not a party of record, that he employed an attorney who was present for him and participated in the trial, since to bind one, not a party of record, by a former judgment, it is essential that he should have openly intervened in the former suit, assuming its direction and control, to the knowledge of the opposite party, for the prosecution or defense of some interest in the subject of the suit, or to avert a liability he may be under to indemnify the defendant against an adverse judgment. The plea is insufficient, in that it does not contain allegations to that effect. The demurrer must, therefore, be sustained, and the plea be overruled.

Having reached this conclusion, it is unnecessary to consider the effect of the resolution of the general assembly, set forth in the replication to the plea, filed subject to the demurrer to the plea.

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**JUDGMENTS — WHO BOUND BY.** — The doctrine of former adjudication is limited in actions in *personam* to parties and privies, and the party who invokes it must be one who tendered to the other an issue to which the latter could have demurred or pleaded: *Jones v. Vert*, 121 Ind. 140; 16 Am. St. Rep. 379. One not a party to an action cannot be estopped nor claim an estoppel against the plaintiff by the judgment on the ground that he was the

real party in interest, unless he conducted the defense openly and to the knowledge of the plaintiff, and for the defense of his own interests; *Cannon Riv. etc. Ass'n v. Rogers*, 42 Minn. 123; 18 Am. St. Rep. 497, and note; *Smith v. United States Express Co.*, 135 Ill. 279. For a further discussion of this subject, see the extended notes to *Gould v. Sternburg*, 15 Am. St. Rep. 142; *Hill v. Bain*, 2 Am. St. Rep. 876, and note to *Sauls v. Freeman*, 12 Am. St. Rep. 199.

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## BUTLER v. BAKER.

[17 RHODE ISLAND, 582.]

**BROKER, WHEN ENTITLED TO COMMISSIONS.** — Before a broker can recover commissions for selling property it must appear that he procured a purchaser of sufficient pecuniary ability to make a purchase. Though the person procured by the broker enters into a contract of purchase, yet if he is not able to comply with his contract, and the seller, in accepting him as the purchaser, did not rely upon his own judgment, but rather upon that of the broker, the latter is not entitled to commissions. The production by the broker of a person as a purchaser is an implied representation on his part that such person is able financially, as well as ready and willing, to purchase.

*John W. Hogan* for the plaintiff.

*Edward C. Dubois* for the defendant.

**MATTESON, C. J.** This is an action of *assumpsit* to recover compensation claimed to be due to the plaintiff as a real estate broker. The plaintiff testified at the trial in the court of common pleas that he contracted with the defendant to find a purchaser of his estate for \$2,800, and that the defendant agreed with him that he should have as his commission for the sale all that the estate should bring over \$2,800; that he found a purchaser named Bronson for the property, at the price of \$2,850, and brought him to the plaintiff's agent; that Bronson paid \$25 on account of the purchase money to the plaintiff's agent, who gave him a receipt therefor, as received from Bronson's wife, dated September 17, 1890, and reciting that the remainder of the purchase money, \$2,825, was to be paid on delivery of the deed on or before October 1, 1890. The plaintiff requested the court to instruct the jury that on such a contract as the one in suit a broker is entitled to his commission upon the production of a purchaser ready and willing to purchase on the seller's terms and the making of a contract to that effect, although the buyer is afterwards unwilling or unable to consummate the contract. The court declined to give the instruction, but charged the jury that the

contract being that the broker should bring a purchaser, the law required him, in order to entitle himself to a commission, to produce a person able as well as ready and willing to purchase the estate. The plaintiff excepted to the charge as given, but not to the refusal of the court to give the instruction requested. The jury returned a verdict for the defendant, and the case is before us on the exception stated, and also upon an exception to the ruling of the court relating to the admission of testimony.

The plaintiff has argued the case as though his exception to the charge as given covered the refusal to give the instruction requested. The question argued, and doubtless intended to be raised, is not strictly before us for the reason stated. Inasmuch, however, as it is open to the plaintiff to raise the question by a petition for new trial on the ground that the verdict is against the evidence, we have thought it proper to give our views upon it. That question is, whether it is enough to entitle a broker to his commission that he has produced a person as a purchaser of an estate who is ready and willing to purchase upon the seller's terms, and a contract has been entered into to that effect between the seller and the person produced, or whether it must also appear that the person produced is of sufficient pecuniary ability to make the purchase. The plaintiff contends that the signing of the receipt setting forth the terms of the contract of sale was an acceptance of Bronson as a purchaser, and that he thereby became entitled to his commission, his contract having then been completed, without reference to Bronson's ability to perform the contract of purchase. We do not assent to this position. The production of a person as a purchaser was an implied representation by the plaintiff to the defendant that Bronson was able financially, as well as ready and willing, to purchase. The case does not show that the defendant had any previous knowledge of Bronson, or exercised any independent judgment of his own concerning Bronson's ability to purchase, but rather that in signing the receipt, and thereby accepting Bronson as purchaser, he relied, as he had a right to rely, upon this implied representation arising out of the plaintiff's duty under the contract. The relation between a broker and his employer is of a confidential nature, requiring the utmost good faith on the part of the former to the latter, and entitling the latter to the benefit of the former's skill, knowledge, and advice. It is scarcely to be presumed that the

defendant, knowing absolutely nothing, so far as the testimony shows, concerning Bronson's financial responsibility, would have accepted him as a purchaser unless he did so in reliance upon the duty of the plaintiff to bring a person capable of becoming a purchaser, or, in other words, possessing the requisite pecuniary ability to make the purchase. The plaintiff's duty as a broker to the defendant as his employer required him to give to the defendant, before the defendant entered into the contract with Bronson, such knowledge as he possessed in relation to Bronson's financial responsibility, or, if he had no knowledge concerning it, to at least have so notified the defendant, in order to give the defendant opportunity to investigate the matter for himself. Had he done so, and the defendant had exercised his own independent judgment, and accepted Bronson as a purchaser, a very different question would have been presented. As he failed to do so, we do not think he is entitled to compensation if Bronson proved to be irresponsible financially, notwithstanding the fact that in the circumstances mentioned the defendant entered into a contract with Bronson for the sale of the property.

We find no case which holds that a broker has fulfilled his undertaking by presenting a person as a purchaser who is not financially able to make the purchase. In *Iselin v. Griffith*, 62 Iowa, 668, 670, it is said: "Something more than a mere offer to purchase should be shown. . . . Such an offer might be made by one without means, nor in any condition to comply with the terms of the sale. . . . An offer from such a one ought not to be considered as constituting the performance of the plaintiff's undertaking to negotiate a sale of the land": See also *McGavock v. Wadlief*, 20 How. 221; *Barnard v. Monnot*, 1 Abb. App. 108; *Simonson v. Kissick*, 4 Daly, 143; *Duclos v. Cunningham*, 102 N. Y. 678; *Kimberly v. Henderson*, 29 Md. 512; *Sievers v. Griffin*, 14 Ill. App. 63; *Leahy v. Hair*, 33 Ill. App. 461; *Zeidler v. Walker*, 41 Mo. App. 118; *McLaughlin v. Wheeler* (S. Dak., Jan. 30, 1891), 47 N. W. Rep. 816.

The cases differ as to the question on whom rests the burden of proof in showing the financial ability of the proposed purchaser. The following hold that the burden is on the plaintiff suing for his commission, on the ground that it is a part of his undertaking to produce a person of sufficient financial ability: *Iselin v. Griffith*, 62 Iowa, 668; *Coleman v. Meade*, 13 Bush, 358; *Pratt v. Hotchkiss*, 10 Ill. App. 603;



*Leahy v. Hair*, 33 Ill. App. 461; *Zeidler v. Walker*, 41 Mo. App. 118. The following, on the other hand, hold that the burden is on the defendant, on the ground that it is to be presumed, until the contrary appears, that the person procured as a purchaser is solvent and pecuniarily able to make the purchase: *Goss v. Broom*, 31 Minn. 484; *Hart v. Hoffman*, 44 How. Pr. 168; *Simonson v. Kissick*, 4 Daly, 143; *Cook v. Kroemeke*, 4 Daly, 268. It is not necessary for us to decide this question. No testimony was adduced by the plaintiff in relation to Bronson's financial responsibility, although the plaintiff called him as a witness to other matters. On the part of the defendant, it was shown that on October 1, 1890, the last day of the period limited for the payment of the residue of the purchase money and the delivery of the deed, Bronson, instead of going prepared to pay the money and take the deed, went to ask for additional time in which to obtain the money, and that, though the defendant held himself in readiness to complete the sale on his part for four weeks thereafter, Bronson did not obtain the money and consummate the purchase.

We think that this evidence, in the absence of anything to the contrary, warranted the court in instructing the jury that they might infer from it, and the jury in finding, that Bronson was not of sufficient pecuniary ability to consummate the purchase.

The testimony admitted, subject to the plaintiff's exception, related to what took place between the defendant and Bronson in reference to the contract after, as the plaintiff claimed, he was entitled to his commission by the acceptance of Bronson as a purchaser by the defendant. In the view of the case we have taken, the testimony was properly admitted.

Exceptions overruled, and judgment of the court of common pleas affirmed with costs of this court.

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**BROKERS — WHEN ENTITLED TO COMMISSION — INABILITY OF PURCHASER TO COMPLETE CONTRACT.** — This subject is thoroughly treated in *Kalley v. Baker*, 132 N. Y. 1; 28 Am. St. Rep. 542, and an extended note thereto. See also *Ward v. Cobb*, 148 Mass. 518; 12 Am. St. Rep. 587, and note; note to *Walker v. Osgood*, 93 Am. Dec. 175.

## DODGE v. GRANGER.

[17 RHODE ISLAND, 664.]

**MUNICIPAL CORPORATIONS. — MEMBERS OF A MUNICIPAL FIRE DEPARTMENT** are public officers, for whose negligence the municipality is not answerable. No exception to this rule arises from the fact that the negligent act complained of was not done at a fire, but consisted in negligently placing a ladder across a sidewalk in front of an engine house.

*William W. Blodgett, Edward W. Blodgett, and Willard B. Tanner*, for the plaintiff.

*Nicholas Van Slyck and Cyrus M. Van Slyck*, for the defendant.

**TILLINGHAST, J.** This is an action of trespass on the case to recover damages from the city of Providence, for injuries resulting from the alleged negligence of said city in failing to keep a certain public street or highway, known as Exchange Place, in suitable repair, so that it should be safe and convenient for travelers.

The declaration sets out that some of the members of the fire department of said city connected with the fire-engine house known as Station No. 1, situated on said Exchange Place, for the purpose of more easily cleaning said station, placed one of the hook-and-ladder trucks belonging to said city, and in the care and under the control of said fire department, so that one of the ladders projected across the sidewalk directly in front of said engine house, where it was allowed to remain for the space of, to wit, one hour, and that the plaintiff, while passing along said sidewalk between four and five o'clock in the afternoon, in the exercise of due care, came in contact with the said ladder and was injured. It also sets out that the members of said fire department had been for a long time prior thereto, to wit, for the space of ten years prior to said accident, in the frequent and daily habit of placing their trucks so that the ladders thereof would project across said sidewalk in front of said house, without warning to the public, at all hours of the day.

The defendant demurs to the declaration on the ground that the members of the fire department are public officers, for whose negligent acts the city is not liable.

The plaintiff, while admitting the general doctrine contended for by the defendant in support of its demurrer, yet claims that the case stated in the declaration is not governed

by the rule announced, for the reason that the act complained of was not one which was done at a fire, or on the way to or returning from a fire, but was the negligently placing of a truck at said station and leaving it there so that the projecting ladders formed an obstruction to the street and sidewalk, for which the city is liable the same as if said obstruction had been placed there by a mere stranger.

We do not think that the plaintiff's position is tenable. It is the duty of the fire department to take care of its apparatus and keep it in proper condition for use, as well as to use it for the extinguishment of fires, and the members of said department are acting in the line of their duty while so taking care of said appliances as fully as when actually engaged in extinguishing fires.

The efficiency and usefulness of such a department must necessarily depend very largely upon the diligence exercised in the management and care of its appliances when not in actual service, so that the same may at all times be in proper condition for instant use. The cleaning of the station house referred to in the declaration was evidently necessary and proper, both on account of the health and comfort of the firemen stationed there, and also for the better protection and preservation of said appliances.

It is evidently necessary that the horses belonging to the department should be taken care of and exercised, that hose and hydrants should frequently be tested, and that the entire apparatus should be kept in the best of repair. And we fail to see that the city is any more responsible for the negligence of the members of said department when in the performance of these duties than when in the performance of the more important duty of extinguishing fires. The case of *Welsh v. Village of Rutland*, 56 Vt. 228, 48 Am. Rep. 762, is quite similar in several respects to the case at bar. In that case, a hydrant connected with the aqueduct pipe having become frozen, one of the assistant engineers was directed by the village trustees to thaw out the same at the expense of the village. This he proceeded to do, using for the purpose the steam fire engine belonging to the fire department. The water which was allowed to escape from the hydrant in order to clear it of broken ice froze in the street, and the plaintiff falling thereon was injured. But it was held that the plaintiff could not recover.

The court said: "The propriety and necessity of thawing out the hydrants is not disputed; and putting them in condi-

tion for effective service in case of a fire which was liable to occur at any moment was not only directly in the line of duty prescribed by the ordinance just quoted, but also as important a part of the general duty to protect from and extinguish fires as would be the laying of hose or hauling of fire apparatus while a conflagration was in actual progress." . . . . The court further said: "If the defendant were liable in this case, it would be impossible to avoid a similar conclusion in a case of a negligent or careless act in putting the hydrants in order for efficiency, or in the use or repair of any of the fire apparatus, or indeed any negligence or carelessness of firemen while in active service at a fire, and that would be a state of law which, it must readily be seen, cities and villages could not live under."

In *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196, the city was held not to be liable for a personal injury to the plaintiff caused by the bursting of the hose attached to a fire engine. Gray, J., said: "In the absence of express statute, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them, than in the case of a town house or a public way. It makes no difference whether the legislature itself prescribes the duties of the officers charged with the repair and management of fire engines, or delegates to the city or town the definition of those duties by ordinance or by by-law. However appointed or elected, such persons are public officers who perform duties imposed by law for the benefit of all the citizens, the performance of which the city or town has no control over, and derives no benefit from in its corporate capacity. The acts of such public officers are their own official acts, and not the acts of the municipal corporation or its agents." In the case of *Burrill v. City of Augusta*, 78 Me. 118; 57 Am. Rep. 788, the plaintiff alleged that the officers of the fire department of the defendant city, having occasion to use a steam fire engine belonging to said city for a necessary purpose, after said use carelessly and negligently allowed the engine to stand within the limits of a public street in said city, and, while so standing negligently drew the fire and permitted the steam to escape therefrom with a great noise, whereby the plaintiff's horse, which she was rightfully driving upon the street, was frightened, ran away, and the plaintiff, without any fault on her part was thrown to the ground and injured. The defendant demurred to the declara-



tion, and the demurrer was sustained on the ground that a municipal corporation is not liable for the negligent acts of its fire department while in the discharge of their official duties. See, also, 7 Am. & Eng. Ency. of Law, 997, 998, and cases cited; Dillon on Municipal Corporations, 4th ed., sec. 976, and cases cited; *Aldrich v. Tripp*, 11 R. I. 141; 23 Am. Rep. 434; *Wixon v. Newport*, 13 R. I. 454; 43 Am. Rep. 35.

We do not wish to be understood to hold that a city may not be liable for damages resulting from an obstruction wrongfully placed and unreasonably continued in a highway by the fire department. For it being the duty of towns and cities to keep their highways in repair, so that the same shall be safe and convenient for travellers, it follows that a liability would arise for permitting a nuisance to exist in a highway after due notice thereof, no matter by whom it should be caused.

But we do not think that the acts charged in the plaintiff's declaration, under the circumstances therein set forth, can be held to constitute such a nuisance.

The question raised as to whether the declaration sufficiently shows that the defendant had notice of the alleged obstruction, therefore, is of no importance

Demurrer sustained.

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**MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENT ACTS OF MEMBERS OF FIRE DEPARTMENT.** — A city is not liable for the negligent act of its fireman in so opening the door to an engine house as to injure a pedestrian on the sidewalk: *Kies v. City of Erie*, 135 Pa. St. 144; 20 Am. St. Rep. 867. A municipal corporation is not liable for the negligence of its fire department: *Welsh v. Rutland*, 56 Vt. 228; 48 Am. Rep. 762; *Wilcox v. Chicago*, 107 Ill. 334; 47 Am. Rep. 434; *Robinson v. Evansville*, 87 Ind. 334; 44 Am. Rep. 770; *Greenwood v. Louisville*, 13 Bush. 226; 26 Am. Rep. 263; *Huges v. Oshkosh*, 33 Wis. 314; 14 Am. Rep. 760; *Heller v. Sedalia*, 53 Mo. 159; 14 Am. Rep. 444, and note; *Torbush v. Norwich*, 38 Conn. 225; 9 Am. Rep. 395; *Jewett v. New Haven*, 38 Conn. 368; 9 Am. Rep. 382; *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196; *Wheeler v. Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 368, and also the cases cited in the opinion to the leading case.

## ALLEN v. KEILY.

[17 RHODE ISLAND, 731.]

**A LANDLORD MAY FORCIBLY EJECT A TENANT FROM HIS PREMISES AFTER THE EXPIRATION OF HIS LEASE**, though the tenant is in possession under a fair claim of right to remain a tenant. If the tenancy has in fact terminated, he is a mere trespasser, and the landlord has the right to use so much force as is reasonably necessary to expel him.

*John M. Brennan*, for the plaintiffs.

*George J. West and John Palmer*, for the defendant.

**TILLINGHAST, J.** The only question raised by the exceptions taken to the rulings of the court in this case is, whether a landlord can forcibly eject a tenant from his premises, after the expiration of the tenancy, if the tenant holds possession, in good faith, under a color and reasonable claim of right.

The defendant requested the court to charge the jury as follows, viz:—

1. "If the landlord enter and expel the occupant who wrongly holds a tenement, but uses no more force than is reasonably necessary to accomplish this, he will not be liable to an action of assault and battery, although, in order to effect such expulsion and removal, it becomes necessary to use so much force and violence as to subject him to an indictment at common law for a breach of the peace, or under the statute for making forcible entry."

2. "If the plaintiff was in possession, but the rent was due more than fifteen days after demand, the plaintiff was a mere trespasser and could be expelled by the defendant."

These requests were refused by the court, and the following was charged in lieu thereof, viz.: "One in possession under a reasonable claim and color of right, honestly believing it, has a right to maintain his possession, and no personal violence can be used to expel him . . . . If Mrs. Baldwin was in possession under a claim of right, the defendant had no right to use any degree of personal force to expel plaintiff."

In explanation of its charge, and refusal to charge as requested, the court stated the law applicable to the case on trial to be as follows, viz.: "That an owner has the right to put an undoubted trespasser off his premises. But if one is out of possession of property held by another under a color and reasonable claim of right, he has no right to use personal violence to regain possession. Hence, if Mrs. Baldwin was in

possession under a fair claim of right to remain a tenant, or under her husband's tenancy, on the ground that the defendant had money belonging to one of them in his possession, more than the amount of rent due, on account of which her occupation had been recognized, he had no right to use personal violence to eject her." We think this was error.

The question at issue, in so far as the tenancy in question was concerned, was, whether or not it had been terminated. If it had, the plaintiff was a mere trespasser, and the defendant had the right to use so much force as was reasonably necessary to expel her. If the tenancy had not been terminated, she was not a trespasser, and the defendant had no right to interfere with her. But the question as to whether Mr. Baldwin was entitled to possessions was a mere question of right, depending upon the fact as to whether the tenancy had been legally terminated, and not upon the belief of the tenant as to her right to remain. That is to say, the mere fact that a person honestly believes that he is lawfully in possession of a tenement or messuage does not prevent him from being a trespasser, and liable to be dealt with as such. Possession of real estate is either rightful or wrongful. And the right to the possession thereof, like the right of ownership, is to be determined solely by the evidence submitted, and the law applicable thereto, and is not dependent upon, or in any degree affected by, the belief of the claimant as to such right. If this were not so, it would be in the power of any one in the wrongful possession of real estate, who believes his possession to be rightful, to compel the person who is legally entitled to the possession thereof to resort to an action at law to recover the same, thus practically nullifying the right which the law confers upon the owner to take forcible possession by expelling the trespasser.

Nor do we see that the distinction made by the court, between "an undoubted trespasser" and one who holds possession "under a color and reasonable claim of right," changes the legal aspect of the case. Mrs. Baldwin was either a trespasser or she was not. If she was, neither her belief that she was not, nor the fact that she held "under a color and reasonable claim of right," was of any importance. The only question of importance concerning this branch of the case was, whether she was in fact a trespasser. And this was a question to be determined by the jury upon all the proof bearing upon that point.

The doctrine laid down by this court in *Souter v. Codman*, 14 R. I. 119, 51 Am. Rep. 364, and subsequently followed in *Freeman v. Wilson*, 16 R. I. 524, is in harmony with the current of both the American and English decisions as to the right of a landlord to use physical force in expelling a tenant whose term has expired; and we see no reason to overrule or modify the opinions therein expressed: See also, 2 Taylor on Landlord and Tenant, 8th ed., secs. 531, 532, and cases cited.

We are therefore of the opinion that the court erred in refusing the defendant's requests to charge, and in charging to the contrary, as above set forth.

Petition granted.

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**LANDLORD AND TENANT—FORCIBLE EJECTMENT OF TENANT BY LANDLORD AT EXPIRATION OF TERM.**—A landlord may forcibly enter the premises and eject without unnecessary force a tenant who is holding over and who has reasonable notice to quit, and by so doing he will not be liable to an action for assault: *Low v. Elwell*, 121 Mass. 309; 23 Am. Rep. 272; *Gillespie v. Beecher*, 85 Mich. 347; *Freeman v. Wilson*, 16 R. I. 524; *Stearns v. Sampson*, 59 Me. 568; 8 Am. Rep. 442. See extended notes to *State v. Ross*, 69 Am. Dec. 754; *Daniels v. Brown*, 69 Am. Dec. 508, and *Mosseller v. Deaver*, 19 Am. St. Rep. 544.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**VERMONT.**

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**REYNOLDS v. BOSTON AND MAINE R. R. Co.**

[64 VERMONT, 66.]

**A RAILROAD USING THE CARS OF A CONNECTING LINE IS LIABLE to the same extent as if they were its own, if such cars, when received and used, are in a condition dangerous to its employees.**

**MASTER AND SERVANT — DUTY TO INSTRUCT SERVANT AS TO PERILS OF SERVICE.** — If an employer engages one to perform a dangerous service, requiring caution and the exercise of peculiar skill, knowing that he is inexperienced and ignorant of such danger, it is the duty of the employer to give suitable instructions and warnings as to the danger he is likely to meet in the discharge of his duties.

**MASTER AND SERVANT. — A WARNING OF DANGER IS NOT SUFFICIENT to exonerate an employer, unless it discloses to the employee of what the danger consists and how to avoid it.**

**RAILWAYS. — IF CARS ARE BROUGHT UPON A ROAD WITH COUPLINGS OF A MORE DANGEROUS CHARACTER than those which a brakeman has been in the habit of using, and he is ignorant of their different couplings and of their dangers and the mode of avoiding them, it is negligence on the part of a railway corporation and its agents to permit such brakeman to work with cars having such couplings without giving him warning of the danger to which he is exposed and instructing him how to avoid it.**

**NEGLIGENCE, CONTRIBUTORY, WHEN A QUESTION FOR THE JURY.** — Whether a brakeman was guilty of contributory negligence in attempting to couple cars in the manner which he did is a question for the jury, if he was inexperienced, and ignorant of the perils to which he was exposed, and his employer had not given him proper instructions to aid him in avoiding such dangers.

**ACTION on the case to recover compensation for injuries received by the plaintiff while a brakeman in the service of the defendant.** The plaintiff's arm was caught between the dead-woods of two cars which he was seeking to couple. These cars belonged to another line of railway, from which they

were received by the defendant for the purpose of transportation over its line. The court directed the jury to return a verdict for the defendant. The plaintiff excepted.

*C. A. Prouty and E. A. Cook*, for the plaintiff.

*Dickerman and Young*, for the defendant.

TAFT, J. After the plaintiff rested in the opening of his case the defendant moved for a verdict upon the ground that there was no testimony tending to show that the defendant was negligent in receiving or hauling the cars which caused the injury to the plaintiff, nor in cautioning the plaintiff about the work that he was to do. The plaintiff claimed to recover upon both grounds. The cars causing the injury did not belong to the defendant, were not of its construction, but came to it, in the course of its business, from a connecting road. It is difficult to see any distinction between the liability of the defendant in respect of its own cars and those belonging to another road coming to it for transportation over its line. If any part of the equipment of a car is not safe and suitable when annexed to its own property, it is doubtful if the statute would compel it to transport cars belonging to others equipped in the same manner. Conceding that the statute imposes an obligation upon the defendant to receive and forward cars coming to it from a connecting line, it may well be questioned whether it could be compelled to receive those dangerous in their construction or deadly in their use. The defendant urges that in addition to the obligation imposed upon it by statute to receive such cars, that unless it does so it will lose its through business. Whether such would be the result is at least problematical. It might be the means of compelling connecting roads to provide their cars with suitable equipment. Whatever might be the result in respect of a loss of business, we know of no legal reason for relieving a company from liability for its negligence in order to enable it to retain its business. We think the testimony did not tend to show negligence in the defendant in receiving and forwarding cars equipped with double deadwoods; that with suitable instructions to a brakeman, double deadwoods are as safe as single ones. If this was the only question in the case we should be inclined to affirm the ruling of the court below.

The important point in the case is the claim of the plaintiff that the defendant neglected to give him suitable instructions

in regard to coupling cars equipped with double deadwoods. Upon this claim the testimony of the plaintiff tended to show that he was employed by the defendant as a brakeman upon one of its freight trains, and when in the line of his duty was injured in an attempt to couple two cars equipped with double deadwoods; that freight cars are equipped with deadwoods, either single or double; that in coupling cars with single deadwoods, the latter do not meet, being prevented from meeting by a shoulder upon the drawback, leaving a space between them sufficiently wide for the brakeman to use his arm in handling the coupling pin; that with double deadwoods, when the cars come together, the deadwoods meet; that coupling freight cars is a very dangerous business with either kind of deadwoods; that he was a young man, ignorant of railroad service, inexperienced in coupling cars, and at the time of the accident had not observed cars with double deadwoods; that defendant employed him, knowing of his ignorance and inexperience, put him at work as brakeman, gave him no instructions as to coupling cars, save as to certain danger from cars loaded with lumber; that within a few days he learned to couple cars with single deadwoods, but that in his first attempt to couple double deadwood cars he lost an arm; that the manner of coupling the two kinds was essentially different; that in coupling cars equipped with double deadwoods the arm and hand must be kept above or below the deadwoods instead of between them, as in the case of single deadwoods, as the double ones meet, while the single ones do not; that double deadwood cars were brought onto the defendant's road daily in large numbers; that one might reasonably be expected in any train; that about the sixth day of this service he was called upon suddenly to couple the two parts of a train, and attempted to do it; that the cars were equipped with double deadwoods, and he, not noticing the difference, made the attempt in his usual way; that his arm was caught at once, and crushed between the deadwoods. These are the main facts indicated by the plaintiff's testimony. Did he have the right to have them submitted to the jury?

When an employer engages one to perform a dangerous service which requires caution and the exercise of peculiar skill, knowing that he is without experience and ignorant of its dangers, it is the duty of the employer to give the employee suitable instructions and warnings as to the dangers he is

likely to meet in the performance of the services he is engaged in and is required by the employer to perform. The defendant does not seriously contend against this rule, but insists that at the time of the accident it was using all reasonable means to instruct the plaintiff as to the duties of his position, the dangers of the work, and how to avoid them. But this very fact was one that the plaintiff had the right to have the jury pass upon, for the court cannot say as matter of law that the defendant was fulfilling its duty in respect of instructions. In his few days of service he had learned to couple single deadwood cars, and had been warned of danger from cars loaded with lumber, but his testimony tended to show that he had not been instructed as to double deadwood cars, not even informed of their existence. In this respect we think it tended to show negligence in the defendant in not giving him suitable instructions as to the manner of coupling them and its dangers. It did not suffice for the defendant to tell the plaintiff that he must be careful, that the business was highly dangerous; this must have been apparent to anyone of ordinary observation. He should have been told in what the dangers consisted and how to avoid them, and given suitable instructions as to his duties.

The defendant makes the further objection that the accident was caused by the plaintiff's own negligence. There is no doubt about the rule of law invoked by the defendant in this respect. Conceding the negligence of the defendant, if that of the plaintiff contributed in the least degree to the accident, there can be no recovery. But this was not a question for the court as the evidence then stood before it. It was a proper question for the jury. It is true that at the time of the accident the plaintiff could see the drawbars, he could see the double deadwoods, the cars were fast coming together, he had at the most but a few seconds to make any observations or examine the appliances for connecting them. If it was apparent to him at the time that the deadwoods would meet under any circumstances, the claim of the defendant might be urged with some force, but the question is, was he negligent in not observing that they would meet, that the drawbars were so constructed that they would be pushed back under the cars so that the deadwoods would meet? In all the cars which he had then handled the drawbars prevented the deadwoods from meeting; he had but a few seconds to observe and act, and to say as matter of law that he was



negligent in not noticing that the double deadwoods would meet is to hold him to a rule which we think is too strict. It was for the jury to say whether, under all the circumstances, he was negligent. It is true that a servant assumes the known and obvious dangers attendant upon his entering and continuing in the employment in which he is engaged, but this rule does not relieve the employer from the duty of giving the servant suitable instructions as to the peculiar dangers of the service. The dangers may be obvious to an experienced brakeman, but an inexperienced one, or one with no instructions, may fail in perceiving them. The service is fraught with danger. Railroad statistics show that one brakeman is killed and more than twenty are wounded in the United States daily in coupling and uncoupling cars; experts in the service often suffer, much more the ignorant and inexperienced. The equipment of the car which caused the plaintiff's injury is appropriately denominated the "deadwood," for whatever gets between them is thereafter "as dead as a door nail." A brakeman's body or arm is a frail instrument when used to stop a moving freight train. A master must not expose a servant ignorant of the great dangers of the service and inexperienced in the manner of performing them, even with his consent to such dangers, without instructions and cautions sufficient to enable him to do his work as safely as the circumstances by which he is surrounded permit, he exercising reasonable care and prudence on his part. An experienced man may safely do a service involving obvious danger, while certain injury would follow the attempt to do it by one inexperienced or without instructions; an inexperienced man may see the danger, but be ignorant of the risk and of the manner of performing the work so as to avoid injury therefrom. This case is a good illustration of the reasonableness of the rule requiring instructions and cautions by a master of the hazards of the service in which the servant is engaged. Had the plaintiff been informed of double deadwoods, and shown how to couple cars equipped with them, he would undoubtedly have avoided the injury, the master at least would not have been in fault. An object lesson of thirty minutes duration would no doubt have been sufficient to teach him the mode of coupling cars equipped with double deadwoods and the dangers incident thereto. The testimony tending to show negligence in the defendant in the respect indicated, and that the plaintiff was in the exercise of due care, the case should

have been submitted to the jury. In failing to do this there was error in the ruling of the court below, for which the judgment is reversed and cause remanded.

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**CONTRIBUTORY NEGLIGENCE — WHEN A QUESTION FOR JURY.** — When considerable doubt exists as to whether or not the plaintiff was guilty of contributory negligence, that question should be submitted to the jury for its determination: *People's Bank v. Morgolofski*, 75 Md. 432; 32 Am. St. Rep. 403, and note; *Ingerman v. Moore*, 90 Cal. 410; 25 Am. St. Rep. 138, and note.

**MASTER AND SERVANT — MASTER'S DUTY TO INSTRUCT INEXPERIENCED SERVANT.** — A master is bound so to instruct an inexperienced servant with reference to dangerous machinery that he can understand and appreciate the danger and the necessity for the exercise of care: *Ingerman v. Moore*, 90 Cal. 410; 25 Am. St. Rep. 138, and note with cases collected; *Myhan v. Louisiana etc. Light Co.*, 41 La. Ann. 964; 17 Am. St. Rep. 436, and note. A master must warn a servant as to all dangers to which he will be exposed in the course of his employment, except such as the employee may be deemed to have foreseen, or which the master cannot be deemed to have foreseen: *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475; 30 Am. St. Rep. 745, and particularly note.

**RAILROADS — LIABILITY FOR DEFECTS OF FOREIGN CARS.** — This question is fully discussed in *Thyng v. Fitchburg R. R. Co.*, 156 Mass. 13; 32 Am. St. Rep. 425, and the note thereto.

**RAILROADS — DUTY TO BRAKEMAN.** — A brakeman ordered to couple cars of peculiar, unusual, and extra hazardous construction, and with which he is entirely unacquainted, should be notified by the company of their unusual construction and the danger arising therefrom; and a failure to give such notice renders the company liable in damages for injury to the brakeman: *Missouri Pac. R'y v. White*, 76 Tex. 102; 18 Am. St. Rep. 33, and note. For a further discussion of the liability of railroads to brakeman for injuries caused by defective coupling to cars see *Mason v. Richmond etc. R. R. Co.*, 111 N. C. 482; 32 Am. St. Rep. 814, and note.

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## BILLINGS v. ACCIDENT INSURANCE COMPANY.

[64 VERMONT, 78.]

**LIFE INSURANCE — SUICIDE.** — Under a policy of life insurance exempting the insurer from liability for the death of the assured from suicide, sane or insane, there can be no recovery if he takes his own life, though at the time he did so he was in such an insane condition that he was incapable of understanding the physical nature and consequences of his act and did not know that by it he would take his own life.

**ACTION to recover upon a policy of life insurance.** It was conceded that the assured committed suicide. The trial court ruled in favor of the defendant.

*Bromley and Clark, and H. A. Harman, for the plaintiff.*

*Henry Ballard and J. C. Baker, for the defendant.*

TAFT, J. It is a condition of the policy in question that it shall not cover a case if death results from suicide (sane or insane). It is not denied by the plaintiff but that the assured died from the effects of a pistol shot, fired by himself, but she insists and offered testimony to show that when the insured so fired the shot, his mind had become so dominated and controlled by an unnatural impulse to fire said pistol into his own forehead, that his will could not resist said impulse, and that he did not voluntarily or intentionally fire the same, but in obedience to such impulse; that at the time when said shot was so fired, deceased had "become mentally incapable of understanding and appreciating the physical nature and consequences of the act he was then committing, and did not understand or appreciate the same, and did not then know nor recognize the fact that by so firing that pistol he would take his own life."

Life insurance companies long since inserted in their contracts a clause of nonliability in case the assured died by "suicide" or "by his own hand," which courts have construed as synonymous terms. In construing this clause courts have widely differed, some, notably those of England, Massachusetts, and New York, holding that no recovery can be had in case of self-destruction, however insane the act of the assured might have been, while others, including this court, in *Hathaway v. National Life Ins. Co.*, 48 Vt. 335, have held that when one's reason and judgment have become so impaired that his mind is overthrown, and he could not resist the insane idea that he must take his own life, although his mind in that condition contrived the means, and his physical strength carried them out and took his life, that such self-destruction did not void the policy. After the decisions holding companies liable in case of suicide by the assured while insane, many companies inserted the condition of nonliability in case of "suicide, sane or insane." This clause has been before the courts for construction, and the decisions generally are, that a company is not liable if the assured designedly dies by his own hand, i. e., if he commits the act intentionally with knowledge of its consequences, although unconscious of its criminal character. This is as far as many of the courts have been required to go upon the facts before

them, but the question has arisen in some instances as to the liability of the insurer in case the assured destroys himself in such an insane condition as to be incapable of understanding the physical nature and consequences of the act he was doing; did not know that by firing the pistol, hanging himself, or doing like acts, he would take his own life. That the insurer is liable in such cases is maintained apparently in *Mutual B. L. Ins. Co. v. Dariess*, 87 Ky. 541; and *Adkins v. Columbia L. Ins. Co.*, 70 Mo. 27; 35 Am. Rep. 410; and perhaps some other cases.

We think the contrary rule the better doctrine. The parties contracted, and the condition is expressed in terms not easily misunderstood; the words are: "Nor will it (the policy) cover death or injury resulting from suicide (sane or insane)." It is not contended that the insured was in any way misled, nor that the contract was contrary to sound morals or public policy. If the insured can contract against hazardous occupations, residence within the tropics in July and August, death in a duel, by the hands of the law, in war, or when intoxicated, why can they not limit their liability in case of suicide, felonious or otherwise? It is our duty to construe the contract made by the parties, not contract for them. The better construction to give a term or phrase in a contract is the one according to its ordinary and common meaning, as mankind would generally understand it. The defendant evidently was unwilling to incur the perils of insanity, and this clause limiting its liability was inserted for its protection. It was a valid contract. The defendant had the right to say that it would not hold itself responsible for the acts of the assured committed when insane, and the question is, can the court with such a contract before it attempt to measure the degrees of insanity. The construction contended for by the plaintiff renders the words "sane or insane" immaterial, surplusage, of no force whatever. They must have been inserted for some purpose. Felonious suicide was not alone in the contemplation of the parties to the contract. If it had been there was no necessity of adding anything to the general words. The defendant says that by force of them we are not to be liable in case the assured dies by suicide, sane or insane, and the only answer is, it is true the assured died by his own hand when insane, but he was very insane,—in fact, so insane, that when he took his life he did not know what he was doing, nor the effect of his acts. If we adopt this construc-



tion of the contract, we add to it an element not agreed to by the parties. If the death of the assured was caused in the manner and under the circumstances stated in the plaintiff's offer of evidence, the defendant is not liable. There was nothing in the evidence nor offer of evidence tending to show an accidental discharge of the pistol, nor that death resulted from anything save the pistol shot fired by the assured. We hold there can be no recovery if the assured committed the fatal act otherwise than accidentally; that the clause "suicide, sane or insane," was intended to and does include self-destruction, irrespective of the assured's mental condition at the time of the act which caused his death. This is the better rule, in that it gives effect to the contract made by the parties and the logical conclusion of the better considered cases: *De Gogorza v. Knickerbocker L. Ins. Co.*, 65 N. Y. 232; *Pierce v. Traveler's L. Ins. Co.*, 34 Wis. 389; *Scarth v. Security M. L. Soc.*, 75 Iowa, 346; *Bigelow v. Berkshire L. Ins. Co.*, 93 U. S. 284; *Chapman v. Republic L. Ins. Co.*, 6 Biss. 238; 5 *Bigelow's Life and Accident Insurance*, 110; *Riley v. Hartford etc. Ins. Co.*, 25 Fed. Rep. 315; *Streeter v. Western Union etc. Soc.*, 65 Mich. 199; 8 Am. St. Rep. 882.

The construction of and ruling of the court upon the clause of the contract in question is sustained.

Under the agreement of the parties the cause is remanded.

ROWELL, MUNSON, and START, JJ., concur.

TYLER and THOMPSON, JJ., dissent.

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**INSURANCE — SUICIDE WHILE INSANE.** — When a policy of life insurance declares that if the insured shall die by his own hand, sane or insane, it shall become void, it is avoided, if he commits suicide while insane, unless the insanity was such that he did not know that his act was done for the purpose of self-destruction: *Streeter v. Western Ins. Co.*, 65 Mich. 199; 8 Am. St. Rep. 882, and especially note where the cases discussing this subject are discussed: *Sabin v. Senate of National Union*, 90 Mich. 177; *Blackstone v. Standard Life etc. Ins. Co.*, 74 Mich. 592; *Michigan etc. Ins. Co. v. Naugle*, 130 Ind. 79. See also extended note to *Phadenhauer v. Germania etc. Ins. Co.*, 19 Am. Rep. 623.

## HUNT v. HAYES.

[64 VERMONT, 89.]

**HUSBAND AND WIFE.** — **IF A WIFE HAS ADEQUATE MEANS OF SUPPORT,** she cannot procure necessities on the credit of her husband though she is living separate from him for justifiable cause.

**ACTION** by plaintiff to recover for necessities furnished the wife of the defendant. She was in possession of an income of two thousand dollars per annum under an antenuptial agreement, out of which she could have procured all necessities. The trial court ruled that the husband was liable notwithstanding this agreement and the income realized from it. It was conceded that the wife was living separate from the husband through his fault and for justifiable cause.

*Gilbert A. Davis, and Dillingham and Huse,* for the plaintiff.

*William Batchelder and William E. Johnson,* for the defendant.

**ROWELL, J.** The authority of a wife to pledge the credit of her husband for necessities is usually regarded as a delegated authority and not as an inherent authority; and it is considered that if she binds him at all in this behalf she binds him only as his agent. But this authority or agency may be a presumption of law as well as an inference of fact; and it must be a presumption of law when an agency in fact, express or implied, is either not proved or is expressly disproved, as is often the case. Thus, in *Harrison v. Grady*, 13 L. T., N. S., 369, it is said that when a wife is turned out of her home without the means of obtaining necessities, it is an irrebuttable presumption of law that she has her husband's authority to pledge his credit for necessities; but that when husband and wife are cohabiting, it is a presumption of fact that she is his agent for ordering articles supplied to their establishment that are suitable to the station that he allows her to assume, but that if they are not suitable to that station, a presumption arises that she was not his agent to pledge his credit for them. So in *Reud v. Legard*, 6 Ex. 637, where a husband was made liable for necessities supplied to his wife during the period of his lunacy, Baron Alderson, says: "If a wife is compelled by her husband's misconduct to procure necessities for herself, as, for instance, if he drives her away from his house, or brings improper persons into it, so that no respectable woman could

live there, then, according to the adjudged cases, he gives her authority to pledge his credit for her necessary maintenance elsewhere, which means that the law gives her authority by force of the relation of husband and wife." Baron Martin said that this is the true foundation of the liability, namely, that by contracting the relation of marriage, a husband takes upon himself the duty of supplying his wife with necessaries, and that if he does not perform that duty, either through his own fault or in consequence of a misfortune of the kind in that case, the wife has, by reason of the relation, an authority to procure them herself, and that the husband is responsible for what is so supplied.

This doctrine is pretty satisfactory; but we should be quite as well satisfied to say that in such cases the law treats the husband just as though he had in fact given the wife authority; the same as in the case of an implied promise, where the law does not really go upon the ground of a promise, but treats the party just as though he had promised; and that is what is meant by an implied promise.

That a wife, wrongfully turned away by her husband without the means of supplying herself with necessaries, may pledge his credit for them, is undeniable. But the question we have to consider is, whether, when thus turned away, she can pledge her husband's credit for necessaries when she has an adequate income of her own with which she can supply herself.

The earliest case we have found on this question is *Warr v. Huntly*, 1 Salk. 118, which is this: An ordinary workingman married a woman of like condition, and after cohabiting for some time the husband left her, and during his absence the wife worked, and this action being brought for her diet, it was held by Lord Holt that the money she earned should go to keep her. The principle of this case is recognized in *Johnston v. Sumner*, 3 Hurl. & N. 261, though the case itself is not referred to. Pollock, C. B., there says: "If the husband turns his wife away, it is not unreasonable to say she has an authority of necessity; for by law she has no property, and may not be able to earn her living; but we should hesitate to say, if a laboring man turned his wife away, she being capable of earning, and earning as much as he did, or if a man turned his wife away, she having a settlement double his income in amount, — that in such cases the wife could bind the husband." But a precarious income is not enough.

Thus in *Thompson v. Hervey*, 4 Burr. 2177, the wife, who had been sent adrift, had a pension of three hundred pounds a year from the crown, granted to her in her own name, but determinable at the pleasure of the crown; and it was held that she could pledge the husband's credit notwithstanding, for that the pension, being only a voluntary grace and bounty and only during the pleasure of the crown, was not what any creditor of hers could be supposed to give her credit upon.

*Liddlow v. Wilmot*, 2 Stark. 86, is much relied upon by the defendant and strongly denied to be in point by the plaintiff. But we think it in point. The original cause of the separation, which took place thirty years before suit brought, did not appear, but a reason for its continuance did appear, for the defendant had long cohabited with another woman, by whom he had a daughter twenty-five years old, consequently the wife was necessarily away, and this is what is said of the case in *Johnston v. Sumner*, 3 Hurl. & N. 261. So it was not a case of separation by mutual consent, as clearly appears by what was said in summing up. The wife had adequate means of her own, but it does not appear whence she derived them, much less that she derived them from her husband by way of an allowance on separation, as is claimed in argument to be the fair inference from the facts stated. Nor is there anything to show that the wife had forfeited her conjugal rights. Lord Ellenborough, in summing up, said: "The first question for consideration is, whether the defendant turned his wife out of doors, or by the indecency of his conduct precluded her from living with him, for then he was bound by law to afford her means of support adequate to her situation; but if either from her husband or from other sources she was possessed of such means, the law gives no remedy against the husband, but the idea of an implied credit is repelled." And this is undoubtedly the law of England. Blackburn, J., in *Bazeley v. Forder*, 9 Best & S. 599, puts it thus: "A wife when separated from her husband in consequence of misconduct on his part rendering it improper for her to remain with him, is in the same position as if he turned her out of doors, and is by law clothed with power to pledge his credit for her reasonable expenses according to her husband's degree, unless she is in some other way supplied with the means of providing them." In this connection it is worthy of remark, if the husband's liability when he turns his wife away is put upon the ground of agency arising from necessity, as many of the



cases do put it (*Eastland v. Burchell*, L. R. 3 Q. B. D. 432), it logically follows that when there is no necessity there can be no agency, for *cessante ratione legis, cessat ipse lex*; and there can be no necessity when the wife has means of her own with which she can supply herself.

*Clifford v. Laton*, 3 Car. & P. 15, is understood by some to be to the same effect as *Liddlow v. Wilmot*, 2 Stark. 86. Mr. Smith so regards it in his 2 Lead. Cas. 438. It is so digested in 4 Jacob's Fisher's Digest, pl. 6041. And in *Johnston v. Sumner*, Pollock, C. B., cites it in connection with *Liddlow v. Wilmot*, 2 Stark. 86, and to the same proposition. And it is quite susceptible of the construction they give it, although it must be admitted that as the case is reported in Carrington and Payne, that point does not very clearly appear.

In *Litson v. Brown*, 26 Ind. 489, it is held that if a wife, living apart from her husband for just cause, has means of her own with which she can support herself, however derived, no necessity exists for others to supply her, and that the husband cannot be made liable except on an express promise to pay. Mr. Schouler, in his work on Husband and Wife, sec. 117, seems to recognize this case as law, for he cites it in support of the proposition that when a husband by his misconduct compels his wife to live apart from him, he is liable for her necessities notwithstanding his allowance, as long as that allowance is insufficient and she has no proper means of support. And we do not think that he elsewhere in his work controverts this doctrine. True, he says that antenuptial settlements cannot vary the terms of the conjugal relation, nor add to nor take from the personal rights and duties of the husband and wife. But he is speaking generally, and without reference to the question we are considering; and what he says is true as a general proposition, both in England and in this country. Indeed we find little or no authority in this country opposed to the view here taken of this question.

But in cases like the one before us, it is for the jury to say whether the wife has adequate means or not for her support.

As to the defendant's liability for the support of his child, it does not appear why the child is with the mother, whether with defendant's consent and approval or against his will and wishes. It may be with her in a way to charge the defendant for its support; but whether it is or not we cannot determine on this record. As to the law of the subject, see *Raw-*

*lyns v. Vandyke*, 3 Esp. 250; *Bazeley v. Forder*, 9 Best. & S. 599; *Gill v. Read*, 5 R. I. 343; 73 Am. Dec. 73; *Reynolds v. Sweetser*, 15 Gray, 78. The case of *Gordon v. Potter*, 17 Vt. 348, which holds that a father is not liable for necessities furnished to his minor child except upon his promise, express or implied, to pay for them, is not opposed to these cases, for they also go upon the ground of an implied promise.

Judgment reversed and cause remanded.

MUNSON, J., dissents.

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**HUSBAND AND WIFE—HUSBAND'S LIABILITY FOR WIFE'S NECESSARIES WHILE LIVING APART WHERE WIFE HAS MEANS.**—Where a husband and wife separate by consent under an agreement that he shall provide her with a competent separate maintenance and he pays it accordingly, he is not liable for necessities supplied her: *Baker v. Barney*, 8 Johns. 72; 5 Am. Dec. 326; see *Alley v. Winn*, 134 Mass. 77; 45 Am. Rep. 297, and note. A husband is not liable for a wife's necessities after she has obtained a decree for alimony against him: *Bennett v. O'Fallon*, 2 Mo. 69; 22 Am. Dec. 440; *Hare v. Gibson*, 32 Ohio St. 33; 30 Am. Rep. 568, and note; but he would not be relieved from such liability by a subsequent provision made for her by a decree for past alimony where the necessities were previously furnished: *Mitchell v. Treanor*, 11 Ga. 324; 56 Am. Dec. 421, and note. A *feme covert* is not liable for support furnished her, and no action lies against her administrator therefor, though he have assets: *Shaw v. Thompson*, 16 Pick. 198; 26 Am. Dec. 655, and note.

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## STATE v. MATHERS.

[64 VERMONT, 101.]

**EVIDENCE IMPROPERLY PROCURED.**—When papers are offered in evidence, the court can take no notice of how they were obtained, whether legally or illegally, properly or improperly, nor will it form a collateral issue to try that question. Hence if a prisoner writes a letter to his wife and intrusts it to his daughter for delivery, and another daughter secures possession of it and produces it at his trial, it is admissible in evidence against him.

**PROSECUTION** for assault to commit rape, resulting in conviction. Part of the evidence of the prosecution consisted of the letter referred to in the opinion of the court.

*W. B. Sheldon*, for the respondent.

*C. H. Mason*, state's attorney, for the state.

**ROWELL, J.** The prisoner, being in jail on a charge of assault and battery with intent to commit rape, wrote a criminal letter to his wife, intended for her alone, and gave it

unsealed to one of his daughters to hand to her; but before delivery it was taken from that daughter's pocket by another daughter and produced at the trial by the prosecution and offered in evidence. The prisoner objected to its admission, for that it was a confidential communication and therefore privileged; but it was admitted, to which he excepted.

Conceding, without deciding, that the letter was a privileged communication in the hands of the daughter to whom it was given, and conceding that it would have been a privileged communication in the hands of the wife, yet this was not a reason for excluding it, coming into the possession of the prosecution as it did. When papers are offered in evidence, the court can take no notice of how they were obtained, whether legally or illegally, properly or improperly, nor will it form a collateral issue to try that question: 1 Greenleaf on Evidence, sec. 254a; 1 Wharton on Evidence, sec. 586. Thus in *Jordon v. Lewis*, H. 13 Geo. 2, B. R., reported in note to *Legatt v. Tollervey*, 14 East, 302, a copy of an indictment obtained without authority was held not to be inadmissible for that reason; and Lee, C. J., said that the court could not notice the manner in which it was obtained. This case was followed in *Legatt v. Tollervey*, 14 East, 302, and a record of the quarter sessions, produced without authority, held admissible notwithstanding. These cases were approved and followed in *Commonwealth v. Dana*, 2 Met. 329, 337.

In *Lloyd v. Mostyn*, 10 Mees & W. 478, the bond in suit was in possession of W. who held it as the representative of a former attorney of the obligors, and was himself the defendant's general attorney, though not his attorney of record in the action, and who had undertaken to produce the bond at the trial if the judge should think he was bound to do so. Before the assizes the bond had been sent by W. to the defendant's attorney in the action, in London, for the purpose of inspection and admission under a judge's order, and the plaintiff's attorney had there taken a correct copy of it. At the trial, W. had the bond in court, but objected to produce it on the ground of privilege, and the objection was allowed. The plaintiff then tendered in evidence said copy of the bond. The defendant objected that the bond having been in the confidential custody of W. a copy so obtained could not be used in evidence; and *Fisher v. Heming*, 1 Phil. Ev. 147, was relied upon as authority. But Baron Parke said he had always

doubted that case, and Lord Abinger said it was impossible to say that the copy was not evidence.

In *State v. Buffington*, 20 Kan. 599, 27 Am. Rep. 193, a letter, written by the defendant to his wife and sent to her by mail, was taken from the post office by the prosecuting witness and handed to the wife, who read it and handed it back to the witness, who furnished it to the prosecuting officer to be read in evidence. There was no testimony tending to show that when offered in evidence it was in the custody or control of anyone except the witness and the prosecuting attorney. Its admission was objected to on the ground of privilege, but the court held it admissible by reason of the circumstances in which it was produced.

Exceptions not sustained and judgment on verdict.

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WITNESSES — HUSBAND AND WIFE — PRIVILEGED COMMUNICATIONS — LETTERS FROM ONE SPOUSE TO THE OTHER. — This subject is fully treated in the monographic note to *Commonwealth v. Sapp*, 29 Am. St. Rep. 411-423, and the cases in harmony with the rule announced in the principal case, that the manner in which evidence is obtained will not be made an issue, are referred to at page 415.

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## WALCOTT v. METROPOLITAN LIFE INSURANCE CO.

[64 VERMONT, 221.]

**LIFE INSURANCE — PRESUMPTION AS TO MODE OF DEATH.** — Nothing appearing to the contrary, the legal presumption is that a man died from a natural cause, and not from an act of self-destruction. The mere fact of death in an unknown manner creates no presumption of suicide, nor does the finding of a coroner's jury that the cause of death was insanity tend to prove the commission of suicide.

**LIFE INSURANCE. — SELF-DESTRUCTION IS NEVER PRESUMED;** and if recovery upon a policy of life insurance is resisted on the ground that the assured committed suicide, the defendant must satisfy the jury, by a preponderance of competent evidence, that the injuries which caused death were intentional on the part of the assured.

**ACTION upon a policy of life insurance.** During the progress of the trial, counsel referred to a finding of a coroner's jury which had been sent by plaintiff to defendant; but neither party offered this finding in evidence. It was, however, admitted that such jury found that the cause of death was insanity. The trial court decided in favor of the defendant by limiting the amount of plaintiff's recovery to the amount of premiums paid under the policy.



*Boyce and Shurtleff*, for the plaintiff.

*Arnoux, Ritch, and Woodford, and Dillingham and Huse*, for the defendant.

**THOMPSON, J.** The plaintiff seeks to recover the amount of a policy of insurance on the life of Andrew J. Gamble, under which she as his widow is the beneficiary.

Among other conditions in the policy is the following: "The liability of said company shall not be deemed to cover the risk of death by suicide; but in the event of the life insured dying by his own hand or act, whether sane or insane, said company shall be held only, upon the surrender of this policy, accompanied with proofs of death as herewithin provided, to return to the said assured the sum of the net premiums previously received, without interest."

The policy of insurance declared on was put in evidence by the plaintiff. She also introduced evidence of the death of the insured, the payment of the premiums that had become due on the policy according to its terms at the time of his death, and of the furnishing the defendant with satisfactory proof of his death.

The plaintiff testified in substance that the insured died sometime during the night of August 10, 1888, and that she learned of his death about six o'clock the following morning; that about three weeks before his death they had a little girl about a year old die, to whom he was very much attached, and that her death so affected him that he became low-spirited, melancholy, and unable to sleep or rest nights, to such an extent that it affected his health, and caused him to keep his room; that on the night of August 10, 1888, he retired to his bed with his wife, the witness, as usual, and got up at half-past eleven in the evening, and went out, stating as he went out the purpose for which he was going, "and that he would be right back again"; that the witness being tired, felt asleep, and did not awake until morning, and that she never saw him again alive. The reporter's certified transcript of the case shows that the counsel for the plaintiff admitted on trial that a coroner's inquest was had respecting the death of the insured, and that certain findings were made in respect thereto by the coroner's jury. It also appeared that a certified copy of the findings of the coroner's jury was furnished the defendant by the plaintiff with the proof of the death of the insured, and that the defendant's attorney had this copy

in court during the trial of the case below; that the plaintiff offered to put the same in evidence, if the defendant would permit her to do so without objection, or to permit the defendant to put the same in evidence without objection; but the defendant declined to put the same in evidence itself, or to permit the plaintiff to do so. W. A. Boyce, one of the plaintiff's attorneys, testified in her behalf, and on cross-examination was shown the copy of the findings of the coroner's jury, and admitted that it was one of the papers which he sent with the proof of death to the defendant, whereupon he was interrogated by the defendant as follows:—

“Q. It purports to be a copy of the findings of the coroner's jury, does it not ?

“A. Something of that purport.

“Q. Wherein they reported that the cause of this man's death was insanity ?

“A. Yes, sir; precisely.”

There was no other evidence excepting as above stated tending to show the circumstances attending the death of the insured, or the cause of his death. The defendant introduced no evidence, but at the close of plaintiff's case rested and moved the court to direct a verdict in its behalf on the ground that the plaintiff's case showed that the insured committed suicide, or died by his own hand, sane or insane, and that the company was not liable by virtue of the exception quoted.

It is not necessary for us to decide as to the admissibility of the finding of the coroner's jury, either alone or as a part of the proof of death, as that question is not raised by either side. As the case stood when this motion was made, and when the case was disposed of by the court below, there was no evidence tending to show that the insured committed suicide, or died by his own hand, sane or insane. It is to be assumed that the witness Boyce correctly stated the finding of the coroner's jury as to the cause of the death of the insured, otherwise the defendant would have put in evidence the proof of death furnished, and which included a copy of this finding. If it were true “that the cause of the man's death was insanity,” that fact had no tendency to prove that he committed suicide, or died by his own hand, sane or insane. Insanity, as well as fever or any other disease, may cause a natural death. Nothing appearing to the contrary, whether a man die from the effects of insanity or any other disease, the legal presumption is that he died a natural death from

natural causes, and not from an act of self-destruction. A person is found dead; the presumption is that his death was natural or accidental. The mere fact of death in an unknown manner creates no legal presumption of suicide, or the taking of one's life by his own hand or act. Upon evenly balanced testimony, the law assumes innocence rather than crime: *Lawson's Presumptive Evidence*, 192; *May on Insurance*, 2d ed., sec. 325; *Mallory v. Travellers' Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410; *Cronkhite v. Travellers' Ins. Co.*, 75 Wis. 116; 17 Am. St. Rep. 184; *Freeman v. Travellers' Ins. Co.*, 144 Mass. 572.

*Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, was an action upon an accident policy of insurance. The defence was: 1. That the death of the insured was caused by suicide; 2. That it was caused by intentional injuries inflicted either by the insured or by some other person. The court below instructed the jury that "it is manifest that self-destruction cannot be presumed. So strong is the instinctive love of life in the human breast, and so uniform the efforts of men to preserve their existence, that suicide cannot be presumed. The plaintiff is therefore entitled to recover, unless the defendant has by competent evidence overcome this presumption, and satisfied the jury by a preponderance of evidence that the injuries which caused the death of the insured were intentional on his part. The presumption is that the death was not voluntary; and the defendant, in order to sustain the issue of suicide on his part, must overcome this presumption, and satisfy the jury that the death was voluntary." The United States supreme court by Harlan, J., on this question say: "In respect to the issue as to suicide, the court instructed the jury that self-destruction was not to be presumed. In *Mallory v. Travellers' Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410, which was a suit upon an accident policy, it appeared that the death was caused by accidental injury, or by the suicidal act of the deceased. 'But,' the court properly said 'the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person.' Did the court err in saying to the jury that, upon the issue as to suicide, the law was for the plaintiff, unless that presumption was overcome by competent evidence? This question must be answered in the negative. The condition that direct and positive proof must be made of death having been caused by external, violent, and accidental means, did not deprive the plaintiff, when making such proof, of the benefit of the rules

of law established for the guidance of courts and juries in the investigation and determination of facts." The case being barren of any evidence tending to show that the insured took his own life, and the presumption of law being to the contrary on the facts shown, the court below properly denied the defendant's motion to have a verdict directed for it.

There being no evidence tending to show self-destruction by the insured, there is no occasion to pass upon the legal effect of this condition in the policy as affecting the right of recovery in a case where the insured, being sane or insane, destroys his own life.

2. The plaintiff also moved the court to direct a verdict for her for the full amount of the policy, which motion the court denied, and directed a verdict for her for the amount of the net premiums received by the defendant without interest. In this there was error. The defendant, by its motion for a verdict on the evidence introduced by the plaintiff, admitted not only the testimony to be true, but also every conclusion which a jury might fairly or reasonably infer therefrom: *Parks v. Ross*, 11 How. 372. After its motion was overruled the defendant did not then ask to go to the jury on any question raised by the evidence, but elected to stand upon its motion for a verdict and its exception to the ruling of the court denying it. As the case then stood the undisputed evidence clearly established the right of the plaintiff to recover the full amount of the policy, and a verdict to that effect should have been directed for her. There was no conflict of evidence, and it, with the inference of law arising therefrom, directly proved the facts in issue: *Lindsay v. Lindsay*, 11 Vt. 621; *Wilder v. Wheeldon*, 56 Vt. 344; *Noyes v. Rockwood*, 56 Vt. 647; *St. Johnsbury v. Thompson*, 59 Vt. 301; 59 Am. Rep. 731; *Latre-mouille v. Bennington etc. Ry Co.*, 63 Vt. 336.

Judgment reversed and cause remanded for new trial.

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FROM the opinion of a majority of the court Judge Taft dissented on the ground that the verdict of the coroner's jury, as admitted by plaintiff, furnished evidence of the suicide of the assured, which the defendant was entitled to have submitted to the jury, and further, that the evidence and other proceedings at the trial all tended to show that the assured was insane, and that it was inferable that because of such insanity, he committed suicide.

INSURANCE—SUICIDE—PRESUMPTION AGAINST.—In case of the violent death of the insured there is a presumption of law that he did not commit suicide: *Insurance Co. v. Bennett*, 90 Tenn. 256; 25 Am. St. Rep. 685, and note; *Cronkhite v. Travellers' Ins. Co.*, 75 Wis. 116; 17 Am. St. Rep. 184, and note; note to *St. Peter v. Western Ins. Co.*, 8 Am. St. Rep. 885.



## NOYES v. HUBBARD.

[64 VERMONT, 302.]

**INSOLVENCY — ALIMONY.** — A judgment for alimony is not released by a discharge in insolvency, when, by statute, the effect of such discharge is declared to be to discharge the insolvent "from debts proved against his estate; and from debts provable founded on a contract made by him." A judgment or decree for alimony is not a judgment for the enforcement of any contract, express or implied, existing between the parties thereto, but for the enforcement of a duty in the performance of which the public, as well as the parties, are interested.

*J. C. Baker*, for the petitioner.

*C. M. Willard*, for the petitionee.

Ross, C. J. This is a petition to the county court, praying that the petitionee be dealt with for contempt for neglecting to perform the decree of that court made in a divorce proceeding between them, ordering him to pay the petitioner one dollar a week for the support of their minor child until the child shall attain the age of eighteen years.

The petitionee pleads in bar to the petition a discharge granted him since the making of the order by the court of insolvency.

The facts of the plea are admitted by the demurrer. The contention is, whether the discharge in insolvency relieved the petitionee from the payment of the money ordered by the decree of alimony. By the Revised Laws, sec. 1856, the discharge in insolvency discharged the petitionee "from debts proved against his estate, and from debts provable founded on contract made by him while an inhabitant of the state, if made within the state, or to be performed within the same, or due to a person resident therein, at the time of filing of the petition." The claim for this alimony was not proved against the estate of the petitioner in insolvency.

The petitionee contends that the claim sought to be enforced is a debt provable, because he contends that the decree granting the alimony is a judgment, and a judgment for the payment of money is a debt founded on a contract. If it be of that character, it could not be enforced by proceedings for contempt, since the passage of the act in 1839 abolishing imprisonment for debt founded on a contract: *Sawyer v. Vilas*, 19 Vt. 43.

While ordinary judgments for the payment of money are

held to evidence debts founded on contract, express or implied, which were discharged by a discharge in bankruptcy under the law of 1841 (*Harrington v. McNaughton*, 20 Vt. 293; *Downer v. Rowell*, 26 Vt. 397), all orders, decrees, and judgments for the payment of money are not of that nature: *Clark v. Trombly*, 19 Vt. 48; *In re Bingham*, 32 Vt. 329; *Leach v. Leach*, 51 Vt. 440; *Leach v. Peabody*, 58 Vt. 485.

A decree of alimony to be performed by the payment of money is not evidence of a debt founded on a contract, express or implied, and may be enforced by imprisonment for contempt: *Andrew v. Andrew*, 62 Vt. 495. It is there held that such a decree is not a judgment for the enforcement of any contract, express or implied, existing between the parties thereto, but for the enforcement of a duty in the performance of which the public as well as the parties are interested. Such a judgment, therefore, is not a judgment founded on a contract, and is not discharged by a discharge in insolvency.

Judgment reversed demurrer sustained, plea in bar adjudged insufficient, and cause remanded.

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**INSOLVENCY. — EFFECT OF DISCHARGE:** See extended note to *Clark v. Rowland*, 53 Am. Dec. 297. Insolvency will not bar a recovery of money promised in an action at law, when the consideration is an act to be performed subsequent to the insolvency: *Smith v. Busby*, 15 Mo. 387; 57 Am. Dec. 207, and note. A discharge in insolvency does not release the debtor from rent accruing under a written lease subsequently to the date named in the discharge: *Mason v. Clough*, 155 Mass. 389. Where a decree of foreclosure is rendered against a party subsequent to his discharge in insolvency, but before it is entered, and he does not apply to the court to limit the plaintiff's recovery to the proceeds of the sale, the discharge will not bar a recovery of any deficiency remaining after the sale: *Leisure v. Kneeland*, 2 Wash. 537; 26 Am. St. Rep. 888, and note. See also *Lochimer v. Stewart*, 91 Tenn. 385; 30 Am. St. Rep. 887, and note.

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## RE BUCKMAN'S WILL.

[64 VERMONT, 313.]

**WITNESSES.** — THE CONTESTANT OF A WILL WHO IS ALSO A LEGATEE THEREUNDER is competent as a witness in proceedings respecting its admission to probate.

**WITNESSES.** — A HUSBAND, AFTER THE DEATH OF HIS WIFE, IS A COMPETENT WITNESS with respect to matters of a nonconfidential nature, not affecting her character.

**WITNESSES** — HUSBAND AND WIFE. — A HUSBAND, AFTER THE DEATH OF HIS WIFE, is a competent witness to prove an agreement made between him and her in the presence of a third person, relative to their respective interests in real property. Such an agreement is a business transaction, and not a confidential communication.

**WILLS.** — EVIDENCE tending to prove that the testator undertook to devise property which did not belong to him, is admissible as bearing upon the issues of testamentary capacity and of undue influence.

PROCEEDING for the probate of the will of Emma Buckman. Her husband, on the trial, offered himself as a witness and his evidence was received. He testified to a conversation with her, in the presence of third persons, in which she admitted that certain real estate standing in her name was their joint property. This real property she devised to persons other than her husband.

*Howe and Cooledge, and George E. Lawrence, for the proponent.*

*J. C. Baker, and Butler and Maloney, for the appellant.*

ROWELL, J. The fact that the contestant is a legatee under the will does not render him incompetent as a witness. The ground and reason for this holding will be found fully set forth in *Foster v. Dickerson*, 64 Vt. 233, and therefore they will not be stated here.

The court properly limited the contestant's testimony to nonconfidential matters and to matters not affecting his wife's character. That is the rule early adopted in this state, and uniformly adhered to in practice: *Smith v. Potter*, 27 Vt. 304; 65 Am. Dec. 198. And it makes no difference that had his wife been living, the contestant could not have been a witness against her; for then he would have been incompetent on the ground of public policy; but now, the marital relation having been dissolved by the death of his wife, that policy no longer renders him incompetent, only to the extent indicated by the rule stated: *Edgell v. Bennett*, 7 Vt. 534.

Nor did the contestant transcend the limit prescribed, by testifying to an agreement or understanding between him and his wife relative to their respective interests in the real estate devised by her will. That was not a matter in which she treated with him in marital confidence when they were alone, but was purely a business transaction, had and done between them in the presence of witnesses, evidently called as such, which precludes the idea of marital confidence.

It is not claimed that the other matters to which he testified were violations of such confidence.

The testimony was relevant to the issue of want of testamentary capacity and to the issue of undue influence; for if the testatrix undertook to devise property not her own, it tended to show mental weakness, as not knowing what property she had nor understanding the true relation she sustained to her husband in respect to their property rights. In *Bellows v. Sowles*, 59 Vt. 63, it was held that evidence that the testator undertook to devise property not his own, tended to show undue influence.

The agreement or understanding to which the contestant testified was only collaterally in issue, so the death of his wife did not render him incompetent by statute to testify to it: *Morse v. Low*, 44 Vt. 561.

Judgment affirmed and to be certified.

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In the case referred to in the opinion of the court as reported in 64 Vermont 233, one of the legatees under the will was allowed to testify, and the action of the court was assailed on the ground that the statutes of the state excluded a party to an action from testifying "where one of the original parties to the contract or cause of action in issue and on trial is dead." The supreme court in sustaining the action of the trial court said: "This is not a case 'where one of the original parties to the contract or cause of action in issue and on trial is dead.' There was no cause of action until the death of the testatrix. The testatrix by her legal representatives is not a party to these proceedings or in any way interested therein, directly or indirectly. The controversy is between living parties, who, on the one side, are the legatees under the will, represented by the proponents, and on the other side are the heirs at law of the testatrix. The former claim to take the estate under the will, and the latter under the statute regulating the descent of estates, insisting that the alleged will is a nullity. The act of the testatrix in making the alleged will is only the subject-matter of the investigation. The proceedings to have the will admitted to probate are in the nature of proceedings *in rem* and establish the relation of all parties to the *corpus* of the estate. The gist of the action is not changed by the fact that the trial may indirectly involve a determination of the relations of the witness to the testatrix. 'The probate of a will establishes its *status*; and the *status* thus established adheres to the will' "as a fixture, and the judgment



or decree in the premises unless avoided in some mode prescribed by law, binds and concludes the whole world": Freeman on Judgments, sec. 608."

**WITNESSES — HUSBAND AND WIFE — EFFECT OF DEATH OF ONE. —** A widow, though interested in the result of the action, is competent to testify to matters relating to her deceased husband's estate, except as to transactions and communications between themselves: *Norris v. Stewart*, 105 N. C. 455; 18 Am. St. Rep. 917; *Short v. Tinsley*, 1 Met. 397; 71 Am. Dec. 482; *Smith v. Potter*, 27 Vt. 304; 65 Am. Dec. 198, and note; *Babcock v. Booth*, 2 Hill, 181; 38 Am. Dec. 578, and note; *Griffin v. Griffin*, 125 Ill. 430. In a suit by a widow against the heirs of her deceased husband to set aside a fraudulent deed, the widow may testify to transactions with her husband and statements made by him: *Crimmins v. Crimmins*, 43 N. J. Eq. 86. But see especially the note to *Commonwealth v. Sapp*, 29 Am. St. Rep. 419.

**WILLS — CAPACITY TO MAKE. —** The testator's knowledge or ignorance of the property owned by him, and which he wants to devise, as evidence of his mental capacity to make a will is discussed in the following authorities, all of which agree that such evidence is admissible: *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85; *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552; *Waddington v. Buzby*, 45 N. J. Eq. 173; 14 Am. St. Rep. 706, and note; note to *Herster v. Herster*, 9 Am. St. Rep. 110; *Bannister v. Jackson*, 45 N. J. Eq. 702; *Lee's Case*, 46 N. J. Eq. 193.

## AUSTIN v. BAILEY.

[64 VERMONT, 367.]

**PAYMENT, WHAT IS NOT. —** THE TAKING OF A NEW NOTE IN SUBSTITUTION for one secured by mortgage does not extinguish the debt evidenced by the latter so as to discharge the mortgage, unless such was the intention of the parties, shown by something besides what arises from the mere act of substitution, and the reason is, that the mortgage secures the debt, not merely the evidence of it; and as a change in the evidence does not pay the debt, the lien of the mortgage is not affected by it.

**MORTGAGE. —** THE TAKING OF A SECOND MORTGAGE ON THE SAME PROPERTY to secure a note given for the amount of a note secured by the first mortgage and for other indebtedness, does not operate to discharge such first mortgage unless such was the intention of the parties.

**MORTGAGE. —** THE FORECLOSURE OF A MORTGAGE DOES NOT EXHAUST THE LIEN as to subsequent encumbrancers who have a right to redeem. These must redeem from the mortgage and cannot redeem from the sale.

*L. F. Wilbur*, for the defendants.

*Seneca Haselton*, for the plaintiff.

**ROWELL, J.** On November 16, 1889, Malaney, owning the colt in question, mortgaged it to the defendants Bailey and Putnam, to secure his promissory note of that date for seventy-five dollars, payable the next day, and the mortgage was recorded on the day of its date. After the note matured, said

defendants put the mortgage, but not the note, into the hands of the defendant Wheeler, a deputy sheriff, to foreclose. But they soon told him to proceed no farther, as there was a virtual agreement to settle the matter; and he did not proceed, but the mortgage remained in his hands.

On February 23, 1890, Malaney gave Bailey and Putnam another mortgage of the colt, to secure his certain other promissory note for \$115, executed that day, but antedated November 17th aforesaid, payable on or before September 16, 1890, in equal monthly installments, commencing February 15, 1890. This note was given for the seventy-five-dollar note secured by the first mortgage and forty dollars that Bailey and Putnam had paid to a third person for keeping the colt, and who had a lien on it therefor superior to their first mortgage.

When the second note and mortgage were given, the first note was given up, but the first mortgage was not discharged, and has not since been, and there is no express finding that the parties thereto intended it should be discharged by the giving of the new note and mortgage.

On January 23, 1890, which was between the giving of said mortgages, Malaney hired the plaintiff to keep and break the colt at five dollars per week; and the plaintiff kept it eight weeks under that agreement, and until March 19, 1890, when the defendant Wheeler, who was proceeding by the direction of the other defendants to foreclose the second mortgage, took it from the plaintiff's possession against his protest and claim of lien, and sold it on that mortgage to the other defendants for \$55, leaving a balance due and unpaid of \$53.80. It does not appear that Bailey and Putnam knew when they took the second mortgage and gave up the old note that Malaney had hired the plaintiff to keep and break the colt. But the plaintiff is charged with notice of the first mortgage, for it was on record.

The plaintiff claims that from the facts found and certified up there arises a legal presumption that the parties intended that the second note and mortgage should operate as payment of the first note and a discharge of the first mortgage; but if not, that this court should presume, if necessary to uphold the judgment, that the county court inferred such intention from the facts found; that in the circumstances, the taking of the second note and mortgage was an abandonment of the first mortgage; but if not, that by taking and selling

the colt on the second mortgage, the defendants are estopped to set up the first mortgage, as the plaintiff's position in the premises was taken with reference to the defendant's position therein.

But the taking of a new note in substitution for one secured by mortgage, does not extinguish the debt evidenced by the latter so as to discharge the mortgage, unless such was the intention of the parties, shown by something besides what arises from the mere act of substitution; and the reason is, that the mortgage secures the debt, not merely the evidence of it, and as a change in the evidence, does not pay the debt, the lien of the mortgage is not affected by it: *Dana v. Binney*, 7 Vt. 493; *Seymour v. Darrow*, 31 Vt. 122.

Nor does the taking of a second mortgage on the same property to secure the substituted note, operate to discharge the first mortgage, unless such was the intention of the parties: 2 Jones on Mortgages, sec. 279; *Hill v. Beebe*, 13 N. Y. 556; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *Packard v. Kingman*, 11 Iowa, 219; *Gregory v. Thomas*, 20 Wend. 17; nor the inclusion of an additional demand in the substituted note. That may serve to show the purpose of the transaction, but it does not show an intention to discharge the prior mortgage: *Hill v. Beebe*, 13 N. Y. 556; 2 Jones on Mortgages, secs. 927, 930. In this case the additional demand did not increase the amount of the lien on the colt, for it was already a lien upon it.

It follows, therefore, that the taking of the new note and mortgage was not in law a discharge nor an abandonment of the first mortgage. Nor by taking and selling the colt on the second mortgage are the defendants estopped to set up the first mortgage, for the plaintiff's position in the premises could not have been taken, as claimed, with reference to the action, for whatever he did was done before that.

But although there is no estoppel, it is necessary to consider whether such taking and sale were effective as matter of law to discharge the lien of the first mortgage by withdrawing the property from its operation. It is undoubtedly true that for most purposes the foreclosure of a mortgage by sale exhausts the lien of the mortgage foreclosed, and severs the connection between it and the property mortgaged. But this is not true as to subsequent encumbrancers who have a right to redeem. They must redeem from the mortgage and cannot redeem from the sale: *Bradley v. Snyder*, 14 Ill. 263; 58

Am. Dec. 564, and note. In this case, without saying how it would be if the facts were otherwise, the property having been purchased by the mortgagees, and, for aught that appears, being still in their possession, the plaintiff's right to redeem from the first mortgage was not affected by the foreclosure of the second mortgage, and as to him such foreclosure was not effective as matter of law to discharge the lien of the first mortgage by withdrawing the property from its operation; hence that mortgage may be set up against him notwithstanding such foreclosure.

As to presuming that the county court inferred from the facts found that the parties intended to discharge the first mortgage—if indeed were we at liberty to thus presume in view of the statute requiring the facts on which the judgment was rendered to be reduced to writing and prohibiting other or different facts at issue from being incorporated into the exceptions—it is sufficient to say that the facts found do not show that the county court ought to have drawn such inference, as is shown by what has been said, and therefore we cannot presume that it did draw such inference: *Pratt v. Page*, 32 Vt. 13.

Judgment reversed and judgment for the defendants.

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**MORTGAGES — DISCHARGE.** — A mortgage is discharged only by payment or release, and not by a change in or renewal of the note which the mortgage was given to secure: *Bunker v. Barron*, 79 Me. 62; 1 Am. St. Rep. 282, and note; *Dunham v. Dey*, 15 Johns. 554; 8 Am. Dec. 282; *Dumell v. Terstegege*, 23 Ind. 397; 85 Am. Dec. 466, and extended note; *Reid v. Abernethy*, 77 Iowa, 438; *Hinton v. Ferrebee*, 107 N. C. 154.

**MORTGAGES — RELEASE OF FIRST BY TAKING SECOND.** — The taking of a second mortgage to secure the same debt secured by a first mortgage, and upon the same property, does not discharge the lien of the first mortgage: *Howard v. First Nat. Bank*, 44 Kan. 549; *Pouder v. Ritzinger*, 119 Ind. 597. The simultaneity of release of one mortgage and the giving of another on the same property to the same mortgagee does avoid the loss of the first mortgage lien by the release: *Woollen v. Hillen*, 9 Gill. 185; 52 Am. Dec. 690, and note.

**MORTGAGES — FORECLOSURE — REDEMPTION BY SUBSEQUENT ENCUMBRANCES:** See extended note to *Horn v. Indianapolis Nat. Bank*, 21 Am. St. Rep. 247. The lien of a mortgage is not exhausted by foreclosure and sale of the mortgaged premises, when the owners of the equity of redemption seek to redeem; it is from the mortgage, and not the sale under it: *Bradley v. Snyder*, 14 Ill. 263; 58 Am. Dec. 564, and extended note.



## WILCOX v. MOON.

[64 VERMONT, 450.]

**LIBEL.** — SENDING A LIBELOUS COMMUNICATION TO A MARRIED WOMAN RESPECTING HERSELF, inclosed in a sealed envelope, is not a publication of the libel. If she shows it to her husband, this is her own act, for which the sender is not answerable.

**ACTION** for libel. The alleged libel consisted of a communication inclosed by the defendant in a sealed envelope, and addressed to plaintiff, who was a married woman. Her husband got the communication from the post office, and handed it to his wife, whereupon she broke the seal, and they read it together. The question was whether this constituted a publication of the libel; and the trial court having ruled it did, the defendant excepted, and caused the exception to be certified to the supreme court, to be there passed upon before final judgment.

*J. C. Baker*, for the defendant.

*Waterman, Martin, and Hitt*, for the plaintiff.

**TAFT, J.** When this case was before the court at the February term, 1891, Munson, J. in the opinion said: "It is true that a communication to the plaintiff wife by a letter so transmitted as not to be seen by others would not be such a publication as would sustain an action": *Wilcox v. Moon*, 63 Vt. 481. To entitle the plaintiff to recover, publication to some third party must be shown, and so sending a libelous letter to the plaintiff, who received it unopened, is no evidence of publication. The gist of the action is the injury to the plaintiff's reputation, which consists in the good opinion of her fellow citizens. If third persons have no knowledge of the libel, she has sustained no injury to her reputation. If the defendant did not publish the libel to third parties, he has committed no wrong for which he is liable in a civil action. The defendant is not liable for a publication by the plaintiff, for it is not the defendant's act. As stated, if a man write a libelous letter, and deliver it to the party himself, it is no publication; sending a sealed letter, if nothing more is shown, is the same as a delivery to the party. Sending an unsealed letter by a messenger who reads it is evidence of a publication. Sending one to a party who cannot read, and this is known to the sender, and the party to whom it is sent from necessity procures another to read

it, is likewise evidence of publication; so is sending such a letter to one whose clerk is in the habit of opening and reading his letters, and this habit is known to the sender, and whose clerk does in fact open and read it. These exceptions to the general rule seem to be based upon the principle that the letter is sent with the intent, on the part of the sender, that, without any act of the person to whom it is sent, or from his necessity, if an illiterate person, it must or may be read by a third person. The letter in question was sealed, sent by the post, and received by the plaintiff unopened. Showing it by the plaintiff to her husband was her own act, not that of the defendant. There was no testimony in the case tending to show knowledge in the defendant that plaintiff's husband was ever in the habit of opening and reading the plaintiff's correspondence. In respect of the publication of a libel, husband and wife are distinct persons, and so a publication to a wife sustains an action in favor of the husband: See *Wilcox v. Moon*, 61 Vt. 484. The husband in this case had no legal right to the letter addressed to the plaintiff. In these modern days, when tendency is to regard husband and wife as distinct persons, we are not inclined to return to the ancient legal fiction regarding them as one. If the twain were one, then, when the husband read the letter, no third person saw it; only the plaintiff herself read it. A libel sent to the wife, and shown by her to her husband, is a publication by the wife, not by the sender. There was nothing in the testimony tending to show a publication by the defendant, nor that he intended the letter should or might be read by anyone before it reached the plaintiff's hands, or by a third person from necessity afterwards. The ruling that the facts stated would constitute a publication was erroneous, and the cause is remanded.

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**LIBEL — SUFFICIENCY OF PUBLICATION.** — No action lies for a libel published only by writing and mailing it to the plaintiff: *Spirits v. Poundstone*, 87 Ind. 522; 44 Am. Rep. 773; *Apolinaire v. Roca*, 43 La. Ann. 842; and it does not constitute a publication by the defendant though the plaintiff afterwards makes the contents of the letter known to other parties: *Fonville v. McNease*, Dud. (S. C.) 303; 31 Am. Dec. 556, and note. But the sender of a libelous letter is liable for its further publication by the receiver, if such further publication was a probable consequence of sending it: *Miller v. Butler*, 6 Cush. 71; 52 Am. Dec. 768, and note. Where a complaint for libel alleges that the defendant did "compose and publish" certain matters concerning the plaintiff and then sets out the libelous matter addressed directly to the plaintiff, it is sufficient on general demurrer, for while the libel is addressed

to the plaintiff it may have been communicated to other persons and thus published: *Wilcox v. Moon*, 63 Vt. 481. To constitute the publication of a libelous letter, the contents need not be made known to the public generally. It is enough if they were made known to a single person: *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455, and note.

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## McCASKER v. ENRIGHT.

[64<sup>th</sup> VERMONT, 488.]

**EVIDENCE OF OTHER TRANSACTIONS.** — When there is a question whether an act is accidental or intentional, the fact that it forms part of a series of similar occurrences, in each of which the person doing the act is concerned, is relevant.

**FRAUDS — EVIDENCE OF OTHER FRAUDULENT TRANSACTIONS.** — If an act is claimed to be fraudulent, evidence of other similar fraudulent acts is admissible if they were committed at or about the same time and the same motive may reasonably be supposed to exist for all of them.

**ASSUMPSIT on a promissory note.** Verdict and judgment for the plaintiff.

*J. C. Enright*, for the defendant.

*George L. Fletcher*, for the plaintiff:

ROWELL, J. The defendant's testimony tended to show that nothing was said about his giving a note for the cloth; that he did not intend to give a note for it, and did not suppose he did, but supposed he was giving an obligation embodying the contract, which was, to pay for the cloth in three months if he had then sold it, but if not, then to pay for what he had sold, return the rest, and receive back his obligation; that O'Brine, the payee of the note, wrote the paper he signed, but did not read it to him, nor did he read it himself, but took O'Brine's statement as to what it was; that when his wife indorsed the paper at O'Brine's request, to show that the sale was made to the head of a family, she attempted to see its face, but was prevented by O'Brine. His testimony further tended to show that he sold none of the cloth, and saw no more of O'Brine, and that the next he heard about it was on August 4, 1890, when he received a letter from the plaintiff, calling him to go to the bank in Chester and pay the note, which was the first time he understood he had given a note.

The defendant claimed as matter of defense that he was defrauded in giving a note instead of an obligation embody-

ing the contract; and on that question O'Brine's intent in the premises was material and relevant.

The defendant does not claim in argument that the testimony in the case impeached the note so as to cast the burden on the plaintiffs to show that they were *bona fide* holders of it, but complains of the exclusion of depositions offered by him to show prior similar fraudulent transactions on the part of O'Brine, had with other parties, whereof the plaintiffs had knowledge before they bought the note in suit. One of those depositions tends to show that O'Brine got the deponent's note for cloth when the deponent supposed he was giving an obligation entirely different in terms and legal effect; that he saw no more of O'Brine; and that the plaintiffs afterwards sued him on the note. Another deposition tends to show that O'Brine got the deponent's note for cloth on the strength of representing that he had twelve tailors following him, cutting and making, who would be along the then next week and "board it all out," and perhaps more; that the twelve tailors did not come; O'Brine was seen no more, and the next deponent knew he received a letter from the plaintiffs that they held the note, and were innocent purchasers thereof.

It is immaterial for present purposes whether those depositions show that the plaintiffs knew about the transactions therein related or not when they bought the note in suit, for if they were relevant to show a fraudulent intent on the part of O'Brine in obtaining the defendant's note instead of his obligation embodying the contract, they should have been admitted, as they, with the testimony in the case, would so far have impeached the note for fraud in obtaining it as to cast the burden on the plaintiffs to show that they were *bona fide* holders.

The plaintiffs claim that the testimony contained in these depositions is too remote, and invoke the rule that inferences cannot be drawn from one transaction to another that is not specifically connected with it merely because the two resemble each other; that they must be linked together by the chain of cause and effect in some assignable way before you can draw the inference. But this, like most general rules, has its exceptions, and one exception is in respect of facts showing system, which Mr. Justice Stephen formulates thus: When there is a question whether an act was accidental or intentional, the fact that such act forms part of a series of similar occurrences, in each of which the person doing the act was



concerned, is deemed to be relevant: Digby on Evidence, art. 12. This exception is variously stated, but well recognized, both in this state and elsewhere. Thus, in *Castle v. Bullard*, 23 How. 172, 186, it is said that the decided cases have established the doctrine that cases of fraud are among the well-recognized exceptions to the general rule that other wrongful acts of the defendant are not admissible on the trial of the particular charge immediately involved in the issue; that similar fraudulent acts are admissible if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration; that some of the decisions go further, and hold that such evidence is admissible as affording a ground of presumption to prove the main charge: *Eastman v. Premo*, 49 Vt. 355; 24 Am. Rep. 142; *Bradley Fertilizer Co. v. Fuller*, 58 Vt. 315, are full authority in this state for the exception.

No claim is made that the transactions disclosed by the depositions were too remote in point of time. The depositions were admissible for the purpose above indicated, and their exclusion was error.

As the point was not made in argument, we express no opinion as to the impeaching quality of the testimony in the case.

Judgment reversed and cause remanded.

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EVIDENCE OF OTHER FRAUDULENT TRANSACTIONS. — When a purchase is claimed to have been fraudulent, evidence of distinct fraudulent purchases made at or about the same time as the purchase under consideration, is admissible: *Cary v. Hotailing*, 1 Hill, 311; 37 Am. Dec. 323, and especially note with cases collected; *Eastman v. Premo*, 49 Vt. 355; 24 Am. Rep. 142. To show the fraudulent intent with which certain representations were made, evidence of other fraudulent representations of a similar character made by the same person and about the same time are admissible: *Perkins v. Prout*, 47 N. H. 387; 93 Am. Dec. 449; but such other transactions must be so near to the one in suit in point of time, and so like it in other relations, that the same fraudulent motive may reasonably be imputed to all: *Hall v. Naylor*, 18 N. Y. 588; 75 Am. Dec. 269, and note. But see *McKay v. Russell*, 3 Wash. 378, 28 Am. St. Rep. 44, where it was held that evidence of similar fraudulent representations made to a third party in a similar but distinct transaction is inadmissible.

## HAWLEY v. SHELDON.

[64 VERMONT, 491.]

**A WATERCOURSE** is a channel or canal for the conveyance of water, particularly in draining lands; and may be natural or artificial. It consists of bed, banks, and water, though the water need not flow continuously. There must be a distinct channel with well-defined banks cut through the turf and into the soil by the flow of the water, presenting on a casual glance to every eye the unmistakable evidence of the frequent action of running water, and not a mere depression.

**WATERCOURSE — TERMINATION OF.** — If a watercourse runs to a point and there spreads over the adjacent land without running in any different channel, it ceases to be a watercourse, and one who by dams and other obstructions prevents it from running over his land is not guilty of obstructing a watercourse.

*J. C. Enright and J. J. Wilson*, for the plaintiffs.

*Gilbert A. Davis, W. E. Johnson, and Frank H. Clark*, for the defendant.

**TYLER, J.** The action in case for obstructing a brook or stream of water. When the plaintiffs rested, the court, on motion, directed a verdict for the defendant.

The plaintiff's evidence tended to show that certain springs in the hillside in their land ran down and formed a small pond near the highway and thence the water made its way through a ravine and spread out upon the meadow below; that in the year 1852, for the purpose of forming a channel for the water and of draining the land so they could drive upon it, they turned a furrow through the ravine, terminating within ten or twelve feet of the line fence between their land and the defendant's; that it was a deep furrow until near the lower end, when it was shallower and ended with a turn to one side so as to discharge the water upon the surface of the ground; that the water that ran in the ditch mainly came from the pond; that water ran in the ditch all the year, generally two to three inches deep by about six inches wide less than that in dry weather and considerably more in case of heavy rains and melting snows; that in 1887, the channel having become obstructed, the plaintiffs cleared it out to about its former capacity; that the water had no channel after it left the ditch; that sometimes when low, it would disappear in the plaintiff's grass land and not visibly reach the division line, and that when it was higher it would overflow upon the defendant's land; some of the witnesses said it "soaked through" the land between the end of the ditch and

the line fence; that it never resumed a channel after it passed onto the land of the defendant; that the defendant with sods and sticks made an obstruction along the line upon his own and the plaintiff's land and prevented the water from entering upon his land, which is the cause of action alleged.

The case must be governed by the law relative to watercourses, which is well settled.

We have seen no better definition of a watercourse than that given by Chancellor Williamson: *Earl v. De Hart*, 12 N. J. Eq. 280; 72 Am. Dec. 395: "A watercourse is a channel or canal for conveyance of water, particularly in draining lands. It may be natural, as when it is made by the natural flow of the water, caused by the general superficies of the surrounding land from which the water is collected into one channel; or it may be artificial, as in case of a ditch or other artificial means used to divert the water from its natural channel, or to carry it from low lands, from which it will not flow in consequence of the natural formation of the surface of the surrounding land." Angell on Watercourses, sec. 4, says that a watercourse consists of bed, banks, and water, though the water need not flow continuously; that many watercourses are sometimes dry. There must be a distinct channel, the bed of the stream, with well-defined banks, cut through the turf and into the soil by the flowing of the water, presenting on a casual glance to every eye the unmistakable evidences of the frequent action of running water, and not a mere depression: *Gibbs v. Williams*, 25 Kan. 214; 37 Am. Rep. 241.

This stream, small as the evidence tended to show it was, and small as was its channel, clearly falls within the legal definition of a watercourse. Its beginning was at the point where it first received the percolating water of the ravine and sent it down towards the meadow in one course; its terminus was at the point where the furrow ran out and the water was discharged upon the meadow near the defendant's land.

By reason of the nature or conformation of the soil, water sometimes leaves its channel, and after spreading over a wide space without apparent banks, flows a considerable distance and again takes a regular channel, yet it maintains its character as a watercourse: *Macomber v. Godfrey*, 108 Mass. 219; 11 Am. Rep. 314; *Gillett v. Johnson*, 30 Conn. 180. But in this case none of the plaintiff's evidence tended to show that the water ever found a channel on the defendant's land; on the contrary, it was lost in the soil near the division line.

From the end of the ditch to the fence, a distance of ten or twelve feet, there was no channel; all the witnesses so testified. William Hawley, one of the plaintiffs, was asked:—

Q. "Why did n't you run it clear down to the line fence?"

A. "I did n't propose to throw all the water on to Mr. Sheldon. I did n't run it there. I left it within ten feet—I don't know just ten—ten or a dozen, and let it spread its natural course."

In answer to the question, "When it gets down to the end of the channel where does it go to," he said: "It spreads off on both farms." So it appears from his own testimony that it became mere surface water, and was squandered when it reached the end of the ditch.

If this stream of water had continued in a defined channel upon and over the defendant's land, he and the plaintiffs would have acquired correlative rights in relation to it. Each party would have had a right to its natural flow, but upon the evidence produced by the plaintiffs, the defendant was not guilty of obstructing a brook or stream of water, and the court below properly directed a verdict in his favor.

Judgment affirmed.

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**WATERCOURSE — DEFINITION.** — A watercourse is a stream of water, usually flowing in a particular direction, with well-defined banks and channels: *Simmons v. Winters*, 21 Or. 35; 28 Am. St. Rep. 727, and note. For a watercourse there must be a channel, a bed to the stream, and not merely lowland or a slough over which water flows: *Chicago etc. R. R. Co. v. Morrow*, 42 Kan. 339. See *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349, cited in the opinion to the leading case.

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## CASWELL v. CASWELL.

[64 VERMONT, 557.]

**DIVORCE BECAUSE OF IMPRISONMENT OF A HUSBAND ON A CONVICTION OF A FELONY** will not be granted if, at the time the marriage was contracted, he had already been convicted of such felony and this fact was known to the wife.

**SUIT for divorce.** Plaintiff, after occupying meretricious relations with the defendant, married another man whom the defendant killed on the day after such marriage, and for this homicide he was tried and convicted of murder in the second degree. After such conviction, but before his sentence, the plaintiff married him. He was subsequently sentenced to



state prison for life, and plaintiff thereafter commenced this suit for divorce. Judgment for the defendant.

*S. C. Shurtleff*, for the petitionee.

**TAFT, J.** To entitle one to relief in a divorce court the party must come with clean hands. It is a general doctrine that a man shall not complain of what he knew or might have known at the time of the marriage. At the time of the marriage the libelant knew, or had good reason to believe, that the libelee would be sentenced to life imprisonment in the state prison under a prior conviction of murder. When one marries a state prison convict it is trifling with the law for the party to say she did not know that sentence would follow conviction. A slight delay would have given the knowledge.

The decree is affirmed. —

**DIVORCE — CAUSE KNOWN TO LIBELANT AT TIME OF MARRIAGE.** — A man cannot avoid a marriage on the ground that the woman falsely represented herself to him as chaste, and thereby induced him to marry her, where he knew she was unchaste before entering into the marriage contract: *Crehore v. Crehore*, 97 Mass. 330; 93 Am. Dec. 93, and note. A man arrested on probable cause and without malice, for seduction, who marries the woman to secure his discharge, cannot have the marriage avoided upon discovering that he could not have been convicted of the seduction: *Marvin v. Marvin*, 52 Ark. 425; 20 Am. St. Rep. 191, and note. See also *McCulloch v. McCulloch*, 69 Tex. 682; 5 Am. St. Rep. 96, and note discussing the pregnancy of the woman at the time of the marriage as a ground for divorce.

## CONNECTICUT RIVER SAVINGS BANK *v.* ALBEE.

[64 VERMONT, 571.]

**TRUSTS.** — A VOLUNTARY COMPLETED TRUST IS VALID and may be enforced in equity though the beneficiary did not assent to nor have notice of it.

**TRUSTS.** — IF A FATHER DEPOSITS MONEY IN A SAVINGS BANK IN THE NAME OF HIS SON, designates himself as trustee, and takes a deposit book in the name of such son and himself as trustee, this transaction creates a voluntary trust in favor of the son, though the father retains possession of the book, depositing other moneys thereon and drawing out various sums as trustee.

**VOLUNTARY TRUSTS — EVIDENCE.** — If a father deposits money in bank in the name of his son designating himself as trustee, his subsequent declarations are not admissible for the purpose of showing that he did not intend to create a trust in favor of his son.

**EVIDENCE.** — DECLARATIONS OF A DECEASED PERSON are admissible in evidence against those who claim in the interest or right of such decedent.

INTERPLEADER by a savings bank to determine to whom a deposit should be paid. Samuel Albee having on deposit in the bank a sum in excess of three thousand dollars, was advised by the treasurer of the bank that all deposits in excess of two thousand dollars would be taxed against the depositor, and that a payment of that tax might probably be avoided by transferring a portion of the deposit to the name of another person. A few days afterwards he drew the sum of sixteen hundred dollars, and deposited it in the name of his son, Charles P. Albee, Samuel Albee, trustee, informing the treasurer of the bank that the transfer was made to avoid taxation. The father received a deposit book in which were the following entries: "No. 5362. Charles P. Albee of Rockingham, Vermont, in account with Connecticut River Savings Bank." "Connecticut River Savings Bank in account with Charles P. Albee, Samuel Albee, trustee." The deposit book was taken by the father and kept among his private papers until the time of his death. He deposited various other moneys thereon and at different times withdrew various sums. After the father's death, the money was claimed by his administrator and by the son, Charles P. Albee. Charles S. Albee, son of Charles P. Albee, was permitted to testify that previous to the death of Samuel Albee he stated that he had been over to Charleston and made a deposit in the bank there in the name and for the benefit of Charles P. Albee. Ruth McQuaid, Simon Albee, and Harry Albee were permitted, subject to objection, to testify to conversations in which Samuel Albee had told them that the money deposited in the name of Charles P. Albee was his money as much as any other money he had and was under his control.

*George A. Weston, Gilbert A. Davis, Waterman, Martin, and Hitt, for the defendants.*

THOMPSON, J. 1. A completed trust, although voluntary, is valid and may be enforced in equity. It is not essential to its validity that the beneficiary should have had notice of its creation or have assented to it. The owner and donor of personal property may create a perfect, or complete trust, by his unequivocal declaration in writing or by parol, that he himself holds such property in trust for the purposes named. The trust is equally valid whether he constitutes himself, or another person, the trustee. "He need not in express terms declare himself trustee, but he must do something equivalent

to it, and use expressions which have that meaning." The act creating the trust must be consummated and not rest in mere intention. "It must appear from written or oral declarations, from the nature of the transactions, the relation of the parties, and the purpose of the gift, that the fiduciary relation is completely established." This is the rule whether the donor makes himself or another person the trustee. If he constitutes himself trustee it is not necessary as between himself and the beneficiary, that he should part with the possession of the trust property. "If the donor retains the legal title but effectually declares himself a trustee for the donee, thus clothing the donee with the beneficial estate, the gift is valid although voluntary; the donee's rights are perfect and equity will enforce them against the donor, and all persons claiming under him as volunteers." The trust once created cannot be revoked by the donor, unless the power of revocation is reserved by the donor, when he created it. "A voluntary trust which is still executory, incomplete, imperfect, or promissory, will neither be enforced nor aided." "If the intention is to make such a transfer as would constitute a gift, but the transaction is imperfect for this purpose, the court will not hold the intended transfer to operate as a declaration of trust; 'for then every imperfect instrument would be made effectual by being converted into a perfect trust.'"

Such is the general doctrine in regard to voluntary trusts as laid down by elementary writers on the subject, and as enunciated by the courts in the best considered and leading cases in which it has been discussed: 2 Pomeroy's Equity Jurisprudence 1st. ed. secs. 996-998; Perry on Trusts and Trustees, 1st. ed., secs. 96-99, 104, 105; Adams' Equity, 6th Am. ed. 194; *Ex parte Pye*, 18 Ves. Jr. 149; *Milroy v. Lord*, 4 De Gex, F. & J. 264; *Kekewich v. Manning*, 1 De Gex, M. & G. 176; *Ellison v. Ellison*, 1 Lead. Cas. Eq., 3d Am. ed. 297, and notes; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Heartley v. Nicholson*, L. R. 19 Eq. 233; 11 Eng. Repts. (Moak's notes) 816; *Jones v. Lock*, L. R. 1 Ch. 25; *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446; *Young v. Young*, 80 N. Y. 422; 36 Am. Rep. 634; *Estate of Webb*, 49 Cal. 541; *Stone v. Hackett*, 12 Gray, 227; *Urann v. Coates*, 109 Mass. 581; *Gerrish v. New Bedford Sav. Inst.*, 128 Mass. 159; 35 Am. Rep. 365; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 44, and note; *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69; *Taylor v. Henry*, 48 Md. 550; 30 Am. Rep. 486; *In re Gaffney's Estate*, 146 Pa. St.

49; *Pope v. Burlington Sav. Bank*, 56 Vt. 284; 48 Am. Rep. 781; *Sargent v. Baldwin*, 60 Vt. 17.

These are only a few of the many cases bearing upon this subject, but they sufficiently illustrate it. A large number are collected in note 1 to sec. 997 of Pomeroy's *Equity Jurisprudence*, 1st ed.

In the case at bar, Samuel Albee deposited in the Connecticut River Savings Bank sixteen hundred dollars in the name of his son, the defendant, Charles P. Albee, naming himself trustee. The treasurer of the bank at the same time delivered to Samuel Albee a deposit book, on the outside cover of which was the entry: "No. 5362. Charles P. Albee, of Rockingham, Vt., in acct. with Conn. River Savings Bank," and in the book is this entry: "Conn. River Savings Bank in acct. with Charles P. Albee (Samuel Albee, trustee)." "Dec. 12, 1878, deposit, \$1,600." This book was retained by Samuel Albee until his death. While he held this book and after the first deposit he made one deposit to this account, and on several occasions drew various sums of money from it, receipting therefor as trustee. In form at least this transaction created a voluntary trust in favor of Charles P. Albee by Samuel Albee, in which the latter constituted and declared himself to be the trustee. The fact that he stated that he made the transfer to avoid taxation does not negate the idea that he also intended to create a trust for the benefit of Charles P., but on the contrary it is perfectly consistent with that purpose. The retention of the book is not inconsistent with this construction. If there was a trust, he must be deemed to have retained it as trustee. In *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446, it is said: "There are many cases where the instrument creating the trust has been retained by the author until his death, especially where he made himself the trustee, and yet the trust sustained." Such fact, among others, has been considered on the question of intent, in those courts which hold the creation of the trust to be one of intent on the part of the alleged donor, although he may have made the deposit in the name of the alleged donee, but it is never deemed decisive against the validity of the trust.

If the intent with which Samuel Albee made this deposit were to be held to be decisive of the rights of the parties to this litigation, what other intent, on the facts found from admissible evidence, can be imputed to him, than such as his acts at that time imported? He directed the bank to make the de-



posit in the manner and form it did, and he took the deposit book, the voucher, to himself in trust for Charles P. Albee. There was no contingency or uncertainty in the circumstances, and the transaction was complete. The money was deposited absolutely and unqualifiedly in trust, and Samuel Albee himself was the trustee. So far as is disclosed by legal evidence, he never said nor did anything thereafter, inconsistent with that transaction, viewed on the theory that such a trust was intended to be created by him. The fact that he deposited other money to this account, and as trustee drew money from it, is perfectly consistent with his being trustee.

We think there was a perfect, completed, voluntary trust created by this transaction: *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 44, and note; *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69; *In re Gaffney's Estate*, 146 Pa. St. 49; and other authorities there cited.

But we are not left to infer the intention of Samuel Albee from the transaction of making the deposit, for very near and after that occurrence, he declared that he made the deposit for the benefit of Charles P. We think a fair construction of the master's original report is that he finds such was his intention. This establishes the trust, if it were to be determined by the law of New Hampshire as found by the master, and stated in *Blasdel v. Locke*, 52 N. H. 238, and *Marcy v. Ama-zeen*, 61 N. H. 131, 60 Am. Rep. 320, or in accordance with certain Massachusetts cases cited on defendant Lane's brief, part 5.

The case of *Pope v. Burlington Sav. Bank*, 56 Vt. 284; 48 Am. Rep. 781, is distinguishable from this case. In that case, there was no declaration of trust, but an imperfect gift. The intestate retained in himself the absolute control and disposal of the deposit, for his own use and benefit, making it payable to himself by the terms of the deposit.

2. The testimony of the witnesses, Ruth McQuaid, Simon Albee, and Harriett Albee, as to the declarations of the intestate in respect to the deposit, and made after the trust had been created, were not admissible. "No such declarations made after the creation of the trust could have any legitimate effect upon it." *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 44, and note; *Mutual Ins. Co. v. Deale*, 18 Md. 26; 79 Am. Dec. 673; *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69; *Bullard v. Billings*, 2 Vt. 309; *Brackett v. Wait*, 6 Vt. 411;

*Edgell v. Bennett*, 7 Vt. 534; *Sargeant v. Sargeant*, 18 Vt. 371; *Hough v. Barton*, 20 Vt. 455; *Leland v. Farnham*, 25 Vt. 553; *Washburn v. Ramsdell*, 17 Vt. 299; *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29; *Halloran v. Whitcomb*, 43 Vt. 306; *Ross v. White*, 60 Vt. 558; *Sargent v. Baldwin*, 60 Vt. 17.

As before stated when a voluntary trust is once created, it cannot be annulled by the act or declarations of the party creating it, unless a power of revocation is reserved for that purpose: See *Sargent v. Baldwin*, 60 Vt. 17, and cases there cited. No such power was reserved by Samuel Albee.

3. The testimony of Charles S. Albee in respect to the declarations of Samuel Albee as to his intent in making the deposit, and the reason that moved him to do it, was properly admitted. "The declarations of a trustee can be given in evidence to show how he held the estate; that is in those states where the trust may be proved by parol": Perry on Trusts, 1st ed., secs. 77, 147. "The declarations of deceased persons made against their interest or right, are admissible against those who claim in the interest or right of such deceased persons": *Wheeler v. Wheeler's Estate*, 47 Vt. 637, 645; 2 Saunders on Pleading and Evidence, 557; *Ivat v. Finch*, 1 Taunt. 141; 1 Greenleaf on Evidence, 12th ed. sec. 189.

The decree of the court of chancery is affirmed and cause remanded.

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EVIDENCE — DECLARATIONS OF DECEASED PERSONS. — The declarations of a deceased owner of land, made while in possession and in disparagement of his title are admissible in evidence against him and those claiming under him, and also for or against strangers: *McLeod v. Swain*, 87 Ga. 156; 27 Am. St. Rep. 229, and note; *Miller v. Feenane*, 50 N. J. L. 32. The declarations of a testator may be given in evidence against his personal representative: *Hurlburt v. Hurlburt*, 128 N. Y. 420; 26 Am. St. Rep. 482, and note. Conversations of a creditor with a debtor since deceased, are admissible in an action by the creditors against the heirs of the deceased, the witness and other creditors: *Hutzler v. Phillips*, 26 S. C. 136; 4 Am. St. Rep. 687. See extended note to *Cox v. State*, 37 Am. Rep. 83.

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## AGENCY.

1. **WRITING EXECUTED IN BLANK.** — One who signs a blank piece of paper cannot be bound by the obligation subsequently written therein unless it can be shown that he gave the person who wrote it authority to do so. *Richards v. Day*, 704.
2. **LIABILITY OF PRINCIPAL FOR AGENTS' ACTS.** — The principal is responsible for the act of an agent, when done within the scope of his authority, though in violation of a rule or instruction of the principal, unknown to the person dealing with the agent. *Kansas City etc. R. R. Co. v. Higdon*, 119.
3. **A PRINCIPAL IS LIABLE TO THIRD PERSONS IN A CIVIL SUIT FOR THE FRAUDS, DECEITS, CONCEALMENTS, MISREPRESENTATIONS, TORTS, NEGLIGENCES, AND OTHER MALFEASANCES OR MISFEASANCES** and omissions of duty of his agent in the course of his employment, although the principal did not authorize, justify, or participate in, or know of such misconduct, or even forbade or disapproved of it. *Fifth Ave. Bank v. Forty-Second St. etc. R'y Co.*, 712.
4. **PERSONAL LIABILITY OF AGENT.** — One who assumes, without authority, to act as the agent of another and to sign his name to a due bill as maker, is not himself personally liable thereon when there is nothing on the face of the instrument to show that he personally promises to pay the amount named therein. *Cole v. O'Brien*, 616.
- See **BANKS**, 15; **CORPORATIONS**, 20, 29, 31, 39, 40; **DEEDS**, 2; **EVIDENCE**, 9; **INSURANCE**, 7, 11; **LANDLORD AND TENANT**; **NEGLIGENCE**, 3; **NEGOTIABLE INSTRUMENTS**, 11, 12; **VENDOR AND PURCHASER**, 2; **WAREHOUSEMEN**, 2; **WITNESSES**, 4, 5.

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## APPEAL.

1. **DEFECTIVE RECORD.** — When the record on appeal is defective, the remedy is by *certiorari* or by stipulation correcting the error; but the mere filing of certified copies of omitted instructions will not remedy the irregularity of failing to set them out in the record. *Beck v. Dowell*, 547.
2. **NEW TRIAL, MOTION FOR NOT NECESSARY, WHEN CASE TRIED BY COURT WITHOUT JURY.** — When a trial is had by a court without a jury, the question whether the finding of the court is contrary to the evidence may be reviewed on appeal, although no motion for a new trial was made before judgment. *North Hudson Mut. Building etc. Ass'n v. Childs*, 57.
3. **DUTY OF TRIAL COURT TO EXAMINE AND PASS UPON ISSUES IN FIRST INSTANCE.** — It is the duty of the trial court to judicially investigate and pass upon questions raised on the trial, and the supreme court will not assume the burden of that duty in the first instance. *North Hudson Mut. Building etc. Ass'n v. Childs*, 57.

4. **VARIANCE BETWEEN A PLEADING AND AN INSTRUMENT OFFERED IN EVIDENCE** thereunder cannot be urged for the first time on appeal. *Richelieu Hotel Co. v. International etc. Encampment Co.*, 234.
5. **REVIEW OF ORDER OVERRULING DEMURRER.** — Error in overruling a demurrer to an answer will not be reviewed on appeal when a replication has been filed after the demurrer has been overruled, and the answer is defective and uncertain in form of averment, or in such matters as can be cured by verdict. Otherwise when the answer fails to state facts sufficient to constitute a cause of action. *Raymond v. Wimselle*, 604.
6. **EVIDENCE THAT DEFENDANT COULD NOT READ, ERROR IN REJECTING.** If defendant seeks to escape from an instrument signed by him, on the ground that he could not read and its contents were misrepresented to him, and after testifying that he is unable to read, causes two other witnesses to testify to the same fact, but their evidence is excluded, this exclusion is reversible error if the defendant's inability to read is not conceded, and the court, in its charge to the jury, informs them that they are not bound to take the defendant's statement because of his interest in the result of the suit. The defendant, if the question was still an open one, had the right to fortify his evidence in any way that he could. *Page v. Krekey*, 731.
7. **REPORT OF EXPERT SHOULD NOT BE ADOPTED BY TRIAL COURT WITHOUT JUDICIAL EXAMINATION.** — In an action by a corporation against its president and treasurer to recover for losses alleged to have been sustained through their negligent and unauthorized acts, it is error for the trial court, without judicial examination as to its accuracy and justice, to adopt as a basis of judicial action against the defendants, the report of an expert accountant employed by the plaintiff to examine into its accounts and ascertain the extent of such alleged losses. *North Hudson Mut. Building etc. Ass'n v. Childs*, 57.
8. **NON-PREJUDICIAL ERROR.** — Where the matter set up in a special plea is covered by another plea, the sustaining of a demurrer to the special plea, if error, is error without prejudice. *Kansas City etc. R. R. Co. v. Higdon*, 119.
9. **PARTIES, IMPROPER JOINDER OF, NOT A GROUND FOR REVERSAL OF JUDGMENT.** — The misjoinder of a married woman as a party defendant is not a defect which will cause a reversal of the judgment, because her name can be stricken out even in an appellate court. *Bensieck v. Cook*, 422.

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1. **ASSAULT WITH DEADLY WEAPON — WHAT CONSTITUTES.** — When one person points a rifle or other firearm at another and threatens to blow his head off if he does not turn around, this, in law, constitutes an assault, although it is not proved that the gun was loaded; and a direction by the court to acquit is erroneous. It is to be presumed that the gun was loaded, and the fact that it was not loaded is a matter of defense. *State v. Herron, 576.*
2. **ASSAULT TO MURDER — INDICTMENT — DESCRIPTION OF WEAPON.** — An indictment for an assault with intent to murder, at common law or under a statute, which does not specify the instrument necessary to be used, need not state the instrument or means employed by the assailant to effectuate the murderous intent. The means of effecting the murderous intent, or the circumstances evincive of the design with which the act is done, are matters of evidence to the jury to demonstrate the intent and not necessary to be incorporated in the indictment. *State v. Sheerin, 500.*
3. **EVIDENCE OF PARTICIPATION [SUFFICIENT TO BE SUBMITTED TO THE JURY.]** — When the testimony shows that the person who is charged with aiding another in the commission of an assault was carrying the latter in his buggy; that he stopped the vehicle in which the injured person was being driven three times, by blocking the road in front of it with his buggy, and that, when he was asked to let it pass, he replied in a way clearly indicating that he not only knew the assailant's purposes, but that he intended to assist him actually in executing them, there is sufficient evidence to go to the jury on the issue whether the defendant was present, aiding, assisting, advising, or counseling the assault, and a nonsuit should not be granted. *Willi v. Lucas, 436.*
4. **ASSAULT TO MURDER—SUFFICIENCY OF EVIDENCE TO CONVICT.** — On the trial of an assault with intent to murder, evidence that the accused threatened to kill the person assaulted and shot at him several times with a large pistol loaded with gunpowder and bullets, wounding him with at least one bullet, is sufficient to show a present ability to commit the crime charged and to support a conviction. *State v. Sheerin, 600.*

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### BANKS.

1. **DEPOSITOR WHEN A GENERAL CREDITOR MERELY.** — When money delivered to a bank, though for some specific purpose, as for instance investment in a mortgage security, has been mingled with the funds of the bank, there is no reason why the depositor should be preferred above any other creditor. Though the money was deposited by a trustee, yet because it can no longer be identified as a distinct fund and is so mixed up with other funds that it cannot be separated, the beneficial owner can no longer reach it. *Wetherell v. O'Brien*, 221.
2. **GENERAL DEPOSIT — CHECK DEPOSITED AS INDEMNITY.** — When a check is deposited in bank to indemnify the sureties on an appeal bond, and the bank issues a certificate of deposit reciting the appeal and the giving of the bond, and that when the sureties are discharged the deposit



- is to be returned, the deposit is a general one, and after it has been mingled with the other money of the bank, and its identity lost, the depositor is not entitled to a prior lien as against the other creditors of the bank in the event of its insolvency. Such deposit creates the relation of creditor and debtor as between the bank and the depositor, and the latter is only entitled to the rights of a general creditor. *Mutual Acc. Ass'n v. Jacobs*, 302.
3. **GENERAL DEPOSIT.** — When money is deposited in a bank without any understanding that the identical money shall be returned, but only that a like sum of lawful money shall be repaid, the deposit is general, the bank is permitted to use the money in its business, and the relation of debtor and creditor is created by the transaction. *Mutual Acc. Ass'n v. Jacobs*, 302.
  4. **WHEN THERE IS AN ORDINARY GENERAL DEPOSIT** in the bank, there is an implied undertaking on its part to restore, not the same funds, but an equivalent sum whenever it is demanded. *Wetherell v. O'Brien*, 221.
  5. **SPECIAL DEPOSIT.** — When money of any description is deposited in bank, and the identical gold or silver or bank bills deposited are to be returned to the depositor, the deposit is special. It is then the duty of the bank to safely keep and return the identical money. *Mutual Acc. Ass'n v. Jacobs*, 302.
  6. **SPECIAL DEPOSIT, WHAT IS NOT.** — If one goes to a savings bank with money, stating that he wishes to have it loaned on a real estate mortgage, and the banker undertakes to so loan it when an opportunity offers, but it is turned over to the cashier of the bank and mingled with other money, and a pass book is issued showing the deposit of the money in the savings department of the bank, this is not a special deposit, though the banker was told that the money was to be left with him until it could be loaned, and that he should take care of it until he could find a place to loan it on a real-estate mortgage. *Wetherell v. O'Brien*, 221.
  7. **NEGOTIABLE INSTRUMENTS.** — **CERTIFICATES OF DEPOSIT** in the usual form, issued by a bank, and made payable to bearer or order, are negotiable. *First Nat. Bank v. Security Nat. Bank*, 618.
  8. **NEGOTIABLE INSTRUMENTS — CERTIFICATE OF DEPOSIT — TRANSFER — DEFENSES.** — A *bona fide* purchaser of a negotiable certificate of deposit for value before maturity, and without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper; but if such certificate is transferred when overdue, the purchaser takes it subject to all defenses that could have been made had it not left the hands of the payee. *First Nat. Bank v. Security Nat. Bank*, 618.
  9. **NEGOTIABLE INSTRUMENTS — CERTIFICATE OF DEPOSIT — INDORSEMENT WITHOUT RECOURSE.** — When a certificate of deposit is indorsed by the payee "without recourse" before due, this is not sufficient to charge a *bona fide* purchaser with notice of defenses existing against it. *First Nat. Bank v. Security Nat. Bank*, 618.
  10. **NEGOTIABLE INSTRUMENTS — CERTIFICATE OF DEPOSIT — TRANSFER WHEN OVERDUE — DEFENSES.** — When it appears from the face of a certificate of deposit payable to the order of the payee on its return properly indorsed that it is payable three months after date, it is a time certificate, and if transferred by the payee after the expiration of the three months, though before it has been returned properly indorsed, the purchaser takes it as then overdue and subject to all defenses in favor of

the maker which could have been made had it remained in the hands of the original payee. *First Nat. Bank v. Security Nat. Bank*, 618.

11. **NEGOTIABLE INSTRUMENTS — CERTIFICATE OF DEPOSIT — CROSS DEMAND BY MAKER.** — When a negotiable certificate of deposit is transferred when overdue, the maker may, in an action thereon by the purchaser, set off any cross demand existing in his favor against the original payee at the time of the transfer. *First Nat. Bank v. Security Nat. Bank*, 618.
12. **NEGOTIABLE INSTRUMENTS — CERTIFICATE OF DEPOSIT — RETURN OF BEFORE SUIT.** — When a certificate of deposit in the ordinary form is payable on its return duly indorsed, a return and tender of the certificate properly indorsed is not a condition precedent to the right to maintain an action thereon. *First Nat. Bank v. Security Nat. Bank*, 618.
13. **COLLECTIONS — LIABILITY FOR DEFAULT OF CORRESPONDENT.** — A bank which receives for collection merely a note or draft payable at a distant point, with an understanding that such collection is for accommodation only, or that it shall receive no compensation beyond the customary exchange, is not liable for the defaults of a suitable and reputable correspondent at the place of payment, to whom it has forwarded such note or draft with proper instructions for the collection and remittance of the proceeds thereof. *First Nat. Bank v. Sprague*, 644.
14. **COLLECTIONS — LIABILITY OF TRANSMITTING BANK.** — The exchange usually charged by banks for the transmission of money to distant points is not sufficient consideration to support an implied promise on the part of the forwarding bank to insure against loss on account of the fraud or insolvency of its correspondent to make collections. *First Nat. Bank v. Sprague*, 644.
15. **COLLECTIONS — LIABILITY OF FORWARDING BANK.** — The liability of a bank taking a note or bill for collection, which is payable at a distance, extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions, and the corresponding bank is the agent, not of the transmitting bank, but of the holder, so that such bank is not liable for the default of the correspondent selected with due care. *First Nat. Bank v. Sprague*, 644.

#### BEQUEST.

See MASTER AND SERVANT, 1.

#### BILLS OF LADING.

See WAREHOUSEMEN, 2.

#### BONA FIDE PURCHASERS.

See BANKS, 9; EXECUTION, 5; PARTITION, 2; PUBLIC LANDS.

#### BONDS.

1. **WRITING EXECUTED IN BLANK.** — If a bond is executed in blank before a justice of the peace, who is told what he shall afterwards insert in the blanks, and who, disregarding his instructions, inserts different conditions, the bond as thus filled out is not the bond of the person thus signing it. *Richards v. Day*, 704.
2. **DAMAGES UNDER INDEMNITY BOND.** — When an assignee of a mining lease has given an indemnity bond in a certain amount in which he covenants

to fill up holes made in prospecting for ore, and to keep gates in repair and closed, a recovery for a breach of the covenant cannot be had for the whole amount named in the bond, but will be limited to the damages actually sustained. *Keck v. Bieber*, 846.

3. **DAMAGES UNDER INDEMNITY BOND.** — When an assignee of a mining lease has given an indemnity bond in a certain amount in which he covenants to indemnify the assignor against the claims of a third party and against damages by the operation of washing, the recovery will not be limited to the amount named in the bond. *Keck v. Bieber*, 846.
4. **DAMAGES—INDEMNITY ON FORFEITED LEASE.** — When an assignee of a mining lease has allowed it to become forfeited, and thus disabled himself from performing covenants contained in a bond given to his assignor, the latter may sue, from time to time, for royalties due and for other damages arising from breach of the covenants or he may treat the contract as rescinded and claim damages in one action for the entire breach. *Keck v. Bieber*, 846.

See RAILROADS, 8; TRIAL, 3.

#### BOOK ACCOUNTS.

See NEGOTIABLE INSTRUMENTS, 6.

#### BOOKKEEPERS.

See WITNESSES, 5.

#### BOOKS OF ACCOUNT.

See EVIDENCE, 13-17.

#### BOROUGHES.

See MUNICIPAL CORPORATIONS.

#### BRIDGES.

See HIGHWAYS, 4, 5.

#### BROKERS.

**WHEN ENTITLED TO COMMISSIONS.** — Before a broker can recover commissions for selling property it must appear that he procured a purchaser of sufficient pecuniary ability to make a purchase. Though the person procured by the broker enters into a contract of purchase, yet if he is not able to comply with his contract, and the seller, in accepting him as the purchaser, did not rely upon his own judgment, but rather upon that of the broker, the latter is not entitled to commissions. The production by the broker of a person as a purchaser is an implied representation on his part that such person is able financially, as well as ready and willing, to purchase. *Butler v. Baker*, 897.

#### BURDEN OF PROOF.

See HUSBAND AND WIFE, 3; INSURANCE, 14; MASTER AND SERVANT, 8.

#### CANCELLATION.

See INSURANCE, 12.

CARRIERS.

1. **PRESUMPTION OF AS TO KNOWLEDGE OF LIMITATION UPON LIABILITY OF.** — In the absence of fraud, concealment, or improper practice, the legal presumption is, that stipulations limiting the common-law liability of carriers contained in a receipt given by them for freight, were known and assented to by the party receiving it. *Ballou v. Earle*, 881.
2. **A STIPULATION LIMITING THE LIABILITY** of a common carrier, in the event of loss of goods through his negligence, to an amount specified in the receipt, unless the value of the property is therein stated to be of a greater amount, measures the amount of his responsibility, and no recovery can be had against him in excess of such amount. *Ballou v. Earle*, 881.
3. **LIMITING LIABILITY FOR NEGLIGENCE.** — While a common carrier cannot by contract limit its liability for negligence, it may, by contract with the shipper, fix the value of goods intrusted to it for shipment, and estop him from claiming that they were of a greater value in an action to recover compensation for their loss through such negligence. *Ballou v. Earle*, 881.

See RAILROADS, 19-25.

CASHIER.

See WITNESSES, 5.

CAVEAT EMPTOR.

See EXECUTORS AND ADMINISTRATORS, 4.

CERTIFICATES OF DEPOSIT.

See BANKS, 2, 7-12.

CERTIORARI.

1. **TO WHOM SHOULD BE DIRECTED.** — A writ of *certiorari* cannot be directed to an ex-officer after he has parted with the record which it is sought to have reviewed. *In re Dance*, 768.
2. **CONCLUSIVENESS OF RECORD.** — In reviewing a judgment of a justice's court upon a common-law writ of *certiorari*, the record imports verity, and cannot be contradicted by the supplemental return of the justice. *In re Dance*, 768.

See APPEAL, 1.

CHARTERS.

See CORPORATIONS, 3.

CHATTEL MORTGAGES.

**CHANGE OF POSSESSION AS AFFECTING VALIDITY OF.** — Taking possession of mortgaged property by the chattel mortgagee, to be sufficient to cure irregularities in a void mortgage or render it valid, must be either under the authority of a written instrument valid and sufficient for that purpose, or under some parol consent of the mortgagor. *Rathbun v. Berry*, 389.

See CORPORATIONS, 33; FRAUDULENT CONVEYANCES.



**CHECKS.****See BANKS, 2.****CHOSES IN ACTION.****See ASSIGNMENT.****CIRCUMSTANTIAL.****See EVIDENCE, 3.****CIVIL RIGHTS.**

**SEPARATION OF WHITE FROM COLORED PERSONS IN THEATER.** — In the absence of valid legislation to the contrary, the owner or manager of a theater or other place of public amusement may make and enforce a rule requiring colored persons to occupy separate seats and a separate portion of the building from white persons. Such rule is a reasonable regulation, and is not in conflict with nor in violation of the the fourteenth amendment to the constitution of the United States. *Younger v. Judah*, 527.

**COHABITATION.****See MARRIAGE AND DIVORCE, 1-3, 6, 8, 9.****COLLATERAL ATTACK.****See JUDGMENTS, 10; MARRIAGE AND DIVORCE, 15; RECEIVERS, 1.****COLLATERAL SECURITY.****See CORPORATIONS, 17, 19; NEGOTIABLE INSTRUMENTS, 9, 10; PLEDGE,****COLLECTION.****See BANKS, 13-15;****COMBINATIONS.****See CONTRACTS, 7****COMMISSIONERS.****See RAILROADS, 11.****COMMISSIONS.****See BROKERS.****COMMON CARRIERS.****See CARRIERS.****COMPOUNDING FELONIES.**

- 1. DURESS — WHAT DOES NOT CONSTITUTE.** — When a mortgagor has either stolen or wrongfully removed the mortgaged property, and upon being arrested and imprisoned therefor gives his note with sureties for the payment of the mortgage debt, this alone will not constitute duress or compounding a felony in the execution of the note, and such defenses cannot be relied upon by the surety in an action on the note without other evidence. *Cass County Bank v. Bricker*, 649.

- 2. COMPOUNDING FELONY AS DEFENSE.** — The owner of goods stolen or wrongfully taken has a right to receive compensation for the injury sustained, and may take a note signed with sureties therefor; and in such case, unless there is an agreement not to prosecute or to suppress evidence of the crime, the defense of compounding a felony is not available against the note. *Cass County Bank v. Bricker*, 649.

**COMPROMISE.**

**See EXECUTORS AND ADMINISTRATORS, 1.**

**CONCEALMENT.**

**See AGENT, 3; CARRIERS, 1; ESTOPPEL, 1; SPECIFIC PERFORMANCE, 3.**

**CONCURRENT.**

**See JURISDICTION, 2, 3.**

**CONFIDENTIAL COMMUNICATIONS.**

**See WITNESSES, 7, 8.**

**CONFIRMATION.**

**See GUARDIAN AND WARD, 4.**

**CONFLICT OF LAWS.**

**See ELECTIONS, 1.**

**CONSIDERATION.**

**See BANKS, 13-15; CORPORATIONS, 8; EVIDENCE, 11; LICENSE, 2, 3.**

**CONSPIRACY.**

**See FRAUD, 3.**

**CONSTITUTIONAL LAW.**

**See STATUTES.**

**CONSTITUTIONS.**

**See CIVIL RIGHTS; STATUTES, 2.**

**CONSTRUCTION.**

**See ELECTIONS, 1, 4-7.**

**CONTEMPT.**

**DIVORCE — DEFENDANT IN CONTEMPT ENTITLED TO MAKE DEFENSE.** — When a defendant in a suit for divorce is in contempt in failing to obey the order of the court for the payment of temporary alimony, the court has no power to prevent him from interposing a defense to the merits of the bill by striking out his answer. *Gordon v. Gordon*, 294.

**See MARRIAGE AND DIVORCE, 7.**

**CONTRACTORS.**

**See MASTER AND SERVANT, 12; MECHANICS' LIEN.**

## CONTRACTS.

1. **RIGHT OF ONE PARTY TO FINISH PERFORMANCE AFTER THE OTHER HAS REPUDIATED THE AGREEMENT.** — A contracting party who has certain things to do under his contract, has no right to proceed to execute it after he has been notified that the other party to the contract will not stand by his compact; and the mere fact that the contract has been made with several joint contractors, while the refusal to perform has emanated from only one of them, does not affect the operation of the rule. Hence, when one has agreed to erect a building for two persons who have bound themselves jointly to pay a certain sum for the work, but before entering upon the performance of the work, is notified by one of those persons that he will not carry out his part of the contract, the allowable and only proper course is to treat the contract as broken by both the joint contractors and sue for damages. The party who has contracted to erect the building cannot, under such circumstances, go on and complete it, and recover the contract price. *Davis v. Bronson*, 783.
  2. **PURCHASER UNDER CONTRACT BETWEEN THIRD PERSONS, WHETHER AFFECTED BY EXISTING EQUITIES.** — When a party furnishes the money and becomes the purchaser of property under a contract made between third persons, he takes subject to such contract and all equities existing against it. *Chicago etc. Cab Co. v. Yerkes*, 315.
  3. **RESCISSION OF CONTRACT, PERPETRATOR OF FRAUD HAS NO RIGHT TO.** — The perpetrator of a fraud by which a contract has been induced has no right to rescind the contract. *Gunther v. Ullrich*, 32.
  4. **NO CAUSE OF ACTION IN TORT ARISES FROM THE BREACH OF A DUTY CREATED BY CONTRACT,** unless there is some privity of contract between the defendant and the person injured. *Heizer v. Kingsland etc. Mfg. Co.*, 482.
  5. **TRADE, RESTRAINT OF.** — An agreement in restraint of trade is not absolutely void on the ground of public policy because it extends throughout the state. *Herreshoff v. Boutineau*, 550.
  6. **TRADE, RESTRAINT OF.** — An agreement by a teacher with his employer that he will not for a year, after the end of his services, teach the German or French languages or any part thereof, nor be in any way connected with any persons or institutions that teach them in the state of Rhode Island, is void because it is unreasonable and extends beyond anything apparently necessary for the protection of such employer. *Herreshoff v. Boutineau*, 550.
  7. **TRADE, RESTRAINT OF.** — ALL COMBINATIONS, whether of capitalists or of workmen, for the purpose of influencing trade in their special favor by raising or reducing prices are so far illegal that agreements to combine cannot be enforced by the courts. *More v. Bennett*, 216.
  8. **TRADE, RESTRAINT OF.** — AN AGREEMENT BETWEEN MEMBERS OF AN ASSOCIATION OF STENOGRAPHERS to be bound by a schedule of prices to be fixed by the association, and not to compete with each other by taking or offering to take a less price, is contrary to public policy and nonenforceable. *More v. Bennett*, 216.
- See** BONDS, 4; BROKERS; CARRIERS, 3; CORPORATIONS, 2, 3, 9, 25, 30; DAMAGES, 1; INSOLVENCY; LICENSE, 2, 3; MECHANIC'S LIEN, 12, 13; PARTNERSHIP, 1; SALES; SERVICES; SPECIFIC PERFORMANCE; STATUTES; USURY, 1; WITNESSES, 4.

CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT, 11; NEGLIGENCE, 5; RAILROADS, 37, 38, 40-42, 48.

CORONERS.

See EVIDENCE, 7.

CORPORATIONS.

1. **TO ACQUIRE THE RIGHT TO BE A CORPORATION**, the prescribed statutory conditions must be substantially complied with. *People v. Montecito Water Co.*, 172.
2. **ORGANIZATION OF.** — A corporation must have a full and complete organization and existence as an entity and in accordance with the law to which it owes its origin before it can assume its franchise or enter into any kind of contract or transact any business, and whatever be the mode prescribed by the act of incorporation, a substantial compliance with all the provisions of the law under which it is created is required before the corporation can be said to have such an existence as will entitle it to do business. *Walton v. Oliver*, 355.
3. **IMPERFECT ORGANIZATION — PERSONAL LIABILITY OF DIRECTORS.** — When a corporate charter is duly filed in the office of the secretary of state naming certain persons as directors of the corporation, but no other or further steps are ever taken to complete the preliminary organization, or to comply with the law for the government of corporations, such corporation has no such existence as will authorize its officers to contract, transact any business, or incur any liability in its name, and when the directors named in the charter contract and incur liability in the name of such corporation, they render themselves personally liable. *Walton v. Oliver*, 355.
4. **FORMATION OF, VITAL DEFECTS IN.** — If a statute requires articles of incorporation to be subscribed and acknowledged by five or more persons, and such articles, though subscribed by five persons, are acknowledged by four only, this defect is fatal to the existence of the corporation in a proceeding against it by *quo warranto*. *People v. Montecito Water Co.*, 172.
5. **A SUBSCRIPTION OF MONEYS TO BE PAID TO A CORPORATION NOT YET EXISTING** is enforceable by it after it comes into existence. Such a subscription is in the nature of a continuing offer, which ripens into a binding obligation when the corporation, being fully organized, accepts such offer. *Richelieu Hotel Co. v. International etc. Encampment Co.*, 234.
6. **SUBSCRIPTION TO A CORPORATION ABOUT TO BE FORMED.** — Notice to a subscriber of a sum of money to be paid to a corporation to be formed, that his subscription has been accepted by it, is not necessary if it has in fact accepted and acted upon such subscription. *Richelieu Hotel Co. v. International etc. Encampment Co.*, 234.
7. **NOTICE OF THE ACCEPTANCE BY A CORPORATION OF A SUBSCRIPTION FOR ITS BENEFIT**, made before it was organized, is not necessary. Such acceptance may be inferred from the conduct of the corporation in retaining the subscription paper in its possession and expending large sums of money on the faith of it. *Richelieu Hotel Co. v. International etc. Encampment Co.*, 234.



8. **SUBSCRIPTION, CONSIDERATION FOR.**—When money is expended, labor bestowed, and materials furnished on the faith of a subscription paper, a consideration sufficient to sustain it exists, and it becomes irrevocable. *Richelieu Hotel Co. v. International etc. Encampment Co.*, 234.
9. **PLEA OF ULTRA VIRES CANNOT BE AVAILED OF** to defend against an obligation incurred, when the contract has in good faith been performed by the other contracting party, and the corporation has had the benefit of it. This plea should never prevail when it would not advance justice. *Linkauf v. Lombard*, 743.
10. **CORPORATION TO CONDUCT HOTEL BUSINESS, POWERS OF.**—A corporation incorporated to conduct a general hotel business, has power to subscribe a sum of money to be used by another corporation about to be formed for the purpose of carrying on an international military encampment in the city in which the subscribing corporation conducts its business. *Richelieu Hotel Co. v. International etc. Encampment Co.*, 234.
11. **POWERS OF.**—A CORPORATION ORGANIZED TO CARRY ON A HOTEL BUSINESS has, as incident to its powers, the power to adopt and promote all reasonable expedients directly calculated to increase the number of its patrons, such as advertising, employing agents to solicit patronage, running omnibuses and other vehicles to convey guests to and from the hotel, and other similar expedients. *Richelieu Hotel Co. v. International etc. Encampment Co.*, 234.
12. **CAPITAL STOCK—TRUST FUND IN HANDS OF DIRECTORS OR STOCKHOLDERS.**—The capital stock of a corporation is a fund set apart for the payment of its debts, and the directors hold it in trust for that purpose. The stockholders of the corporation are conclusively charged with notice of the trust character which attaches to its capital stock; as to it they cannot occupy the *status* of innocent purchasers, and when they have in their hands any of this trust fund, they hold it *cum onere*, subject to all equities which attach to it. *Commercial Nat. Bank v. Burch*, 331.
13. **PURCHASE OF ITS OWN STOCK BY A CORPORATION** by exchange for its property of equal value, though made in good faith and without any element of fraud, or anything in the apparent condition of the corporation to interfere with the making of the exchange, will not be allowed when it injuriously affects a creditor of the corporation, even though the fact of the indebtedness is not at the time established or known to the stockholders. *Commercial Nat. Bank v. Burch*, 331.
14. **IMPROPER SALE OF PROPERTY, SETTING ASIDE.**—A sale of the property of a corporation under a resolution appointing its president and secretary a committee to dispose of it, will be set aside on the suit of a contesting stockholder, when such sale is made to a purchaser under an agreement with the secretary for their joint acquisition of the property. In such case, the power conferred on the president and secretary requires the action of both, jointly, and the secretary is disqualified to act, on account of his personal interest. *Chicago etc. Cab Co. v. Yerkes*, 315.
15. **IMPROPER SALE OF PROPERTY, SETTING ASIDE.**—An action to set aside a sale of property of a corporation because in fraud of its stockholders, may be maintained by one of the latter without a previous demand on the corporation to bring the action, when it appears that the directors thereof are under the control of the person in whose interest the sale was made. *Chicago etc. Cab Co. v. Yerkes*, 315.

16. **SALE—RATIFICATION.**—Whether or not a ratification of a sale is effective in any case depends upon whether those assuming to ratify might have legally authorized the sale to be made in the first instance. *Chicago etc. Cab Co. v. Yerkes*, 315.
17. **STOCKS, BONA FIDE HOLDER OF FORGED, WHO IS.**—If one to whom an application for a loan is made, for which a certificate of stock is offered as collateral security, applies at the office of the corporation to the person in charge thereof, and who is its secretary and treasurer, and inquires whether it is genuine and all right, and receives an answer in the affirmative, whereupon the loan is made and the stock taken as collateral, the receiver of such security is entitled to protection as a *bona fide* holder; nor does he lose the right to be treated as such holder by selling the stock and applying the proceeds to the payment of his loan, and thereafter, upon discovering that the certificate had been forged, taking an assignment thereof from the purchasers and repaying them the amount paid by them at the sale. *Fifth Ave. Bank v. Forty-second St. etc. R'y Co.*, 712.
18. **CERTIFICATES OF STOCK WITH TRANSFERS THEREOF SIGNED IN BLANK** become in effect, so far as the public is concerned, as if they had been issued to bearer. *Fifth Ave. Bank v. Forty-second St. etc. R'y Co.*, 712.
19. **STOCKS, LIABILITY OF HOLDER OF FORGED.**—If a holder of forged stocks, held as collateral security, makes a sale thereof, he impliedly guarantees that they are genuine, and he is liable to the purchasers for the consideration paid by them. *Fifth Ave. Bank v. Forty-second St. etc. R'y Co.*, 712.
20. **LIABILITY FOR FORGED CERTIFICATES OF STOCK.**—If a secretary of a corporation acts as its transfer agent, and has authority to countersign certificates of stock, when signed by the president and treasurer, and to seal them with the seal of the corporation, such countersigning and sealing constitute an affirmation on the part of the corporation that the stock has been lawfully issued, and that all conditions precedent, upon which the right to issue depends, have been duly observed. Therefore if such secretary makes out in due and regular form a certificate of stock purporting to be signed by the president and treasurer, and countersigned by the secretary, and to which the corporate seal is affixed, and the names of the other officers are forged, and the issuing of the certificate unauthorized, the corporation is answerable to one acquiring such certificate in good faith and for value, believing it to be genuine, and who has made all the inquiries regarding it which can be expected of a prudent purchaser. *Fifth Ave. Bank v. Forty-second St. etc. R'y Co.*, 712.
21. **INCREASE OF STOCK—STOCKHOLDER'S RIGHT TO PURCHASE.**—The right to increase in the capital stock of a corporation is intended for the benefit of the joint owners, and can be exercised only by the corporation itself; and in the absence of stipulations in the charter to the contrary, the original stockholders have a right to subscribe for and hold the new stock. *Humboldt etc. Park Ass'n v. Stevens*, 654.
22. **RIGHT OF MAJORITY STOCKHOLDER TO PURCHASE ITS PROPERTY ON WINDING UP ITS AFFAIRS.**—When it is determined to wind up a corporation and to settle its business, the holder of a majority of its stock cannot make or ratify a sale of all its property to himself against the protest of a holder of minority of its stock and in disregard

- of his rights, but the minority owner may elect to treat the majority owner as a purchaser and require him to account for the value of the property. *Chicago etc. Cab Co. v. Yerkes*, 315.
23. **PURCHASE OF PROPERTY BY MAJORITY STOCKHOLDER.** — It is illegal and fraudulent for a majority stockholder to purchase the property of the corporation at a sale authorized by himself, and such purchase may be set aside in the same way and to the same extent that a purchase of corporate property by a director may be set aside at the instance of a minority stockholder. *Chicago etc. Cab Co. v. Yerkes*, 315.
24. **RIGHT OF MAJORITY STOCKHOLDER ON WINDING UP.** — A majority stockholder in a corporation may, when the law authorizes a vote of stockholders, so vote, upon any matter of policy in the conduct of the corporation, as to best subserve his own interests, and this may relate to the ceasing to do corporate business, the winding up of its affairs, and the sale of its property; but the action resulting from such vote must not be so detrimental to the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that the action of the majority is a wanton or fraudulent destruction of the rights of the minority. *Chicago etc. Cab Co. v. Yerkes*, 315.
25. **ATTACHMENT.** — **AN ACTION AGAINST A STOCKHOLDER** for his proportion of the debt of a corporation of which he is a member is founded upon a contract within the meaning of the section of the code authorizing an attachment to issue in an action upon a contract. *Kennedy v. California Sav. Bank*, 163.
26. **ATTACHMENT — FAILING TO STATE AMOUNT CLAIMED.** — Attachment in an action against a corporation and its stockholders which merely states the amount of the indebtedness claimed to be due from the corporation, without specifying the amount for which each of the stockholders is claimed to be liable, is irregular as to such stockholders and should be discharged on motion. *Kennedy v. California Sav. Bank*, 163.
27. **REMEDY OF AGAINST ITS DIRECTORS AND OFFICERS FOR NEGLIGENCE, FRAUD, OR UNAUTHORIZED ACTS.** — A corporation has a remedy against its directors and officers for negligence, fraud, breaches of trust, or for acts done in excess of their authority, and the case against each is distinct, depending upon the evidence against him, unless two or more have joined or participated in the wrongful act, in which case all participants may be joined in the suit. *North Hudson Mut. Building etc. Ass'n v. Childs*, 57.
28. **MINORITY OF BOARD OF DIRECTORS OF CORPORATION NOT LIABLE AT LAW FOR MISCONDUCT OR NEGLIGENCE.** — No recovery can be had at law against a minority of the board of directors of a corporation for misconduct or negligence, inasmuch as they can act only when lawfully assembled, and their duties are devolved on them as a board and not individually. *North Hudson Mut. Building etc. Ass'n v. Childs*, 57.
29. **LIABILITY OF OFFICERS OF CORPORATION FOR NEGLIGENCE OR UNAUTHORIZED ACTS, BASIS OF.** — The liability of corporate officers to the corporation for damages caused by negligent or unauthorized acts rests upon the common-law rule which renders every agent liable, who violates his authority or neglects his duty to the damage of his principal. *North Hudson Mut. Building etc. Ass'n v. Childs*, 57.

30. **OFFICERS AND MANAGERS OF A CORPORATION CANNOT BE HELD PERSONALLY LIABLE** upon a contract entered into by them while acting for the corporation, on the ground that the contract was foreign to and independent of the corporate business of the corporation, and not a proper or necessary incident thereof. *Linkauf v. Lombard*, 743.
31. **PERSONAL LIABILITY OF THE AGENTS OF A CORPORATION** cannot be established by proving that they determined to enter upon the business, and did enter upon and manage it without any formal action on the part of the corporation or its board of directors, if it further appears that no one was interested in the business except as a stockholder of the corporation, and that the profits of the business were received and the expenses thereof paid by such corporation. *Linkauf v. Lombard*, 743.
32. **OFFICERS OF CORPORATION NOT CHARGEABLE AS EX OFFICIO DIRECTORS, WHEN.** — Where the directors of a corporation hold no meetings, give no attention to the performance of their duties, but leave the entire management of the corporate business to the president, secretary, and treasurer, who conduct its affairs negligently, and in the exercise of powers belonging solely to the board of directors, but in entire good faith and without deriving any improper personal gain or profit or improperly appropriating to themselves any of its property or funds, such officers cannot be charged as *ex officio* members of the board, and neither of them is liable to the corporation for the negligent or unauthorized acts of the others in which he did not participate. *North Hudson Mut. Building etc. Ass'n v. Childs*, 57.
33. **DIRECTORS OF CORPORATION, DEGREE OF CARE REQUIRED OF.** — Directors of corporations, or those acting *ex officio* as such, are bound to exercise that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances in respect to a like gratuitous employment, regard being had to the usages of business and the circumstances of each particular case; but they are not, in the absence of any element of positive misfeasance, and solely on the ground of passive negligence, to be held liable, unless their negligence is gross or they are fairly subject to the imputation of a want of good faith. *North Hudson Mut. Building etc. Ass'n v. Childs*, 57.
34. **DEGREE OF CARE, SKILL, AND JUDGMENT REQUIRED OF OFFICER OF CORPORATION.** — Where it is sought to hold an officer of a corporation liable for non-feasance, negligence, or misjudgment in respect to matters within the scope of his proper powers, he will be held responsible only for a failure to bring to the discharge of his duties such degree of attention, care, skill, and judgment as is ordinarily used and practiced in the discharge of such duties or employments, the degree of care, skill, and judgment depending upon the subject to which it is to be applied, the particular circumstances of the case, and the usages of business. *North Hudson Mut. Building etc. Ass'n v. Childs*, 57.
35. **ACTION BY CORPORATION AGAINST ITS OFFICERS TO BE TREATED AS EQUITABLE ACTION, WHEN.** — An action by a corporation against its president and treasurer for negligence and misconduct in the discharge of the duties of their respective offices, and also as *ex officio* members of the board of directors, where the gravamen of the complaint is that the defendants have exceeded their respective powers as such president and treasurer in dealing with the property and property rights of the corporation, and have usurped the powers of the board of directors without the knowledge, consent, or approval of such board or of the stockholders,



should be treated as an equitable action. *North Hudson Mut. Building etc. Ass'n v. Childs*, 57.

36. A CORPORATION IS ANSWERABLE for loss sustained by a third person from the negligent or wrongful exercise by its officers of the general powers conferred upon them. *Fifth Ave. Bank v. Forty-Second St. etc. R'y Co.*, 712.
  37. PURCHASE BY DIRECTOR OF. — A director in a private corporation whose duty it is to preserve its property and protect it against loss, so far as that can be done by the exercise of ordinary care and diligence, cannot himself become the purchaser of any property of the corporation which it is his duty to sell. *Chicago etc. Cab Co. v. Yerkes*, 315.
  38. ASSIGNMENT BY OFFICERS OF. — Under a resolution passed by the board of directors of an insolvent corporation authorizing its president and secretary "to hereafter execute judgment notes, chattel mortgages, bills of sale, or other instruments in their judgment necessary to the financial interests of the company," such officers have power to make an assignment of the book accounts of the corporation to a creditor holding its judgment notes. *Commercial Nat. Bank v. Burch*, 331.
  39. JURISDICTION — SERVICE OF PROCESS ON FOREIGN CORPORATION. — When a corporation organized and doing business under the law of one state contracts a debt through its authorized agent in another state, he is so far its managing agent there, that service of summons upon him for the debt while he is temporarily within the state will bind the corporation. *Klopp v. Creston City etc. Waterworks Co.*, 666.
  40. JURISDICTION — SERVICE OF PROCESS ON FOREIGN CORPORATION. — When a corporation contracts a debt outside of its own state, service of process in an action to recover such debt, made upon its managing agent while he is temporarily stopping at the place where the debt was contracted, will bind the corporation. *Klopp v. Creston City etc. Waterworks Co.*, 666.
  41. FOREIGN CORPORATION — RIGHT TO TAKE MORTGAGE. — A foreign corporation is entitled to make a mortgage loan in Missouri. *Ferguson v. Soden*, 512.
- See APPEAL, 7; EQUITY, 1; EVIDENCE, 2, 8; INJUNCTIONS, 1; JUDGMENTS, 14; NEGOTIABLE INSTRUMENTS, 6, 11, 12; PLEADING, 1; QUO WARRANTO; RECEIVERS, 1.

## CORRESPONDENT.

See BANKS, 13-15.

## COTENANCY.

1. One tenant in common is not permitted, in equity, to acquire an interest in the property hostile to that of the others, and therefore a purchase by one tenant in common of an encumbrance on the joint estate, or an outstanding title to it, is held, at the election of the other tenants in common within a reasonable time, to inure to the equal benefit of all upon their contributing their proportion of the consideration actually paid. *Ramberg v. Wahlstrom*, 227.
2. A TENANT IN COMMON OF A LEASEHOLD ESTATE MAY PURCHASE THE ENTIRE ESTATE of his landlord, without incurring any obligation to his cotenants to share in the benefits of the purchase, because the estate so purchased is not adverse to the leasehold estate, and the property

acquired by the purchasing cotenant is not inconsistent with the terms of the lease. *Ramberg v. Wahlstrom*, 227.

- 3. IF THE INTEREST OF ONE COTENANT IS SOLD AT AN EXECUTION SALE,** a tenant holding under a lease from all of the cotenants must account to a purchaser at such sale for a moiety of the rents and profits under a statute entitling the purchaser at such a sale to recover the value of the use and occupation of the property from the date of the sale from a tenant in possession thereof. *Harris v. Foster*, 187.

See PARTITION.

#### COUNSEL.

See TRIAL, 9, 10.

#### COUNTERSIGN.

See DEFINITIONS.

#### COUNTY JUDGES.

See QUO WARRANTO, 3.

#### COURTS.

See JURISDICTION; RECEIVERS.

#### COVENANTS.

See BONDS, 2-4; DEEDS, 6

#### CRIMINAL LAW.

**MAYHEM.** — INSTRUCTION IS CORRECT, which, while it leaves the jury free to find the fact "that the defendant knowingly and willfully threw some corrosive fluid into the face and eyes of the injured person," declares that the law presumes that the defendant intends the natural and probable consequence of his act, and that, from the intentional throwing of such a dangerous instrumentality into the eyes of a child, the jury may infer malice. *State v. Ma Foo*, 414.

See ACCESSARIES; ASSAULT, 1, 2, 4; HOMICIDE; HUSBAND AND WIFE, 1-3; LARCENY; RAPE; TRIAL, 9, 11.

#### CROPS.

See JUDICIAL SALES.

#### CROSS DEMAND.

See BANKS, 11.

#### CUSTOM.

See INSURANCE, 3.

#### DAMAGES.

- 1. PENALTIES OR LIQUIDATED DAMAGES.** — When a lump sum is named by the parties to a contract as compensation for loss suffered, the presumption is that the sum named is intended as a penalty and not as liquidated damages, no matter what it is called in the contract, the controlling elements being the intent of the parties and the circumstances of the case, *AM. ST. REP.*, VOL. XXXIII, — 62

and if the contract contains several matters of different degrees of importance and yet the sum named is payable for the breach of any of them, even the least, it is a penalty. *Keck v. Bieber*, 846.

2. EVIDENCE OF FINANCIAL CONDITION OF PLAINTIFF is admissible in an action to recover for personal injury, when the evidence will justify the jury in awarding exemplary or punitive damages. *Beck v. Dowell*, 547.

3. MEASURE OF DAMAGES FOR DEATH OF MARRIED MAN. — In an action to recover damages for the death of a married man, the measure of damages is the pecuniary loss of the widow alone. *Liermann v. Chicago etc. R'y Co.*, 37.

See BONDS, 2-4; EMINENT DOMAIN; RAILROADS, 2-18, 21-25, 29; WITNESSES, 2, 3.

### DEBTOR AND CREDITOR.

1. PAYMENTS — APPLICATION OF. — When a creditor holds two claims against his debtor, and the latter makes a payment without directing to which debt it shall be applied, the creditor may apply it equally to the payment of each debt, neither being barred by limitation. *Beck v. Haas*, 516.

2. PAYMENTS — APPLICATION OF. — When a creditor holds several claims against his debtor, the latter on making a payment, may direct upon which debt it shall be credited, but failing to do this the creditor may make the application in the manner most to his interest. If neither the debtor directs, nor the creditor applies the payment, the law will apply it to the debt which first matures, unless justice and equity demand a different appropriation. *Beck v. Haas*, 516.

See BANKS, 1-3; CORPORATIONS, 13, 38; PARTNERSHIP, 5-7; PLEDGE; TRUSTS, 10-12.

### DEBTS.

See BAILMENT.

### DECEIT.

See SPECIFIC PERFORMANCE, 2, 6.

### DECLARATIONS.

See EVIDENCE, 18; TRUSTS, 15; WILLS, 10.

### DEEDS.

1. DELIVERY, WHAT DOES NOT CONSTITUTE. — If a father executes and acknowledges a deed purporting to grant an estate to his three adult sons, and to operate presently, and then delivers the deed to one of them, saying, "Take this deed and put it in our box at the bank," without doing any other act showing an intention to formally deliver the deed, and himself retaining possession of the land granted, receiving the rents and profits during his lifetime, the instrument is inoperative as a deed for want of sufficient delivery. *Hayes v. Boylan*, 326.

2. DELIVERY, WHAT IS NOT. — When a grantor in a deed hands it to the grantee, telling him to "take this deed and put it in our box at the bank," this does not constitute a present delivery of the deed to the grantee, but a mere employment of him, as agent of the grantor, to do

an act for the grantor whereby the latter could retain the custody of the deed. *Hayes v. Boylan*, 326.

3. DEED TO INFANT — DELIVERY, WHEN SUFFICIENT. — When a parent executes a deed to an infant child and in his interest, and manifests, by his words and conduct, an intention that the deed shall operate at once, a delivery will be presumed, and proof of actual delivery is unnecessary, because it is the duty of the parent to accept and preserve the deed for such infant until he arrives at his majority. *Hayes v. Boylan*, 326.
4. DELIVERY, WHEN SUFFICIENT. — If a grantor intends, when executing a deed, to be understood as delivering it, that will be sufficient as a delivery, or when he induces the grantee to believe that a deed has been executed which makes him the owner of land on which he is afterwards permitted to erect valuable improvements, the grantor is not allowed to set up that the deed is in fact inoperative for want of formal delivery. *Hayes v. Boylan*, 326.
5. CONTRACT BETWEEN COTENANTS NOT TO SUE FOR PARTITION, WHEN VOID. A stipulation in a deed conveying an undivided interest in land, whereby the parties covenant for themselves, their heirs, and assigns never to institute proceedings for the partition of a certain specified portion of that land, is an unreasonable restraint of the enjoyment and use of the property, and therefore void. *Haeussler v. Missouri Iron Co.*, 431.

See GUARDIAN AND WARD, 4.

#### DEEDS OF TRUST.

See HUSBAND AND WIFE, 4.

#### DEFINITIONS.

To COUNTERSIGN AN INSTRUMENT is to sign what has already been signed by a superior,—to authenticate by an additional signature,—and usually has reference to the signature of a subordinate in addition to that of his superior by way of authentication of the execution of a writing to which it is affixed, and it denotes the complete execution of the paper. *Fitz Ave. Bank v. Forty-second St. etc. R'y Co.*, 712.

Constructive trusts. *Riley v. Martinelli*, 209.

"Fish." *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 72.

"On sale and return." *House v. Beak*, 307.

"On sale or return." *House v. Beak*, 307.

Ordinary care. *Driscoll v. Market St. etc. R'y Co.*, 203.

Partnership. *Goldsmith v. Eichold*, 97.

Servant. *Metcalf v. Sweeney*, 864.

Watercourse. *Hawley v. Sheldon*, 941.

Will. *Robinson v. Brewster*, 265.

"Without recourse." *First Nat. Bank v. Security Nat. Bank*, 618.

#### DELIVERY.

See DEEDS, 1-4; NEGOTIABLE INSTRUMENTS, 2; SALES, 1-4, 8; TRUSTS, 1.

#### DEMURRER TO EVIDENCE.

See TRIAL, 8.

#### DEVISE.

See ESTATES; WILLS, 9.



## DILATORY.

See PLEADING, 3, 4.

## DIRECTORS.

See CORPORATIONS, 3, 12, 15, 23, 27-38; INJUNCTIONS, 1.

## DIRECTING VERDICT.

See RAILROADS, 41, 42; TRIAL, 14.

## DISCHARGE.

See MORTGAGES, 5-7.

## DISCRIMINATION.

See INTERSTATE COMMERCE; MUNICIPAL CORPORATIONS, 2-8.

## DIVERSION.

See WATERCOURSES, 3-6.

## DIVORCE.

See MARRIAGE AND DIVORCE.

## DOGS.

See RAILROADS, 19.

## DUEBILLS.

See AGENCY, 4.

## DURESS.

See COMPOUNDING FELONIES, 1; PAYMENT.

## EASEMENTS.

1. **EASEMENT BY ADVERSE USER.** — When a party has enjoyed an easement for such length of time as to confer title to land from the true owner to the disseisor, this adverse enjoyment will establish the right to the easement as against the owner of the servient estate. *Pitzman v. Boyce*, 535.
2. **EASEMENT BY ADVERSE USER.** — To make the enjoyment of an easement adverse to the owner of the servient estate, the intent to claim and enjoy the easement must exist. In the absence of such intent and claim no adverse enjoyment will arise. *Pitzman v. Boyce*, 536.
3. **EASEMENT OF RIGHT OF WAY, RESERVATION OF GIVES NO RIGHT TO FENCE.** A reservation in a conveyance of a reasonable right of way across the land conveyed gives the owner of the dominant estate no right to inclose such right of way with fences. *Sizer v. Quinlan*, 55.

See RAILROADS, 16.

## EJECTMENT.

1. **MARRIED WOMAN, WHEN A PROPER PARTY DEFENDANT.** — When the husband is confined in a lunatic asylum, and the wife is the active defendant in the cause, withholding the premises sued for, and making a

defense of an affirmative character, she must be regarded as a proper party defendant. *Bensieck v. Cook*, 422.

2. **INCOMPETENT EVIDENCE.** — In an action of ejectment, brought by the purchaser at a trustee's sale of the premises, evidence of payments made by the party defendant showing a partial discharge of the notes secured by the deed of trust, is rightly excluded. Such evidence does not show a satisfaction of the debt. *Bensieck v. Cook*, 422.

### ELECTIONS.

1. **STATUTE ADOPTED FROM ANOTHER STATE — CONSTRUCTION OF.** — When an election statute is adopted from another state, the decisions in that state construing it are not also adopted, if inconsistent with the fundamental law of the state adopting it. *Bowers v. Smith*, 491.
2. **STATUTES — CONSTRUCTION — MANDATORY AND DIRECTORY PROVISIONS.** When a statute expressly or by fair implication declares any act to be essential to a valid election or that an act shall be performed in a given manner and no other, such provisions are mandatory and exclusive; but if the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that their performance is essential to the validity of the election they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election. *State v. Russell*, 625.
3. **STATUTES — MANDATORY AND DIRECTORY PROVISIONS.** — Statutory provisions which fix the day and place of the election, and the qualification of the voters are mandatory, while those which relate to the mode of procedure in the election, and to the record and return of the results, are directory merely. *State v. Russell*, 625.
4. **CONSTRUCTION — IRREGULARITIES.** — Courts will consider the chief purpose of election laws, so as to obtain a fair election and an honest return, as paramount in importance to minor requirements which prescribe the formal steps to reach that end; and in order not to defeat the main design, are frequently led to ignore such innocent irregularities of election officers as are free from fraud, and have not interfered with a full and fair expression of the voter's will. *Bowers v. Smith*, 491.
5. **CONSTRUCTION — ERROR OF OFFICIAL.** — Such a construction of an election law as will permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted where the language of the statute is fairly susceptible of any other meaning. *Bowers v. Smith*, 491.
6. **HOW CONSTRUED.** — All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. *Bowers v. Smith*, 491.
7. **CONSTRUCTION OF MANDATORY PROVISIONS.** — When an election law itself declares a specified irregularity in an election to be fatal, courts will follow that command irrespective of their views of the importance of the requirement, but in the absence of such mandatory provision, an irregularity not so vital as to prevent a free and full expression of the popular will, will be considered as immaterial, and will not vitiate the whole return. *Bowers v. Smith*, 491.
8. **AUSTRALIAN BALLOT SYSTEM — MARK MADE WITH PENCIL.** — Under the "Australian ballot system," a provision of a statute that the voting mark shall be made with ink is directory merely, and if the mark is made with pencil the ballot is not thereby rendered void; nor is its val-

idity affected by a further provision of the statute that "no elector shall place any mark upon his ballot by which it may afterwards be identified as the one he voted." *State v. Russell*, 625.

9. **MARKING BALLOTS.** — Under a statute providing that "no elector shall place any mark upon his ballot by which it may afterwards be identified as the one he voted," the mark prohibited is such a one whether letters, figures, or characters in ink or in pencil, as shows an intention on the part of the voter to distinguish his particular ballot from others of its class, and not one that is common to and not distinguishable from others in that class, and the ballot itself must furnish evidence of an unlawful intention on the part of the voter, such as his initials, or a mark known to be his, or the like. *State v. Russell*, 625.
10. **AUSTRALIAN BALLOT LAW — ADDING NAME TO TICKET.** — Under the Australian ballot system as adopted in Missouri, electors may vote for candidates whose names do not appear on the official ballots by adding such names in writing on the blanks provided on the ballot for that purpose. *Bowers v. Smith*, 491.
11. **BALLOTS — EFFECT OF IRREGULARITY.** — Ballots printed by county clerks as directed by law and cast by voters in conformity therewith, but incorrectly prepared by the secretary of state or county clerk by erroneously admitting a candidate's name to a place on the ballot, are not void but should be counted. *Bowers v. Smith*, 491.
12. **BALLOTS — ERRONEOUS ADDITION OF NAME to the official list of nominees,** though not corrected before the election as provided by law, is, under the Australian ballot system, harmless in its effect upon the voter's right to use the official ballot without fear of possible disfranchisement. *Bowers v. Smith*, 491.
13. **BALLOTS — WAIVER OF ERRONEOUS ADDITION OF NAME.** — When, under the Australian ballot system, a candidate causes no timely objection to be made before the election, as provided by law, to the presence on the official ballot of any names of nominees not proper to be there, he must be regarded as having waived such objection. *Bowers v. Smith*, 491.
14. **POLLING PLACES.** — When the ballots voted in a certain election district are received at two polling places instead of one, thus necessitating the appointment of an additional set of election judges not authorized by law, such irregularity will not affect the validity of the ballots cast at either or both of such polling places, when it does not appear to have had any bearing upon the result of the election to the prejudice or disadvantage of the defeated candidate. *Bowers v. Smith*, 491.
15. **PEREMPTORY MANDAMUS** will not be issued requiring the judges and clerks of election to count ballots wrongfully rejected by them when such ballots are beyond their control and have been returned to the county clerk. *State v. Russell*, 625.

See **COTENANCY**, 1; **LANDLORD AND TENANT**, 3; **PARTNERSHIP**, 6.

#### EMINENT DOMAIN.

**CONCLUSIVENESS OF JUDGMENT FOR DAMAGES.** — A judgment of a court having jurisdiction to award damages in a proceeding to condemn lands for railroad purposes is conclusive upon the parties thereto as to all questions therein actually litigated, as well as all matters necessarily within the issue joined, although not formally litigated. *Atchison etc. R. R. Co. v. Boerner*, 637.

See **RAILROADS**, 1-14.

ENTAIL.

See ESTATES.

EQUITY.

- 1. FRAUD — EQUITY WILL NOT RELIEVE AGAINST FRAUDULENT ASSIGNMENT.**  
A creditor of an insolvent corporation who obtains an assignment of its book accounts through fraud is not entitled to the aid of a court of equity to enforce his claim under the assignment. *Commercial Nat Bank v. Burch*, 331.
  - 2. FRAUD — EQUITY WILL NOT RELIEVE AGAINST.** — A party will not be permitted to come into a court of equity to enable him to reap the fruits of fraud; and if it is found that the right sought to be enforced is unconscionable, or has been obtained by fraud, deceit, or covin, a court of equity will not lend its aid. *Commercial Nat. Bank v. Burch*, 331.
  - 3. JURY TRIAL IN SUIT AT EQUITY.** — The refusal to give instructions to the jury in an equity case is not a cause of reversal if the court itself finds upon all the issues. *Riley v. Martinelli*, 209.
- See CORPORATIONS, 35; COTENANCY, 1; INJUNCTIONS; INSANE PERSONS, 2; JUDGMENTS, 6-9; MARRIAGE AND DIVORCE, 14; SPECIFIC PERFORMANCE; TRUSTS, 13.

EQUITY OF REDEMPTION.

See MORTGAGES, 2.

ERROR.

See APPEAL; ASSAULT, 1; TRIAL, 12.

ESTATES.

- ESTATES TAIL — DEVISE — CONSTRUCTION OF.** — A devise of land to the testator's wife for life and after her death to a devisee named, "and to his heirs entail the same forever," vests an estate for life only in such devisee, and upon his death the fee simple in his children. This by virtue of the New Jersey act of June 13, 1820: New Jersey Revision 299, section 11, abolishing estates tail. *Doty v. Teller*, 670.
- See LANDLORD AND TENANT, 3.

ESTOPPEL.

- 1. ESTOPPEL BY SILENCE.** — When one knowingly suffers another in his presence, to purchase property to which he has a claim of title, which he willfully conceals, he will be deemed to have waived his claim, and will not afterwards be permitted to assert it against the purchaser. Therefore, if the vendee of land under an executory contract dies before he has paid any of the purchase price, and the vendor thereafter becomes his administrator, and having taken possession of the land and applied to the probate court for an order to sell the decedent's lands for the payment of his debts, allows the sale to be consummated without giving the purchaser any notice whatever of his personal title or interest in the property, and thus induces such purchaser to change his position to his detriment, the vendor and his privies will be estopped to assert any claim to the land against the purchaser and his privies. *Lindsay v. Cooper*, 105.



- 2. ESTOPPELS ARE PROTECTIVE ONLY**, and are to be invoked as shields, and not as offensive weapons. Their operation should, in all cases, be limited to saving harmless or making whole the person in whose favor they arise, and they should never be made the instruments of gain or profit. *Lindsay v. Cooper*, 105.
- See CARRIERS, 3; INSURANCE, 8; JUDGMENTS, 4; PARTNERSHIP, 7; Quo WARRANTO, 5; RAILROADS, 2, 17.**

### EVIDENCE.

- 1. EVIDENCE OF OTHER TRANSACTIONS.** — When there is a question whether an act is accidental or intentional, the fact that it forms part of a series of similar occurrences, in each of which the person doing the act is concerned, is relevant. *McCasker v. Enright*, 938.
- 2. REPORT OF SECRETARY OF CORPORATION NOT COMPETENT EVIDENCE AGAINST PRESIDENT AND TREASURER.** — A report of the secretary of a corporation is not competent evidence to charge the president and treasurer with losses alleged to have been sustained by the corporation by reason of insufficient payments to it on certain accounts, or to show that no more was paid to him than he reported. *North Hudson Mut. Building etc. Ass'n v. Childs*, 57.
- 3. SUFFICIENCY OF CIRCUMSTANTIAL.** — It is not necessary to prove by direct evidence that a party advised an act or aided in its commission, but such facts may, like any others, be established by circumstantial evidence. *Willi v. Lucas*, 436.
- 4. PRESUMPTIONS AS TO FOREIGN LAWS NOT EXTENDED TO PENAL STATUTES.** Presumptions as to foreign laws are generally confined to those states and countries in which the common law is the law of the land, but even then they do not extend to such statutory enactments as are penal in their nature. The courts of Wisconsin will not presume the existence in Sweden of a statute, law, or custom authorizing a divorce upon the ground of the husband's conviction and sentence for an offense, where such conviction and sentence were without notice or hearing and two years after the husband and his wife and family had left that country and become permanent residents of the United States. *St. Sure v. Lindsfelt*, 50.
- 5. PRESUMPTION OF GUILT ARISES** when the accused person has fled to avoid arrest, but not where he has fled to escape the violence of a mob. *State v. Ma Foo*, 414.
- 6. THE NECESSARY PRESUMPTION ARISING FROM A RECORD** cannot be contradicted by parol evidence any more than the express words of the record itself. *In re Dance*, 768.
- 7. LIFE INSURANCE — PRESUMPTION AS TO MODE OF DEATH.** — Nothing appearing to the contrary, the legal presumption is that a man died from a natural cause, and not from an act of self-destruction. The mere fact of death in an unknown manner creates no presumption of suicide, nor does the finding of a coroner's jury that the cause of death was insanity tend to prove the commission of suicide. *Walcott v. Metropolitan etc. Ins. Co.*, 923.
- 8. CORPORATIONS — SUBSCRIPTION PAPER — DOLLAR MARK, ABSENCE OF.** When it appears from a subscription paper that the subscribers agree to pay certain sums of money, and the amount which each is to pay is expressed in figures, it will be presumed, in the absence of evidence to

the contrary, that they represent dollars. *Richelieu Hotel Co v. International etc. Encampment Co.*, 234.

9. **RES GESTÆ.** — THE STATEMENTS OF AN AGENT appointed to superintend the work of excavating land near a house, when made during the progress of the work and the discharge of his functions, may be relied on by the owner of the house. *Larson v. Metropolitan etc. Ry Co.*, 439.
10. **MORTGAGES.** — ASSUMPTION OF MORTGAGE DEBT BY PURCHASER OF LAND may be shown by parol evidence. *Bensieck v. Cook*, 422.
11. **MORTGAGES** — EVIDENCE ADMISSIBLE TO SHOW CONSIDERATION, BUT NOT TO VARY. — When the consideration expressed in a mortgage is in dispute, parol evidence is admissible to show the real consideration; but when the consideration is not in dispute, parol evidence is not admissible to change the terms of the mortgage in regard to the payment of notes described therein. *Schultz v. Plankinton Bank*, 290.
12. **MORTGAGE SECURING SEVERAL NOTES** — PRIORITY — EVIDENCE TO VARY. When a mortgage is given to secure several notes maturing at different dates, parol evidence of an agreement made contemporaneously with the mortgage, by which, on foreclosure, the proceeds of the sale are to be first applied to the payment of the note last maturing to relieve the indorser thereof, is not admissible in favor of such indorser. *Schultz v. Plankinton Bank*, 290.
13. **ACCOUNT BOOKS.** — Bank books of accounts and original entries shown to have been accurately kept and written up each day are admissible in evidence in favor of the bank. *Robinson v. Smith*, 510.
14. **BOOKS OF ACCOUNT.** — At common law it was necessary, in order to make books of account admissible in evidence, that the entries therein should be proved by the clerk or servant who made them, if he was alive and could be produced, and that they should have been made by a person whose duty it was to make them, and that they were made in the ordinary course of business, and contemporaneously with the delivery of the goods, so as to form a part of the *res gestæ*. The Illinois statute has simply enlarged this rule without repealing it, by permitting the owner who keeps the books to testify to the original entries made therein. *House v. Beak*, 307.
15. **BOOKS OF ACCOUNT.** — When, in an action on account, the clerk who kept the books of original entries testifies to their correctness, and the party furnishing the items to such clerk testifies to the correctness of such items, and it is also shown that the goods described were delivered to defendant, who paid part of the account without objection, and accepted a statement thereof, saying it was all right, and without objecting to its correctness for three years, the books of account are admissible in evidence. *House v. Beak*, 307.
16. **BOOKS OF ACCOUNT.** — When the clerk who makes original entries in books of account has no knowledge of their correctness, but makes them as the items are furnished by another, it is essential that the party furnishing the items should testify to their correctness, or that satisfactory proof thereof from other sources should be produced before the books are admissible in evidence. *House v. Beak*, 307.
17. **BOOKS OF ACCOUNT KEPT BY PARTY.** — When a party to an action keeps his own book of original entries, it is admissible to sustain an account therein composed of many items upon proof that some of the articles were delivered at or about the time the entries purported to have been made; that such entries were in the handwriting of the party

producing the book; that he kept no clerk at the time, and that his customers had settled by the book and found it to be fair and correct. *House v. Beak*, 307.

18. **DECLARATIONS OF A DECEASED PERSON** are admissible in evidence against those who claim in the interest or right of such decedent. *Connecticut River Sav. Bank v. Albee*, 944.

See **APPEAL**, 6; **ASSAULT**, 2, 4; **DAMAGES**, 2; **EJECTMENT**, 2; **FRAUD**, 1; **HOMICIDE**; **INSURANCE**, 1, 3, 11; **NEGOTIABLE INSTRUMENTS**, 1; **PLEADINGS**, 2; **QUO WARRANTO**, 2, 3; **RAILROADS**, 4, 26, 27; **TRIAL**, 2-7, 14; **WILLS**, 9, 10; **WITNESSES**.

### EXCAVATIONS.

See **REAL PROPERTY**.

### EXECUTION.

1. **EXEMPTION OF PROPERTY FROM EXECUTION IS THE DEBTOR'S PERSONAL PRIVILEGE.** — If he does not claim it, no one else can have the benefit of it. Hence his mortgagee cannot make the claim when he does not. *Sherrille v. Chaffee*, 863.
2. **INSURANCE — WHEN NOT SUBJECT TO DEBTS OF INSURED.** — When a reasonable amount of insurance is effected upon the life of a husband, the sole object being to provide a fund for the support of his wife in case of his death, such fund will not ordinarily be liable for his debts. *Talcott v. Field*, 662.
3. **INSURANCE — ENDOWMENT POLICY — RIGHTS OF CREDITORS.** — When an insolvent debtor takes out and pays the premiums on an endowment insurance policy on his life, in favor of his wife, and she receives such endowment from the insurer during the lifetime of the insured, she takes it, or the property in which it is invested in her name, subject to the claims of the husband's creditors. *Talcott v. Field*, 662.
4. **A JUDGMENT OR EXECUTION LIEN ATTACHES ONLY TO THE REAL INSTEAD OF THE APPARENT** interest of the debtor, and a sale thereunder transfers no interest beyond that in fact held by the debtor, unless the purchaser buys in good faith and without any notice actual or constructive of some defect in the debtor's title. *Riley v. Martinelli*, 209.
5. **EXECUTION SALES.** — A JUDGMENT CREDITOR WHO PURCHASES AT A SALE UNDER HIS JUDGMENT and does not pay the purchase price otherwise than by a credit upon such judgment, is regarded as a purchaser in good faith and for value, and protected against all equities and defects in the title of which he has had no notice, actual or constructive. *Riley v. Martinelli*, 209.

See **COTENANCY**, 3; **MECHANICS' LIEN**, 7.

### EXECUTORS AND ADMINISTRATORS.

1. **EXECUTORS AND ADMINISTRATORS** had, at the common law, power to compromise and submit to arbitration disputed claims in favor of or against the estates which they represented. *Parker v. Providence etc. Steamboat Co.*, 869.
2. **EXECUTORS AND ADMINISTRATORS, POWERS OF TO COMPROMISE CLAIMS IN FAVOR OF THE NEXT OF KIN.** — If a statute imposes a liability upon common carriers when the life of a passenger is lost by negligence, and authorizes an action to be brought and a recovery to be had for the bene-

est of the husband or widow and next of kin of the deceased, an executor or administrator entitled to maintain such action for the benefit of such parties is authorized to compromise to the same extent as if the claim were in favor of the estate of the decedent. *Parker v. Providence etc. Steamboat Co.*, 869.

3. ADVERSE POSSESSION — LACHES. — Where an administrator recognizes the validity of a previous judicial sale of his decedent's land by filing the notes given for the purchase money as a claim against the purchaser's estate, and by the subsequent enforcement of the claim, such acts will stop the running of the statute as against an heir of the purchaser who is out of possession; and if such heir was an infant at the time of the suspensive acts, and commenced proceedings for the assertion of her rights to the land within three years after attaining her majority, she will not be deemed guilty of laches nor affected by the statute of limitations. *Lindsay v. Cooper*, 105.
4. JUDICIAL SALES — RIGHTS OF PURCHASERS. — THE RULE OF CAVEAT EMP-  
TOR applies in its utmost vigor and strictness to an administrator's sale, even to the extent of covering those defects of title which an examination of the records and other muniments of title does not disclose, and those secret equities which no ordinary diligence can detect. *Lindsay v. Cooper*, 105.
5. INVALIDITY OF ADMINISTRATOR'S SALE, HOW CURED. — An administrator's sale which is invalid owing to the absence of jurisdictional allegations in the petition for the order of sale becomes binding on the representatives of the decedent if they knowingly receive and distribute among the creditors of his estate the proceeds of the notes given for the purchase money. *Lindsay v. Cooper*, 105.

See ESTOPPEL, 1; LIMITATIONS OF ACTIONS, 3; TRUSTS, 8.

#### EXEMPTION.

See EXECUTION, 1-3.

#### EX MALEFICIO.

See TRUSTS, 4.

#### EXPERTS.

See WITNESSES, 1-3.

#### EXPULSION.

See RAILROADS, 20-25.

#### FALSE REPRESENTATIONS.

See MARRIAGE AND DIVORCE, 3, 4; GUARANTY, 1.

#### FEDERAL COURTS.

See JURISDICTION, 1, 3.

#### FELONY.

See MARRIAGE AND DIVORCE, 11.



## FIDUCIARY.

See PARTNERSHIP, 2, 3.

## FILLING BLANKS.

See AGENCY, 1; BONDS, 1.

## FIRE DEPARTMENT.

See MUNICIPAL CORPORATIONS, 3.

## FORECLOSURE.

See JUDICIAL SALES; LIS PENDENS; MORTGAGES, 2-4; RAILROADS, 9;  
USURY, 3.

## FORFEITURE.

See INSURANCE, 6.

## FORGERY.

See CORPORATIONS, 17, 19, 20.

## FRANCHISES.

See CORPORATIONS, 2.

## FRAUD.

1. EVIDENCE OF OTHER FRAUDULENT TRANSACTIONS. — If an act is claimed to be fraudulent, evidence of other similar fraudulent acts is admissible if they were committed at or about the same time and the same motive may reasonably be supposed to exist for all of them. *McCasker v. Enright*, 938.
2. FRAUD AND CIRCUMVENTION IN PROCURING THE EXECUTION OF AN INSTRUMENT CANNOT BE ESTABLISHED by showing failure of or fraud in its consideration, where there is no pretence that any trick, device, or artifice was resorted to to procure such execution, nor that the party signing it did not know or understand what he was doing. *Richelieu Hotel Co. v. International etc. Encampment Co.*, 234.
3. RATIFICATION OF FRAUDULENT ACT, LIABILITY FOR. — One who ratifies and makes his own the fraudulent act of another becomes liable therefor, although there was no combination or conspiracy between them. *Gunther v. Ulrich*, 32.

See AGENCY, 3; CONTRACTS, 3; CARRIERS, 1; CORPORATIONS, 13, 15, 27-29; ELECTIONS, 4; EQUITY, 1, 2; JUDGMENTS, 6; LANDLORD AND TENANT, 5; MARRIAGE AND DIVORCE, 3; PAYMENT, 2; SPECIFIC PERFORMANCE, 4; TRUSTS, 4, 5.

## FRAUDULENT CONVEYANCES.

CHATTEL MORTGAGE WITH POWER TO SELL — WHEN VOID AS AGAINST CREDITORS. — When a chattel mortgage contains a stipulation authorizing the mortgagor to sell or dispose of the whole of the property, without limitation, in a lump or in any sized lots as he may choose, without providing what shall be done with the proceeds when the goods are sold, and without any agreement between the parties as to how the sale or sales shall be made or what shall be done with the proceeds, such

mortgage is void as in fraud of the creditors of the mortgagor, nor is it rendered valid by the fact that the mortgagee takes possession of the property without the consent of the mortgagor, under a stipulation in the mortgage that the mortgagee may take possession whenever he shall deem himself unsafe or insecure. *Rathbun v. Berry*, 389.

## GIFTS.

See TRUSTS, 1, 2.

## GUARANTY.

1. **A GUARANTY OBTAINED FROM ONE WHO WAS INTOXICATED** when he signed it, who was unable to read and was ignorant of its contents, and who affixed his guaranty upon a false representation that it was an application for a license, is invalid in the hands of any person receiving it with notice of the means by which it was procured. *Page v. Krekey*, 731.
2. **A CHANGE OR ALTERATION** in a contract to which a guaranty was applicable discharges the guarantor whether material or not. Hence if A guarantees that if B does not buy and pay for certain articles to be thereafter furnished, the latter will deliver them at R, and subsequently goods are shipped to B, which if he does not pay for, he is to deliver to M, the guaranty does not apply to the latter contract, and A is not answerable for the nondelivery of the goods to M. *Page v. Krekey*, 731.

## GUARDIAN AND WARD.

1. **GUARDIAN'S SALES.** — PROCEEDINGS BY A GUARDIAN FOR THE SALE OF THE ESTATE OF HIS WARD ARE NOT ADVERSE, but are in effect proceedings by him and for his benefit. The minor is in court by the filing of his petition and thereby submits his property to the jurisdiction of the court. The order of sale is not against or adverse to him, but is the granting of his request. *Scarf v. Aldrich*, 190.
2. **GUARDIAN'S SALES.** — A DEFECTIVE DESCRIPTION OF REAL PROPERTY IN A GUARDIAN'S PETITION for an order of sale and also in the order to show cause does not affect the jurisdiction of the court nor the validity of the sale if the property was sufficiently described in the order of sale. *Scarf v. Aldrich*, 190.
3. **GUARDIAN'S SALES.** — The fact that an order to show cause why a guardian should not be granted authority to sell the real property of his ward was set for hearing at a time less than four weeks after the making of such order, when the statute requires that such hearing shall not be less than four nor more than eight weeks from the time of making the order, does not render void the order of sale based upon the order to show cause, if the statute does not require any notice of the order nor of the application to sell his property to be served upon the minor. *Scarf v. Aldrich*, 190.
4. **GUARDIAN'S SALES.** — IT IS THE EXECUTION OF THE DEED of the guardian and not the confirmation of the sale which vests title in the purchaser. *Scarf v. Aldrich*, 190.

See INSANE PERSONS, 1.

## GUESTS.

See LANDLORD AND TENANT, 5, 8.

## HIGHWAYS.

1. **RIGHT TO REASONABLE USE — NUISANCE.** — Any person may lawfully use a public highway in the transaction of his legitimate business, either of travel or for transportation, but he must use it in a reasonable manner and not interfere with its reasonable use by other citizens, and whether or not a particular use is an unreasonable use and a nuisance, is a question of fact to be submitted to the jury. *Commonwealth v. Allen*, 830.
2. **NUISANCE IN.** — Any obstruction which unnecessarily incommodes or impedes the lawful use of a highway by the public, is an indictable nuisance. *Commonwealth v. Allen*, 830.
3. **USE OF BY TRACTION ENGINE — NUISANCE.** — The running of a traction engine over a public highway upon a single occasion when necessary, as in moving it from one location to another, is not a nuisance. *Commonwealth v. Allen*, 830.
4. **USE OF BY TRACTION ENGINE — NUISANCE.** — The daily and continued use on a public highway of a traction steam engine, which, by its noise and appearance, frightens horses and makes the highway dangerous to persons riding or driving, and by reason of the unusually heavy loads which it draws, injures the highway and endangers the safety of bridges, as well as impedes travel, is an indictable nuisance. *Commonwealth v. Allen*, 830.
5. **HIGHWAYS AND BRIDGES — DUTIES OF TOWNSHIP.** — Highways and bridges are generally constructed for ordinary use in an ordinary manner and not for an unusual or extraordinary use, either by crossing at great speed, or by the passing of a very large and unusual weight, such as that drawn by a traction engine; and a township is not bound to do more than to so construct its bridges as to protect the public against injury by a reasonable, proper, and probable use thereof, in view of the surrounding circumstances, such as the extent, kind, and nature of the travel and business over them. *Commonwealth v. Allen*, 830.
6. **EXTINGUISHMENT OF EASEMENT.** — ADVERSE USER of a public highway for railroad purposes will not extinguish nor destroy the public easement therein. *Laing v. United New Jersey R. R. etc. Co.*, 682.

See WITNESSES, 2.

## HOMICIDE.

1. **SELF-DEFENSE. — WHEN A PERSON IS ATTACKED IN HIS DWELLING HOUSE OR PLACE OF BUSINESS,** it is his duty to refrain from taking life, unless there is an imminent and pressing necessity, real or apparent, to do so, and he must use care to employ no more force than is sufficient to repel the danger to his life, or the apprehended grievous injury to his person. *Askew v. State*, 83.
2. **SELF-DEFENSE — INTOXICATION OF ASSAILANT, EFFECT OF.** — The conduct of a person in a state of voluntary intoxication is, in criminal cases, subject to the same rules and principles as the conduct of a sober person. Therefore, the voluntary intoxication of an assailant does not modify the right of one assaulted in his dwelling or business house, to defend himself against a violent attack; but, if in repelling the attack, the person so assaulted takes the life of his assailant, the intoxication of the latter may be a circumstance to be considered by the jury in determining whether there was apparently a present pressing necessity for defendant to take the life of the deceased, in order to protect his own, or to prevent great bodily harm. *Askew v. State*, 83.

3. **SELF-DEFENSE — DEFECTIVE INSTRUCTIONS REGARDING INTOXICATION OF ASSAILANT.** — When a person takes the life of his assailant, while defending himself against an attack, and it appears from the evidence that the attack was made in his dwelling or place of business, the court in charging the jury as to the duty of the person assaulted when the assailant is intoxicated should not ignore such evidence, nor assume that if the deceased was so intoxicated that he was less prudent, and on account of the impairment of his physical faculties, less dangerous, it was the duty of the defendant to retreat, as a mode of exercising reasonable care to avert the difficulty and avoid the necessity of taking life. Such an instruction is fatally defective. *Askew v. State*, 83.
4. **INSTRUCTIONS AS TO DEFENDANT'S BELIEF OF THE NECESSITY FOR KILLING HIS ASSAILANT.** — An instruction is properly refused, which would permit a jury to acquit a person accused of the homicide of his assailant, if they were "reasonably satisfied from the evidence that the defendant, when he shot the deceased, did it believing that, unless he did so, the deceased would have cut him." That the defendant entertained such a belief is not sufficient. The jury must also be convinced that the circumstances were such as to create in the mind of a reasonably prudent man the belief that such necessity existed. *Askew v. State*, 83.

## HOTELS.

See CORPORATIONS, 10, 11.

## HOUSES OF ILL-FAME.

See SLANDER, 1.

## HUSBAND AND WIFE.

1. **CRIMINAL LAW — RESPONSIBILITY OF A MARRIED WOMAN FOR CRIMES COMMITTED IN HER HUSBAND'S PRESENCE.** — The presumption of the common law that when the wife acts with her husband in the commission of a crime she acts under his coercion is not allowed in all offenses, and a wife is answerable for murder, though committed in the presence of or in company with her husband. *Bibb v. State*, 88.
2. **CRIMINAL LAW — MARITAL COERCION.** — If a wife commits any felony, with the exception of murder and treason, and perhaps some other felonies, in the presence of her husband, it is presumed that she did it under constraint by him, and she is therefore excused, but this presumption is *prima facie* only, and is rebuttable. *State v. Ma Foo*, 414.
3. **CRIMINAL LAW — MARITAL COERCION — BURDEN OF PROOF.** — When a married woman has committed a crime in her husband's presence, she may be convicted, if it is proved that the husband was not the inciter or responsible agent in the crime. The state need not show that the husband actually disapproved the crime, nor should the jury be instructed that in the absence of evidence of such disapproval the wife must be acquitted. *State v. Ma Foo*, 414.
4. **TRUST DEED BY MARRIED WOMAN.** — A married woman may, by joining with her husband, execute a valid mortgage or deed of trust upon her real estate to secure a debt of her husband, and may therein appoint a trustee to make sale in default of payment of the debt secured. *Ferguson v. Soden*, 512.
5. **MARRIED WOMAN IS NOT ANSWERABLE FOR THE NEGLIGENCE OF A SERVANT** employed by her while living separate and apart from her hus-



band because, notwithstanding such separation, she is not competent to make a valid contract for the employment of a servant. *Ferguson v. Neilson*, 855.

**6. JUDGMENT AGAINST A MARRIED WOMAN** sued without her husband is not void, but is a complete justification to an officer acting in the enforcement of process issued upon and authorized by it. *Smith v. Borden*, 867.

**7. IF A WIFE HAS ADEQUATE MEANS OF SUPPORT**, she cannot procure necessities on the credit of her husband though she is living separate from him for justifiable cause. *Hunt v. Hayes*, 917.

**See DAMAGES; EJECTMENT, 1; EXECUTION, 2, 3; LIBEL; MARRIAGE AND DIVORCE; SPECIFIC PERFORMANCE, 8; TRIAL; TRUSTS, 5; WITNESSES, 7, 88.**

#### IMPEACHMENT.

**See JUDGMENTS, 10.**

#### IMPRISONMENT.

**See MARRIAGE AND DIVORCE, 11.**

#### IMPROVEMENTS.

**See PARTITION, 2, 3.**

#### INDEBITATUS ASSUMPSIT.

**See SALES, 9.**

#### INDEMNITY.

**See BONDS.**

#### INDEPENDENT CONTRACTOR.

**See MASTER AND SERVANT, 12-15.**

#### INDICTMENT.

**See ASSAULT, 2.**

#### INDORSEMENT.

**See NEGOTIABLE INSTRUMENTS, 2-5, 8; WITNESSES, 5.**

#### INFANTS.

**See DEEDS, 3; EXECUTORS AND ADMINISTRATORS, 3; GUARDIAN AND WARD; MASTER AND SERVANT, 5-8.**

#### INJUNCTION.

**1. CORPORATIONS — INJUNCTION AGAINST DIRECTORS.** — Persons illegally elected may be enjoined from acting as directors of a corporation. *Humboldt etc. Park Ass'n v. Stevens*, 654.

**2. JUDGMENT — INJUNCTION AGAINST.** — A judgment will not be enjoined in the absence of proof of a defense on the merits, or that it is contrary to equity or good conscience. *Wilson v. Shipman*, 660.

**3. SLANDER.** — A court of equity has no power to restrain a slander or libel, and it can make no difference whether the words are uttered concerning a person or his title to property. *Flint v. Hutchinson etc. Burner Co.*, 476.

4. **SLANDER OF TITLE — POWER OF EQUITY TO RESTRAIN.** — The loss of business which results from the slander of a man's title to his property is not such a special feature in the wrong as will give a court of equity the right to interfere by injunction to restrain the publication of the slander. *Flint v. Hutchinson etc. Burner Co.*, 476.
  5. **SLANDER OF TITLE — REMEDY FOR.** — Whether the words complained of are uttered in regard to the plaintiff's person or in regard to his property, it is for the jury to determine if they are slanderous or not. After a verdict in his favor, he can have an injunction so restrain the further publication of what the jury has found to be an actionable libel or slander. *Flint v. Hutchinson etc. Burner Co.*, 476.
- See **JUDGMENTS**, 6-9; **MECHANIC'S LIEN**, 7; **RAILROADS**, 15; **USURY**, 4; **WATERCOURSES**, 4-6.

### INSANE PERSONS.

1. **APPOINTMENT OF GUARDIAN AD LITEM** for a lunatic who is made a party defendant in an ejectment suit is proper, and the court has power, after such appointment, to render a judgment as binding on the lunatic and his property as a similar judgment would be upon a sane person. *Bensieck v. Cook*, 422.
2. **LUNATICS, ACTIONS BY, WHO MAY BRING.** — A bill in equity purporting to be by a lunatic by his next friend, and seeking to set aside a deed of such lunatic should be dismissed. No person can maintain such a suit on behalf of a lunatic unless he has authority to act for him and to bind his estate, and this authority his next friend does not possess. *Covington v. Neftzger*, 261.
3. **TRUST DEEDS. — VALIDITY OF SALE UNDER DEED OF TRUST** is not affected by the insanity of one who purchased the premises subject to the lien of that deed, and who assumed the payment of the debt secured by it as a part of the consideration of his purchase, nor is the case altered if the purchaser at the trustee's sale has actual knowledge of such insanity. *Bensieck v. Cook*, 422.

See **EJECTMENT**, 1; **EVIDENCE**, 7; **INSURANCE**, 13.

### INSOLVENCY.

**INSOLVENCY — ALIMONY.** — A judgment for alimony is not released by a discharge in insolvency, when, by statute, the effect of such discharge is declared to be to discharge the insolvent "from debts proved against his estate; and from debts provable founded on a contract made by him." A judgment or decree for alimony is not a judgment for the enforcement of any contract, express or implied, existing between the parties thereto, but for the enforcement of a duty in the performance of which the public, as well as the parties, are interested. *Noyes v. Hubbard*, 928.

See **BANKS**, 2; **CORPORATIONS**, 38; **EQUITY**, 1; **PARTNERSHIP**, 3.

### INSTRUCTIONS.

See **APPEAL**, 6; **CRIMINAL LAW**; **HOMICIDE**, 3, 4; **MASTER AND SERVANT**, 11; **TRIAL**, 7, 10-12.

## INSURANCE.

1. **NOTICE OF LOSS SENT BY MAIL — PRESUMPTION.** — When a prepaid letter, properly addressed, containing a statement of loss under a fire insurance policy, is deposited in the post office, it is presumed that it reached its destination by due course of mail, but this presumption may be rebutted by evidence showing that it was not received. The question is one of fact for determination by the jury. *Whitmore v. Dwelling House Ins. Co.*, 838.
2. **PROOF OF LOSS, SUFFICIENCY OF.** — When a statement of loss under a policy of fire insurance is furnished the insurer within the time stipulated in the policy, and there is nothing to show that it was not in good faith, intended as a compliance therewith, it is the duty of the insurer, if he means to rely upon a failure by the insured to comply with the terms of the policy in respect to notice of loss, to give prompt notice of his objection to the statement received, specifying the defects therein, so that the insured may have an opportunity to correct them. A failure to return such statement, or to notify the insured of defects therein, is sufficient evidence of a waiver of strict compliance with the terms of the policy. *Whitmore v. Dwelling House Ins. Co.*, 838.
3. **WAIVER OF PROOF OF LOSS — EVIDENCE OF USAGE.** — A fire insurance company cannot be bound by the usage and custom of other insurance companies doing business in the vicinity in regard to dispensing with proofs of loss, when the first-named company has expressly contracted for the performance of a certain condition precedent as to proof of loss before the insured is entitled to recover. In an action on the policy, evidence as to the usage and custom of the company sued in regard to waiver of proof of loss, is admissible, but evidence of the practice and usage of other companies doing business in the same locality, is inadmissible. *Phoenix Ins. Co. v. Munger*, 360.
4. **PROOF OF LOSS — WAIVER OF.** — A condition in a policy of fire insurance that in case of loss the insured must forthwith give written notice thereof to the insurer, is waived by the latter when, with full knowledge of the loss, he denies all liability under the policy without waiting for such written notice. *Savage v. Phoenix Ins. Co.*, 591.
5. **WAIVER OF DEFECTS IN PROOFS OF LOSS BY RECEIVING AND RETAINING WITHOUT OBJECTION.** — When an insurance company receives and retains proofs of loss without making any objections thereto, it will be deemed to have waived any defects therein. *Vangindertaelen v. Phoenix Ins. Co.*, 29.
6. **INSURANCE POLICY NOT FORFEITED BY FAILURE TO FURNISH PROOFS OF LOSS WITHIN TIME PRESCRIBED.** — Where a policy of insurance provides that notice of loss shall be given within six days, and that proofs of loss shall be furnished within thirty days after the notice of loss is given, and that the loss shall be payable sixty days after the proofs are received at the company's office, but nowhere provides that the failure to render such proofs within the time named shall operate as a forfeiture of the policy, a failure to furnish the proofs within the time prescribed merely postpones the maturity of the claim, but does not operate as a forfeiture of the policy. *Vangindertaelen v. Phoenix Ins. Co.*, 29.
7. **POWER OF GENERAL AGENT TO WAIVE PROOF OF LOSS BY PAROL.** — An agent of an insurance company who is given full power to receive proposals of insurance against loss and damage by fire, to fix rates of premium, receive moneys, and countersign, issue, and renew policies

within a certain district within a state, is a general agent and may, after loss, bind the company by a parol waiver of conditions relating to proofs of loss, although the policy provides that a waiver shall be void unless in writing, signed by the agent, and indorsed thereon. *Phoenix Ins. Co. v. Munger*, 360.

9. **CONDITION FOR ARBITRATION — WAIVER OF.** — When, upon a loss under a policy of fire insurance, the insurer immediately denies all liability under the policy, asserting that it was not in force when the loss occurred, and repels every effort on the part of the insured to obtain an adjustment of the loss, such insurer must be held to have waived an arbitration clause contained in the policy requiring an award by arbitrators as a condition precedent to a right of action, and he is estopped from setting it up in defense thereto. *Savage v. Phoenix Ins. Co.*, 591.
9. **ARBITRATION CLAUSE IN INSURANCE POLICY NOT BAR TO ACTION, WHEN.** When a policy of insurance provides that if the company and the assured fail to agree as to the amount of the loss, the matter shall be submitted to arbitrators, and that no action under the policy shall be maintainable until an award is obtained, if the proofs of loss are furnished to the company and no objection is made to them, and no suggestion is made by the company that an arbitration be had, an action commenced three months after the proofs are furnished cannot be defeated on the ground that there has been no arbitration. *Vanginder-taelen v. Phenix Ins. Co.*, 29.
10. **OWNERSHIP OF PROPERTY.** — When payment of a loss, under a policy of fire insurance, is resisted on the ground that the insured was not the sole and unconditional owner of the land on which the house stood, as provided in the policy, and the evidence as to whether he was or was not such owner is conflicting, the question must be determined by the jury, and a finding that he was such owner will not be disturbed on appeal. *Whitmore v. Dwelling House Ins. Co.*, 838.
11. **PREMIUM — EVIDENCE OF PAYMENT OF.** — When, in an action to recover for loss under a policy of fire insurance which recites and acknowledges the receipt of the premium, the insurer denies the payment of any premium and alleges a cancellation of the policy for such nonpayment prior to the loss, the testimony on the part of the insured that he gave the amount of the premium to another party to be paid to the insurer, and the testimony of such other party that he so paid the money received, is, in connection with the recitals in the policy, sufficient evidence to sustain a finding that such payment was made, as against a denial of such fact by the agent of the insured. *Savage v. Phoenix Ins. Co.*, 591.
12. **NOTICE OF CANCELLATION — SUFFICIENCY OF.** — When the premium on a policy of fire insurance has in fact been paid, a letter from the insurer to the insured notifying the latter of the effect of nonpayment the premium, and calling attention to cancellation conditions in the policy, is not sufficient notice to arbitrarily terminate the policy if the insurer does not refund or offer to refund the amount of unearned premium as required by such cancellation conditions. *Savage v. Phoenix Ins. Co.*, 591.
13. **LIFE INSURANCE — SUICIDE.** — Under a policy of life insurance exempting the insurer from liability for the death of the assured from suicide, sane or insane, there can be no recovery if he takes his own life, though at the time he did so he was in such an insane condition that he was in-



capable of understanding the physical nature and consequences of his act and did not know that by it he would take his own life. *Billings v. Accident Ins. Co.*, 913.

14. **LIFE INSURANCE. — SELF-DESTRUCTION IS NEVER PRESUMED;** and if recovery upon a policy of life insurance is resisted on the ground that the assured committed suicide, the defendant must satisfy the jury, by a preponderance of competent evidence, that the injuries which caused death were intentional on the part of the assured. *Walcott v. Metropolitan etc. Ins. Co.*, 923.

See EXECUTION, 2, 3.

### INTEREST.

1. **HIGHER RATE FOR NONPAYMENT OF DEBT — PENALTY.** — When money is loaned at a specific rate of interest on a note containing a provision that if not paid at maturity the maker shall pay a higher rate of interest thereafter, the higher rate is in the nature of a penalty, and the payee can recover interest after maturity only at the lower rate agreed upon. *Richardson v. Campbell*, 633.
2. **PRINCIPAL AND COUPON NOTES — USURY.** — When the rate of interest agreed upon for the principal of a loan is legal at the time of the execution of a note therefor, and coupon interest notes executed in connection therewith are not to draw interest until the maturity of the principal debt, the contract is not tainted with usury, and the payee is entitled to interest thereafter on both the principal and interest notes at the rate agreed to be paid upon the principal note before maturity, although a statute passed since its execution has reduced the legal rate of interest, and although the parties agreed that both the principal and interest notes should draw a higher rate of interest after the maturity of the principal debt. *Richardson v. Campbell*, 633.

See USURY.

### INTERSTATE COMMERCE.

1. **TRADE REGULATION — DISCRIMINATION BETWEEN CITIZENS OF DIFFERENT STATES.** — A statute or ordinance permitting all persons to peddle goods manufactured or produced within the state, but prohibiting the same persons from peddling goods of the same character if manufactured or produced in other states, is a trade regulation discriminating between the productions of different states, and void as an attempt to regulate interstate commerce. *Sayre Borough v. Phillips*, 842.
2. **PEDDLER'S LICENSE — DISCRIMINATION.** — A statute or ordinance authorizing the grant of a peddler's license to any citizen of the state, but prohibiting a grant of such license to any person resident in another state, is a trade regulation discriminating between citizens of different states, and void as an attempt to regulate interstate commerce. *Sayre Borough v. Phillips*, 842.

### INTOXICATION.

See GUARANTY, 1; HOMICIDE, 2, 3.

### INTOXICATING LIQUORS.

- SALE OF, WHEN AND WHERE COMPLETED.** — When a liquor dealer, licensed to sell in one county, receives an order there from a customer in an-

other county, and in pursuance of such order delivers the liquor in the usual course of business, either by his own wagon or by common carrier or otherwise, the sale, though on credit, is completed in the county where the order is received, and the dealer cannot be convicted of selling without a license in the county to which he sends the liquor. *Commonwealth v. Hess*, 810.

IRRIGATION.

See WATERCOURSES.

JOINDER.

See APPEAL, 9.

JUDGMENTS.

1. **WHO BOUND BY.** — To BIND ONE NOT A PARTY OF RECORD by a former judgment it is essential that he should have openly intervened in the former suit, assuming its direction and control, to the knowledge of the opposite party, for the prosecution or defense of some interest in the subject of the suit, or to avoid a liability he may be under to indemnify the defendant against an adverse judgment. *Central Baptist Church v. Manchester*, 893.
2. **WHO BOUND BY.** — ONE NOT A PARTY TO A RECORD, but whose counsel is present and participates in the trial of an action against his servant, agent, or employee, is not bound by the judgment therein, though the action is in trespass *quare clausum*, and the defendant relies upon the title of such third person, and the verdict is against such title. *Central Baptist Church v. Manchester*, 893.
3. **JUDGMENTS AGAINST STATE OFFICERS, WHEN DO NOT BIND THE STATE.** A judgment against the managers of a state asylum for the insane in *mandamus* requiring them to adjust and determine the amount due for materials delivered and work done under a certain contract and to make a certificate thereof, is not binding on the state, for there is no provision to be found in any statute giving such managers authority to represent the state in any litigation, or giving the consent of the state to be bound by an adjudication to be made against them. *Peck v. State*, 738.
4. **A JUDGMENT AGAINST STATE OFFICER** never estops the state on the principle of *res judicata*. *Peck v. State*, 738.
5. **RECORD OF FOREIGN JUDGMENT RENDERED WITHOUT JURISDICTION REGARDED AS NULLITY.** — The record of a judgment rendered in a foreign country, where it appears, either from the face of the record or from other admissible evidence, that the court which rendered it had no jurisdiction of the parties or of the subject matter, will be regarded as a nullity. *St. Sure v. Lindsfelt*, 50.
6. **RELIEF AGAINST IN EQUITY.** — When a party to an action at law neglects to make a defense known to him, or which might have been known by the exercise of proper diligence, the judgment rendered therein will not be enjoined, or the party relieved in equity from the result of his own want of proper care and diligence, unless he was prevented from discovering and availing himself of such defense by the fraud of the opposite party, or by other cause beyond his control. *Harding v. Hawkins*, 347.
7. **RELIEF AGAINST IN EQUITY.** — A judgment at law may be enjoined or other equitable relief given against it notwithstanding an ineffectual attempt to defend at law, if an existing equitable defense was not avail-

- able in the action in which such judgment was rendered. *Harding v. Hawkins*, 347.
8. **EQUITY WILL GRANT RELIEF AGAINST** a judgment at law only when it is shown that there is a good and valid defense on the merits, of which defendant was ignorant at the time of the trial, and which he could not have discovered by the exercise of reasonable and proper diligence in time to set it up, or when an existing equitable defense is not available in the action at law. This rule applies as well to sureties as to principals or other parties. *Harding v. Hawkins*, 347.
  9. **EQUITABLE RELIEF AGAINST, WHEN REFUSED.** — The collection of a judgment will not be enjoined or relieved against in equity on the ground that it was recovered on a prior judgment on a note held as collateral security when the debt was paid long before the recovery of the second judgment, if the debtor might have ascertained that fact by inquiry or the exercise of reasonable diligence, and had an ample remedy at law, by motion before the second judgment was rendered, to have an entry of satisfaction made of record. *Harding v. Hawkins*, 347.
  10. **JURISDICTION — COLLATERAL ATTACK.** — A domestic judgment of a court of general jurisdiction, valid on its face, cannot be collaterally attacked in the courts of the same state by showing facts outside of the record, although such facts might be sufficient to impeach such judgment in a direct proceeding against it. *Edgerton v. Edgerton*, 557.
  11. **VACATING.** — **AN AFFIDAVIT OF MERITS IS NOT ESSENTIAL** to a motion to vacate a judgment if it appears that the court did not have jurisdiction to render it. *Norton v. Atchison etc. R. R. Co.*, 198.
  12. **A JUDGMENT MAY BE VACATED ON MOTION** and without an independent suit, if such motion is made within a reasonable time and upon the grounds that the court pronouncing judgment had not acquired jurisdiction over the defendant. *Norton v. Atchison etc. R. R. Co.*, 198.
  13. **JUDGMENT FOUNDED UPON FALSE RETURN OF SERVICE OF PROCESS** may be vacated on motion interposed within a reasonable time. *Norton v. Atchison etc. R. R. Co.*, 198.
  14. **VACATING FOR CAUSE OTHER THAN MISTAKE OR EXCUSABLE NEGLIGENCE.** If a motion is made to vacate a judgment because it is against a foreign corporation and is based upon service of process on one on whom such service could not be lawfully made, such motion does not fall within the class in which the court is authorized to grant relief because of defendant's mistake or excusable neglect, and the time within which it can be made is not affected by the limitation of time imposed upon motions to vacate judgments because of such mistake or neglect. *Norton v. Atchison etc. R. R. Co.*, 198.
  15. **ACTIONS ON — PLEA OF PAYMENT.** — In an action on a judgment, the defendant may plead payment and this issue will then be submitted to a jury, and if it is found that the judgment is in fact paid, the court will, on motion, stay further proceedings, and order an entry of the satisfaction of the judgment to be made on the record. *Harding v. Hawkins*, 347.
- See** CERTIORARI, 2; CORPORATIONS, 38; EMINENT DOMAIN; EXECUTION, 4, 5; HUSBAND AND WIFE, 6; INJUNCTIONS, 2; INSANE PERSONS, 1; INSOLVENCY; JUSTICES OF THE PEACE; MECHANIC'S LIEN, 7; MUNICIPAL CORPORATIONS, 9; PARTNERSHIP, 6; PLEDGE; RAILROADS, 7; RECEIVERS, 2.

## JUDICIAL SALES.

**JUDICIAL SALE AS DIVESTING TENANT'S TITLE TO GROWING CROP.**—A tenant who takes a lease after suit in mortgage foreclosure has been commenced against his landlord, and who sows a crop of wheat after the judgment in foreclosure, is not entitled to any share of such crop, if before it ripens or is ready to harvest there has been a judicial sale of the land and a sheriff's deed to the purchaser. In such case the purchaser is entitled to the whole of the crop. *Goodwin v. Smith*, 373.

See EXECUTORS AND ADMINISTRATORS, 3-5.

## JURISDICTION.

**1. JURISDICTION OF STATE COURT OVER MATTERS LITIGATED IN A FEDERAL COURT.**—Though the trustee of the mortgage bonds of an insolvent corporation may have procured in the circuit court of the United States a decree for the foreclosure of the mortgage and the sale of the property, the simple contract creditors of the corporation may maintain a bill in a state court to have the issue of the mortgage bonds and the decree for the foreclosure of the mortgage declared fraudulent and void as to them. Their right to maintain such a bill rests not merely on the ground that the subject-matter of the second suit is not the same as that of the first, but also on the ground that they are without adequate means of asserting their claims in the foreclosure suit, since they are unable to make themselves parties thereto without the consent of the complainant therein, and do not occupy that relation to the matter or the parties in the suit, which would enable them to file a bill of review of the decree, and show error apparent on the record. *Gay v. Brierfield Coal etc. Co.*, 122.

**2. EXCLUSIVE LIMITATION OF THE RULE REGARDING EXCLUSIVENESS OF.**—The principle that no court can interfere with the proceedings of a court of concurrent jurisdiction is subject to the qualification that, to prevent the abuse of the principle by rendering possible the successful perpetration of injustice or fraud through the forms of law, suitors and litigants are not restricted to any one forum for the adjudication of their rights, provided only that such adjudications are not upon questions pending in another concurrent court which had prior jurisdiction, and provided that its writs or process shall not hinder the performance of any lawful mandate of such concurrent court, or interfere with or disturb the possession of any subject-matter then *in gremio legis*. *Gay v. Brierfield Coal etc. Co.*, 122.

**3. JURISDICTION, CONFLICT OF.**—When two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it, to the exclusion of the other. If a trust estate is being administered by a court of competent jurisdiction, or if property is *in gremio legis* through the proceedings of such a court, no other court can interfere and wrest from it the possession and jurisdiction first obtained. It is immaterial whether the two courts of concurrent jurisdiction derive their powers, one from the federal and the other from a state government, or both from the same government. *Gay v. Brierfield Coal etc. Co.*, 122.

**4. WAIVER OF IRREGULAR PROCEEDINGS.**—All objections that might have been made to the irregularity of filing a bill in the wrong county are deemed to have been waived, if the case is removed by the consent of counsel to another county, and there submitted on demurrers to the



bill without any reference having been made to the irregularity. *Gay v. Brierfield Coal etc. Co.*, 122.

See CORPORATIONS, 39, 40; EMINENT DOMAIN; GUARDIAN AND WARD, 2; JUDGMENTS, 5, 11, 12; MARRIAGE AND DIVORCE, 13-15; RECEIVERS.

### JURY AND JURORS.

See EQUITY, 3; JUSTICES OF THE PEACE; TRIAL.

### JUSTICES OF THE PEACE.

**VALIDITY OF JUDGMENT.** — When the trial is by jury, the justice must enter judgment at once in accordance with the verdict, and such entry must be made within the township and county for which he was elected. *In re Dance*, 768.

See BONDS, 1; CERTIORARI, 2; TRIAL, 3.

### KINDRED.

See SERVICES.

### LACHES.

See EXECUTORS AND ADMINISTRATORS, 3; QUO WARRANTO; SPECIFIC PERFORMANCE, 7; USURY, 3.

### LANDLORD AND TENANT.

1. **TENANT CONTINUING IN POSSESSION** after the expiration of his lease does not cease to be a tenant nor acquire any right to use the property without paying therefor. *Harris v. Foster*, 187.
2. **RENT, PAYMENT OF IN ADVANCE, WHEN DOES NOT PROTECT TENANT.** — Payment of rent in advance cannot protect a tenant against the demands of a mortgagee whose mortgage is of record, and who has recovered judgment foreclosing it, after giving proper notice of the pendency of his suit, and who, after such payment, becomes a purchaser of the mortgaged premises at a sale for the satisfaction of his judgment. *Harris v. Foster*, 187.
3. **LEASE WITH RIGHT TO PURCHASE.** — When a lease for a period of years at a stated annual rental contains a provision that the tenant shall have the right at his election upon the termination of the term to purchase the land, at a stipulated price, there is no completed sale, and the tenant has no estate in the land beyond the leasehold subject to judgment against him until he has elected to purchase and paid or tendered the purchase price. *Bras v. Sheffield*, 386.
4. **NUISANCES.** — A HOLE CONSTRUCTED IN A SIDEWALK to be used for putting coal into a cellar, and provided with a suitable cover, though no license has been given for its construction or maintenance, is not a nuisance, and therefore the landlord of the premises on which such a hole is maintained is not answerable for injuries received by a pedestrian in falling through the hole because of the negligence of the lessee or his agents in leaving it open and unguarded while putting coal into the cellar. *Adams v. Fletcher*, 859.
5. **LIABILITY OF LANDLORD FOR OBVIOUS DEFECTS IN PREMISES.** — In the absence of fraud and deceit a landlord is not liable to a tenant or his guest for obvious defects in the leased premises, which do not constitute a nuisance. *Eyre v. Jordan*, 543.

- 6. LIABILITY OF LANDLORD FOR CONDITION AND USE OF PREMISES.** — When leased premises, harmless in themselves, become dangerous merely by the manner of their use by a tenant in possession, the landlord is not liable for injuries arising from such use. *Eyre v. Jordan*, 543.
- 7. LIABILITY OF LANDLORD FOR DEFECTS IN LEASED PREMISES.** — The fact that the top step of a short stairway, furnishing the usual entrance to the leased premises, is twelve inches shorter than the remaining steps, does not constitute such stairway a nuisance so as to make the landlord liable for injury to a person using it in the dark without any invitation, express or implied, from such landlord. *Eyre v. Jordan*, 543.
- 8. LIABILITY OF LANDLORD FOR INJURY TO TENANT'S GUEST.** — A landlord is not responsible for injury to his tenant's guest arising from such a danger as is created by the negligence of such tenant only. *Eyre v. Jordan*, 543.
- 9. A LANDLORD MAY FORCIBLY EJECT A TENANT FROM HIS PREMISES AFTER THE EXPIRATION OF HIS LEASE**, though the tenant is in possession under a fair claim of right to remain a tenant. If the tenancy has in fact terminated, he is a mere trespasser, and the landlord has the right to use so much force as is reasonably necessary to expel him. *Allen v. Keily*, 905.

See COTENANCY, 2; JUDICIAL SALES; RAILROADS, 6.

## LARCENY.

**ASPORTATION, WHAT IS.** — The offense of larceny is not complete if the accused fails to acquire such dominion over the property as to enable him to take actual custody or control. Therefore, where the evidence merely showed that the defendant struck the hand of the prosecuting witness, and either knocked or took out two dollars, which the witness was holding, but that it was dark at the time and the witness did not see the money either in the defendant's possession or on the ground, a conviction for larceny cannot be sustained. *Thompson v. State*, 145.

## LATERAL SUPPORT.

See REAL PROPERTY.

## LEASE.

See BONDS, 2-4; COTENANCY, 2; LANDLORD AND TENANT; LIS PENDENS; PARTITION, 1.

## LETTERS.

See INSURANCE, 1, 12; LIBEL; TRIAL, 2.

## LETTERS PATENT.

See SLANDER, 3.

## LIBEL.

**SENDING A LIBELOUS COMMUNICATION TO A MARRIED WOMAN RESPECTING HERSELF**, inclosed in a sealed envelope, is not a publication of the libel. If she shows it to her husband, this is her own act, for which the sender is not answerable. *Wilcox v. Moon*, 936.

See INJUNCTIONS, 3-5.

## LICENSE.

1. LICENSE BY PAROL — WHAT CONSTITUTES REVOCATION — EXPENDITURES BY LICENSEE. — When one lays sewer pipe on the land of another without his consent but with his knowledge, his use is not adverse, but merely permissive, and constitutes only a revocable parol license, notwithstanding expenditures made by the licensee. *Pitzman v. Boyce*, 536.
  2. PAROL LICENSE — REVOCATION — NOTICE. — A parol license to lay and use sewer pipe upon the land of another, in the absence of agreement or consideration, may be revoked at the pleasure of the licensor, without notice to the licensee, although he has made expenditures; and a severance of the pipe between the lands of the licensor and the licensee is a revocation of such license. *Pitzman v. Boyce*, 536.
  3. LICENSE BY PAROL — REVOCATION AFTER EXECUTION — EXPENDITURES BY LICENSEE. — A parol license executed upon the land of another without agreement or consideration may be revoked at pleasure by the licensor, so far as its further enjoyment is concerned, notwithstanding expenditures made by the licensee, and without remedy to him for the recovery of such expenditures. *Pitzman v. Boyce*, 536.
- See INTERSTATE COMMERCE; MARRIAGE AND DIVORCE, 1; MUNICIPAL CORPORATIONS, 4-7; PAYMENT, 2, 3.

## LIENS.

- See BANKS, 2; MECHANIC'S LIEN, 3; MORTGAGES, 4, 6; PARTNERSHIP, 5, 7; STATUTES, 2.

## LIMITATIONS OF ACTIONS.

1. STATUTE OF LIMITATIONS applies to applications for *mandamus*. *State v. King*, 635.
  2. STATUTE OF LIMITATIONS. — A proceeding by *mandamus* to recover public money withheld by a public officer after the expiration of his term of office is barred by the statute of limitations after the expiration of the time named therein from the time when the right of action accrued. *State v. King*, 635.
  3. LIMITATIONS OF ACTIONS BY CREDITORS AGAINST SURVIVING MEMBERS OF PARTNERSHIP. — The surviving member of a partnership who is also the executor of a deceased member represents antagonistic interests in a suit for an accounting and a settlement of the affairs of the partnership, and an administrator *ad litem* must be appointed whether he brings such suit as survivor or as executor. Hence the time for bringing such a suit is regulated by a provision in a statute of limitations which declares that "The six months during which an executor or administrator is exempt from suit, after the grant of letters, is not to be taken as any part of the time limited for the commencement of an action against him"; and as the right of a firm creditor to bring suit to have the partnership assets marshaled is neither greater nor less than the right of the surviving partner or the personal representative of the deceased partner to compel an accounting, it follows that the statute does not begin to run against the creditor until the expiration of six months after the death of the deceased partner. *Goldsmith v. Eichold*, 97.
  4. PART PAYMENT of a demand will take it out of the statute of limitations. *Beck v. Haas*, 516.
- See DEBTOR AND CREDITOR; EXECUTORS AND ADMINISTRATORS, 3; QUO WARRANTO, 6; RAILROADS, 5, 9.

LIS PENDENS.

**MORTGAGE, RECEIVER IN SUIT TO FORECLOSE ENTITLED TO RENTS FROM DATE OF HIS APPOINTMENT.** — A tenant who takes a lease of mortgaged land after the filing of a notice of *lis pendens* in a suit to foreclose the mortgage, takes the land subject to whatever order or decree the court may make affecting the title or possession; and, if the court appoints a receiver, such tenant must either surrender or attorn to him, or pay to him a reasonable rent for the use of the premises from the date of the appointment, notwithstanding he has paid to the mortgagor a year's rent in advance. *Gaynor v. Blewett*, 47.

See LANDLORD AND TENANT, 2.

LUNATICS.

See INSANE PERSONS.

MALICE.

See CRIMINAL LAW.

MANDAMUS.

See ELECTIONS, 15; LIMITATIONS OF ACTIONS, 1, 2.

MANUFACTURERS.

See SALES, 5.

MARITAL COERCION.

See HUSBAND AND WIFE, 1-3.

MARRIAGE AND DIVORCE.

1. **A MARRIAGE WITHOUT A LICENSE AND BY AN UNAUTHORIZED PERSON** is valid, if the parties consent thereto and afterwards cohabit together. *Farley v. Farley*, 141.
2. **MARRIAGE PER VERBA DE FUTURO FOLLOWED BY COHABITATION.** — Marriage is not constituted by cohabitation without the solemnization of the marriage ceremony, where it is the understanding of the parties cohabiting that they are not to become husband and wife until a formal ceremony takes place. *Farley v. Farley*, 141.
3. **VALIDITY OF A MARRIAGE PROCURED BY FRAUD.** — Where there is an executory agreement to marry, and one of the parties is induced, by fraudulent representations, to go through a marriage ceremony before a person not authorized to perform it, and the ceremony is followed by cohabitation, the marriage is valid for all civil purposes, unless and until avoided by the deceived party. If the defendant in a divorce suit is the party who was guilty of the fraud, he cannot take advantage of his own wrong and assert that the consent was not mutual, for the purpose of avoiding the marriage. *Farley v. Farley*, 141.
4. **PLEADING MARRIAGE.** — In a bill for divorce, an averment by the complainant that on a certain day "she was lawfully and legally married to the defendant," is sufficient, though subsequent allegations in the bill show that the wife was induced to go through the ceremony of marriage by the fraudulent representations of the defendant that the person who performed the ceremony was an authorized minister. *Farley v. Farley*, 141.



5. **SECOND MARRIAGE WHEN VOID.** — The marriage of a man and woman when one of them has a husband or wife then living and undivorced is void, although the parties in contracting the second marriage acted in the honest belief of a prior divorce. *Gordon v. Gordon*, 294.
6. **ADULTERY TO JUSTIFY DIVORCE MUST BE VOLUNTARY** and not committed by the wife when she is compelled by force or ravishment, nor when she has intercourse with a man not her husband by mistake in believing him to be her husband, nor where she marries and lives with another man in the belief that her husband is dead, unless the statute makes the second marriage void and not voidable, in which case voluntary cohabitation under the second marriage is adultery. *Gordon v. Gordon*, 294.
7. **DIVORCE FOR ADULTERY — COUNTERCHARGE BY DEFENDANT IN CONTEMPT.** When the party suing for a divorce on the ground of adultery is guilty of the same offense, the defendant may allege it in defense. His answer cannot be stricken out because he is in contempt for failure to pay temporary alimony as ordered by the court. *Gordon v. Gordon*, 294.
8. **ADULTERY WHAT IS NOT.** — If, after a formal divorce, a party thereto should suppose it valid when it is void for facts not known to him, cohabitation under a second marriage does not constitute adultery, unless continued after knowledge of the facts. *Gordon v. Gordon*, 294.
9. **COHABITATION UNDER SECOND MARRIAGE, WHEN ADULTEROUS.** When after the hearing of an action for divorce, the attorney for the wife hands her what purports to be a copy of a decree of divorce, and informs her that she is free to marry again, and she, acting upon such information, thereupon without investigating the facts which are open to her, marries another man and cohabits with him for twenty days prior to the time when the decree of divorce is actually rendered, the second marriage is void and such cohabitation is adulterous on her part. *Gordon v. Gordon*, 294.
10. **PLEADING.** — An averment as to the charge of adultery which states "that said defendant has been guilty of adultery with divers parties and persons, whose names are unknown to the oratrix," is sufficiently certain. *Farley v. Farley*, 141.
11. **DIVORCE BECAUSE OF IMPRISONMENT OF A HUSBAND ON A CONVICTION OF A FELONY** will not be granted if, at the time the marriage was contracted, he had already been convicted of such felony and this fact was known to the wife. *Caswell v. Caswell*, 945.
12. **DIVORCE WITHOUT APPEARANCE OR SERVICE OF PROCESS, VOID.** — A decree of divorce rendered against a nonresident defendant without any appearance or service of process, is a nullity. *St. Sure v. Lindsfelt*, 50.
13. **DIVORCE GRANTED IN FOREIGN COUNTRY TO PARTIES RESIDENT HERE, VOID.** The courts of a foreign country have no jurisdiction or power to dissolve the marriage relation between persons resident in this state. Every country has the power to absolutely fix, regulate, and control the marriage status of its own citizens; but no country or state has any power to fix, regulate, or control such status as to the citizens of any other country or state. *St. Sure v. Lindsfelt*, 50.
14. **SEPARATE MAINTENANCE OF WIFE — JURISDICTION OF EQUITY TO GRANT.** — Courts of equity have jurisdiction to enforce the maintenance of a wife by decreeing proper relief in an action brought by her against her husband, independently of an action for divorce, when

it is shown that he, without just cause, has abandoned her, or by his cruelty or other improper conduct has given her just cause for living separate and apart from him, and she is without means of support while he is able to maintain her. Such decree does not, however, amount to a divorce from bed and board, nor does it place any obstacle in the way to a reconciliation of the parties. *Edgerton v. Edgerton*, 557.

13. DECREE OF DIVORCE — COLLATERAL ATTACK. — A decree of divorce, valid upon its face, obtained by a husband against his wife, cannot be collaterally attacked in the same state in an action by the wife to enforce maintenance, by the averment of facts sufficient to avoid such decree for want of jurisdiction. *Edgerton v. Edgerton*, 557.

See CONTEMPT; EVIDENCE, 4.

### MARRIED WOMEN.

See APPEAL, 9; EJECTMENT, 1; HUSBAND AND WIFE; LIBEL; PARTIES, 1, 2.

### MASTER AND SERVANT.

1. ONE IS NOT A SERVANT OF A TESTATOR AND ENTITLED TO PARTICIPATE AS SUCH in a bequest in favor of the servants in his employ at his death, if he did not serve such testator continuously, though he was employed for several years, two days and more each week, at jobs of housecleaning and the like, and in otherwise assisting the regular servants, and was in fact so employed at the time of the testator's death. *Metcalfe v. Sweeney*, 864.
2. DUTY TO INSTRUCT SERVANT AS TO PERILS OF SERVICE. — If an employer engages one to perform a dangerous service, requiring caution and the exercise of peculiar skill, knowing that he is inexperienced and ignorant of such danger, it is the duty of the employer to give suitable instructions and warnings as to the dangers he is likely to meet in the discharge of his duties. *Reynolds v. Boston etc. R. R. Co.*, 908.
3. A WARNING OF DANGER IS NOT SUFFICIENT to exonerate an employer, unless it discloses to the employee of what the danger consists and how to avoid it. *Reynolds v. Boston etc. R. R. Co.*, 908.
4. INEXPERIENCED EMPLOYEES. — Employers owe it as a duty to inexperienced employees to point out the dangers of which they themselves have, or ought to have, knowledge and to give such warnings as may lead to the avoidance of injury by the exercise of reasonable care. Most especially should this duty be performed where the dangers and the means of avoiding them are not apparent, or fully within the comprehension of the servant. *Chicago etc. Brick Co. v. Reinneiger*, 249.
5. MINOR EMPLOYEES. — If a boy employed in a factory in which dangerous machinery is used is of sufficient age, intelligence, and discretion to understand and appreciate the risks to which he is exposed, and is informed of the dangerous nature of the work in which he is employed, then he must be held to have assumed the ordinary hazards and perils of such employment and cannot recover for an injury which is the result thereof. *Chicago etc. Brick Co. v. Reinneiger*, 249.
6. IF A MINOR EMPLOYER KNOWS AND APPRECIATES THE DANGER and peril of the work in which he is engaged, and then chooses to engage in it, he must assume all risks to which he thus exposes himself and cannot recover for an injury resulting to him therefrom. If, on the other hand, from his youth and inexperience, he did not know and appreciate such

dangers and his employer knew, or had reason to know, the peril and danger to which he was exposed and did not explain or give notice thereof, and he, while not guilty of negligence on his part, is injured because he failed to understand and appreciate the danger to which he was exposed, then his employer is answerable. *Chicago etc. Brick Co. v. Reinneiger*, 249.

7. **AN INFANT SERVANT MUST BE MADE TO UNDERSTAND** and appreciate the perils incident to the work upon which he is engaged, and any instruction or explanation which is not sufficient to make him so understand and appreciate will not exonerate the master from liability for injuries received by such servant from such perils because of his not understanding and appreciating them. *Chicago etc. Brick Co. v. Reinneiger*, 249.
8. **NEGLIGENCE — ORDINARY CARE.** — In determining whether a minor employee was, when injured by dangerous machinery, exercising ordinary care, the jury may take into consideration his age, intelligence, and discretion, and his knowledge of, or inexperience with, machinery. The same degree of care is not required of a mere boy of inexperience and immature judgment as of a person of mature years. *Chicago etc. Brick Co. v. Reinneiger*, 249.
9. **QUESTIONS FOR THE JURY.** — Whether a servant was such a person as was entitled to have special instructions concerning risks to which he was exposed and the means of avoiding them, and whether the duty of instructing him was discharged by his employer, are matters for the jury to determine from all the facts and circumstances of the case. The burden is on the servant to prove the existence and breach of such duty. *Chicago etc. Brick Co. v. Reinneiger*, 249.
10. **MASTER BOUND TO FURNISH SERVANT REASONABLY SAFE PLACE TO WORK.** A master is under obligation to furnish his servant a reasonably safe place in which to work, or to explain to him the dangers which he knows or ought to have known, and of which the servant is not chargeable with notice or knowledge. *Meier v. Morgan*, 39.
11. **MASTER LIABLE FOR INJURIES TO SERVANT CAUSED BY FALL OF DEFECTIVE BUILDING, WHEN.** — If the collapse of a building by reason of which a servant is injured is the direct or proximate result of the negligence of his master, the latter is liable for the injury, in the absence of contributory negligence on the part of the servant; and therefore in an action to recover for personal injuries caused by the fall of the side of defendant's ice house while plaintiff was working for them near it, and which had been recently filled with ice under the direct supervision of one of the defendants, it is proper to instruct the jury that if they find from the preponderance of the evidence that in filling the ice house the defendants carelessly permitted cakes of ice to run violently against the side of the building, thus weakening it and tending to shove it outward, and that this was the proximate cause of the accident, the plaintiff, if in the exercise of ordinary care, is entitled to recover. *Meier v. Morgan*, 39.
12. **INDEPENDENT CONTRACTOR, LIABILITY FOR ACTS OF.** — The supervision of a work of construction may be retained without interfering with the independent action or liability of contractors who have engaged to execute either the whole or a part of it; but where the contract under which an excavation is made for the foundations of a house declares that

- it shall be carried to such general depth, and that the operations shall proceed at such times, and to such extent as the representative of the landowner may require, any injuries caused to an adjoining house in consequence of making the excavations in strict pursuance of the orders of such representative, will be deemed to have been due to the exercise of the discretion or judgment vested in the supervising authority; and for that exercise of judgment the landowner must respond. *Larson v. Metropolitan etc. R'y Co.*, 439.
13. OWNER OF DEFECTIVE BUILDING LIABLE FOR INJURY RESULTING FROM ITS FALL, THOUGH BUILT BY INDEPENDENT CONTRACTOR. — The owner of a building cannot dictate that it be constructed of improper materials or upon an unsafe plan, and escape liability for injuries caused thereby because he made a contract with a third person to build it; nor can he, with knowledge of a weakness or defect threatening the strength of the building, set a man at work immediately under it, and shift all responsibility upon the builder. *Meier v. Morgan*, 39.
14. NEGLIGENCE — CONTRACTOR AND EMPLOYER. — If a contractor is employed to take down a wall, and the doing of the work is not intrinsically dangerous, but injuries result to third persons from the negligent manner in which the work is done, the contractor alone is liable, though the wall had become weakened by age and decay, if it was safe as it stood, and would not have fallen or occasioned any injury but for the negligent mode in which the contractor undertook to perform his contract. *Engel v. Eureka Club*, 692.
15. NEGLIGENCE. — A CONTRACTOR AND NOT HIS EMPLOYER is answerable for injuries resulting from the doing of acts which may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons are likely to result, provided it was the duty of the contractor under the contract to exercise such care. *Engel v. Eureka Club*, 692.
16. NEGLIGENCE OF AN INDEPENDENT CONTRACTOR is not ordinarily chargeable to his employer. An exception to this rule exists in the case of statutory duties imposed on individuals or corporations from which they cannot acquire exemption by delegating performance to another, and of contracts for the performance of unlawful acts, or acts which will create a nuisance, or are necessarily attended with danger to others, however skillfully performed. *Engel v. Eureka Club*, 692.
17. MASTER NOT LIABLE TO SERVANT, FOR INJURY CAUSED BY NEGLIGENCE OF VICE PRINCIPAL, WHEN. — The liability of a master who has not been guilty of any negligence or breach of duty in the employment of his servants, for an injury to one of such servants caused by the negligence of another engaged in the same business, depends not upon the rank or grade of either servant but upon the character of the act in the performance of which the injury is inflicted; and he is not liable unless the negligent act pertained to a matter in relation to which he owed a duty to the servant injured. *Dwyer v. American Express Co.*, 44.
- See CONTRACTS, 6; HUSBAND AND WIFE, 5; NEGLIGENCE, 1, 3; RAILROADS, 30-39; SERVICES.

## MAYHEM.

See CRIMINAL LAW.



## MECHANIC'S LIEN.

1. **WHO ENTITLED TO.** — A lien is not acquired by a vendor for materials sold to a contractor when they are supplied under an ordinary sale on credit to him only, though he may actually use them in building a house or making an improvement. *Wagner v. Darby*, 369.
2. **WHO ENTITLED TO — AGREEMENT FOR PAYMENT IN MATERIALS.** — A person who builds a house under a contract that he shall be paid for his services in lime, is entitled to the benefit of a mechanic's lien filed by him, but he has no right to demand payment in money, without showing a demand and refusal to furnish lime. *Pierce v. Marple*, 808.
3. **MECHANIC'S LIEN, RIGHT TO, WHEN PERSONAL AND UNASSIGNABLE.** Where, throughout the whole of the statute, the right to a lien and the right to enforce it appear to be confined to a contractor, laborer, or person furnishing materials, and where, in no instance, is an assignee recognized in connection with the securing or enforcing of the lien, there can be no construction given such statute other than as conferring a mere personal right on the contractor, laborer, etc., and not on his assignee. *Mills v. La Verne Land Co.*, 168.
4. A lien for labor or material is paramount to the lien of a mortgage executed after the building was commenced, but before such labor or material was furnished. *Haxtun etc. Heater Co. v. Gordon*, 776.
5. **MECHANIC'S LIENS FOR ADDITIONS, ELARGEMENTS, OR ALTERATIONS,** made after a building is finished, do not attach from the commencement of the original building, but only from the commencement of such additions, enlargements, or alterations. *Haxtun etc. Heater Co. v. Gordon*, 776.
6. **THOUGH A CHANGE IN THE PLAN OF A BUILDING,** or of some part thereof, is made while it is in process of construction, a lien for labor or materials furnished in connection with such change attaches as of the date of the commencement of the building, and takes precedence over any mortgage executed after such commencement and before such change in plan, although the mortgagee, in making his loan, took into consideration the plans and specifications of the building as then existing, and advanced sufficient money to have carried them out had they not been changed. *Haxtun etc. Heater Co. v. Gordon*, 776.
7. **MERGER OF MECHANIC'S LIEN IN LEGAL TITLE BY CONVEYANCE — JUDGMENT LIEN — SALE ON EXECUTION — INJUNCTION.** — When the holder of a mechanic's lien acquires the legal title by a conveyance of the property such lien will not be so merged in the legal title, that a judgment in favor of a third person against the original owner, rendered subsequent to the conveyance, but at a term of court commenced prior thereto, will create a lien prior or superior to the mechanic's lien, or will authorize a sale of all the property on execution issued under such judgment; and in such case when part of the consideration for such conveyance is that the holder of the mechanic's lien shall satisfy certain mortgages against the property, a part of which he has paid, the property cannot be sold under such execution free of such mortgages, and the holder of the mechanic's lien is entitled to an injunction against the judgment creditor to protect his interests as against such sale; but the judgment creditor is entitled to have the property sold under execution to satisfy his judgment, provided it is sold subject to the rights of the holder of the legal title founded upon his mechanic's and mortgage liens. *Bowling v. Garrett*, 377.

8. **TITLE OF OWNER AS AFFECTING CONTRACTOR.** — All persons furnishing labor or materials for the erection of a building are bound to take notice of the title of the apparent owner. If he is an intruder without right, the lien of the contractor or subcontractor must alike fall, and if he holds an equitable title only, the lien will bind only such title as he has, and no more. *Taylor v. Murphy*, 825.
9. **SUBCONTRACTOR, HOW AFFECTED BY CONTRACT OF CONTRACTOR.** — When a contractor for the construction of a building has stipulated with the owner that no mechanic's lien shall be filed against it, he can confer no right upon his subcontractor to file such lien. *Taylor v. Murphy*, 825.
10. **RIGHTS AND DUTIES OF SUBCONTRACTOR.** — A subcontractor engaged in the construction of a building must take notice of the title of the apparent owner, and of the general character of his agreement with the principal contractor. He must also take notice of the general character of the building and of the materials and labor proper to be used in its construction. He must see that the materials he supplies are such as may be reasonably needed for and used about such a building, both as to quantity and quality. Subject to such qualifications and conditions he may bind the building for what his materials or labor may be reasonably worth, although the liens filed against the building may exceed the contract price agreed upon between the principal contractor and the owner. *Taylor v. Murphy*, 825.
11. **ASSIGNMENT OF RIGHT TO CREATE.** — A laborer or material man cannot assign his right to create and assert a lien by complying with the statutory provisions, and clothe the assignee with the power to create the lien for himself. *Mills v. La Verne Land Co.*, 168.
12. **AGREEMENT NOT TO FILE.** — An agreement by a contractor to provide labor and materials for the erection of a building, and look for his security solely to the personal responsibility of the owner, leaving the building unencumbered by liens, is valid and binding. *Taylor v. Murphy*, 825.
13. **CONTRACT TO RELEASE AND DISCHARGE.** — An agreement by a house builder with the owner that the former will "release and discharge the said houses from the operation of all liens, either for materials furnished or work done in the construction of the same," is not a waiver of the right to file a lien, nor a covenant that none shall be filed, but a mere promise to release and discharge such liens as may be filed prior to a demand for the payment of the balance due on his contract. *Taylor v. Murphy*, 825.
14. **PRACTICE.** — AN AFFIDAVIT OF DEFENSE against a mechanic's lien stating that the material furnished was not such as the building contract required, and in consequence of the defective character of such materials, the house was worth a sum less than it otherwise would have been, and claiming a defense to that amount, but not stating wherein such material was defective, is insufficient, as being too general, and will not prevent the rendition of judgment for plaintiff for the amount claimed. *Taylor v. Murphy*, 825.

See PAYMENT, 1.

### MENTAL ANGUISH.

See RAILROADS, 22.

## MERGER.

See MECHANIC'S LIEN, 7.

## MINES.

See BONDS, 2-4.

## MINORS.

See INFANTS.

## MISJOINDER.

See PARTIES, 2.

## MISREPRESENTATIONS.

See AGENCY, 3; SPECIFIC PERFORMANCE, 3; VENDOR AND PURCHASER.

## MISTAKE.

See JUDGMENTS, 14; PAYMENT, 2; SPECIFIC PERFORMANCE, 2.

## MOBS.

See EVIDENCE, 5.

## MORTGAGES.

1. **MORTGAGE AND NOTES SECURED THEREBY CONSTRUED TOGETHER.** — When a mortgage is given to secure the payment of several notes described therein, such mortgage and notes must be construed as one instrument or contract. *Schultz v. Plankinton Bank*, 290.
2. **PURCHASER AT A FORECLOSURE SALE** is under no obligation, either moral or legal, to reimburse one who bought the premises subject to the debt secured by the mortgage and assumed its payment, for sums of money expended to protect its equity of redemption. *Bensieck v. Cook*, 422.
3. **MORTGAGE OF PRE-EMPTION CLAIM — EVIDENCE OF GOOD FAITH.** — In an action to foreclose a mortgage of a pre-emption claim on public land, evidence of the purpose for which the mortgage money was borrowed is admissible and material to show that the mortgagor was acting in good faith and not in collusion with the mortgagee to convey the title or to evade any provision of law. *Norris v. Heald*, 581.
4. **THE FORECLOSURE OF A MORTGAGE DOES NOT EXHAUST THE LIEN** as to subsequent encumbrancers who have a right to redeem. They must redeem from the mortgage and cannot redeem from the sale. *Austin v. Bailey*, 933.
5. **THE TAKING OF A SECOND MORTGAGE ON THE SAME PROPERTY** to secure a note given for the amount of a note secured by the first mortgage and for other indebtedness, does not operate to discharge such first mortgage unless such was the intention of the parties. *Austin v. Bailey*, 933.
6. **PAYMENT, WHAT IS NOT.** — **THE TAKING OF A NEW NOTE IN SUBSTITUTION** for one secured by mortgage does not extinguish the debt evidenced by the latter so as to discharge the mortgage, unless such was the intention of the parties, shown by something besides what arises from the mere act of substitution, and the reason is, that the mortgage secures the debt, not merely the evidence of it; and as a change in the evidence does not pay the debt, the lien of the mortgage is not affected by it *Austin v. Bailey*, 933.

**7. SATISFACTION, WHAT DOES NOT AMOUNT TO A.** — When premises subject to a debt secured by a deed of trust are conveyed to a purchaser who assumes the debt, and who takes under a conveyance expressly excepting the deed of trust from a warranty otherwise general, the trustor is not bound to pay off the deed of trust, and when he subsequently bids in the property at the trustee's sale, and then substitutes, as purchaser, another party who pays the price and receives a conveyance from the trustee, these circumstances do not show a proper case for the application of the rule that, when one is bound to pay a mortgage debt and does so, a satisfaction and discharge of the mortgage is thereby effected. The position and rights of the party thus substituted as purchaser are precisely the same as if he had personally bid in the property at the sale. *Bensieck v. Cook*, 422.

See **BANKS**, 6; **CORPORATIONS**, 41; **EVIDENCE**, 10, 12; **HUSBAND AND WIFE**, 4; **JUDICIAL SALES**; **LANDLORD AND TENANT**, 2; **LIS PENDENS**; **MECHANIC'S LIENS**, 4, 6; **NEGOTIABLE INSTRUMENTS**, 7; **PUBLIC LAND**; **RAILROADS**, 7, 8; **USURY**, 3, 4.

### MUNICIPAL CORPORATIONS.

- 1. ORDINANCES — POLICE POWER.** — By the organization of a city or borough within its borders, the state imparts to such municipality the powers necessary to the performance of its functions, and to the protection of its citizens in their persons and property, and the police power is one of these. Ordinances passed by cities and boroughs in the legitimate exercise of this power are therefore valid. *Sayre Borough v. Phillips*, 842.
- 2. EXTENT OF POLICE POWER.** — When the state creates a city or borough, it cannot confer upon the municipality powers that the state does not possess, nor can the municipality have any better right to adopt discriminating trade regulations than the state has. *Sayre Borough v. Phillips*, 842.
- 3. POLICE POWER — TRADE REGULATION — DISCRIMINATION.** — A city cannot by ordinance and under pretense of police control regulate trade in the interest of resident dealers, by making the same business lawful to all who live within the city limits, and unlawful as to all who reside outside thereof. *Sayre Borough v. Phillips*, 842.
- 4. PEDDLER'S LICENSE — DISCRIMINATING ORDINANCE.** — A city ordinance prohibiting all persons not residents of the municipality from engaging in the business of peddling or selling goods from house to house, by sample or otherwise, without a city license, is void, for the reason that it is a trade regulation discriminating against nonresidents. *Sayre Borough v. Phillips*, 842.
- 5. POWER TO LICENSE PEDDLING.** — An ordinance prohibiting the business of peddling within the municipal limits without a license from the proper municipal officer is a valid exercise of the police power, but such regulation must be directed against the whole business, and not against one or some of the persons engaged in it. If an ordinance is in reality directed only against certain persons who are engaged in a given business or certain commodities, in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such ordinance is not a police, but a trade regulation, void. *Sayre Borough v. Phillips*, 842.
- 6. PROHIBITORY LICENSE — DISCRIMINATION.** — An ordinance prohibiting all persons from engaging in the business of peddling without a city license,



and fixing the price of such license at a figure so high as to make the ordinance amount to a prohibition and destruction of such business, is valid so long as it operates upon all persons impartially; but if it exempts all residents of the city from its operation, it is void, because it then becomes a trade regulation discriminating against nonresidents. *Sayre Borough v. Phillips*, 842.

7. **LICENSE FEE FOR INSPECTION OF TELEGRAPH POLES.** — A municipality has a right and it is its duty, in the exercise of its police power, to supervise and control the erection and maintenance of telegraph poles and wires within its limits, and an ordinance imposing a license of one dollar per annum for the inspection of each telegraph, telephone, or electric-light pole within the city limits, is a reasonable exercise of such police power. *Allentown v. Western U. Tel. Co.*, 820.
8. **MEMBERS OF A MUNICIPAL FIRE DEPARTMENT** are public officers, for whose negligence the municipality is not answerable. No exception to this rule arises from the fact that the negligent act complained of was not done at a fire, but consisted in negligently placing a ladder across a sidewalk in front of an engine house. *Dodge v. Granger*, 901.
9. **TAXATION — ASSESSMENT OF PUBLIC PROPERTY FOR LOCAL IMPROVEMENT.** Cities have power to levy upon public grounds the special assessments necessary to improve the streets and sidewalks in front of and around them; and when the proper authorities refuse to pay such assessments, and the property cannot be sold at forced sale, the amount thereof may be adjusted in a judicial proceeding, and the judgment enforced and collected the same as any other judgment against the city or county. *Board of Commissioners v. Ottawa*, 395.

See **QUO WARRANTO**, 2-6; **PAYMENT**, 3.

#### NECESSARIES.

See **HUSBAND AND WIFE**, 7.

#### NEGLIGENCE.

1. **PLEADING** — A declaration averring that the defendant's servants so negligently and carelessly managed and navigated its steamer that it ran upon and sunk a vessel of the plaintiff's testator, sufficiently states a cause of action. The details which prove the negligence need not be set forth if it sufficiently appears that a duty existed of which there has been a breach. *Parker v. Providence etc. Steamboat Co.*, 859.
2. **ORDINARY CARE** is that degree of care which people of ordinarily prudent habits could be reasonably expected to exercise under the circumstances of a given case. *Driscoll v. Market St. etc. R'y Co.*, 203.
3. **WHO ANSWERABLE FOR.** — It is a general rule that a party injured by the negligence of another must seek his remedy against the person whose actual negligence it was which caused the injury, and that such person alone is liable. An apparent exception to this rule exists in the cases of principal and agent and master and servant. In these cases, however, the principal or master is liable because the negligence of the servant or agent is in law chargeable to the master or principal. *Engel v. Eureka Club*, 692.
4. **PROXIMATE CAUSE.** — If a child falls into a canal through the culpable negligence or tort of the state, and its father thereupon plunges into the canal in an attempt to rescue his child and both are drowned, the

death of both is a consequence of the negligence of the state, and hence it is answerable for the death of the father as well as of the child. *Gibney v. State*, 690.

5. CONTRIBUTORY NEGLIGENCE NOT CHARGEABLE TO ONE CALLED TO ACT IN EMERGENCY, WHEN. — Contributory negligence is not always chargeable upon the failure to exercise the greatest prudence or the best of judgment in cases where a person is required to act suddenly or in an emergency. *Valin v. Milwaukee etc. R. R. Co.*, 17.

- See CARRIERS, 2, 3; CORPORATIONS, 27-29, 32, 33, 36; HUSBAND AND WIFE, 5; LANDLORD AND TENANT, 4, 8; MASTER AND SERVANT, 6, 11, 14, 16, 17; MUNICIPAL CORPORATIONS, 8; RAILROADS, 26, 27, 29, 34-48; SALES, 5.

### NEGOTIABLE INSTRUMENTS.

1. POSSESSION AS EVIDENCE OF OWNERSHIP. — In an action to recover on a note and to foreclose a mortgage given as security therefor, the possession of the note, although it contains no written indorsement or transfer to the holder, is *prima facie* evidence of ownership as between such holder and the vendee of the mortgaged premises, who purchased after the execution of the mortgage. *O'Keeffe v. First Nat. Bank*, 370.
2. NEGOTIABLE NOTES MAY BE TRANSFERRED BY MERE DELIVERY and without written indorsement. *O'Keeffe v. First Nat. Bank*, 370.
3. EFFECT OF INDORSEMENT BY ONE NOT A PAYEE. — The rule that when a person indorses a negotiable note in blank, not being a payee or indorsee thereof, he is to be treated *prima facie* as a maker, does not apply to the indorsement of a note made payable to the order of the drawer. *First Nat. Bank v. Payne*, 520.
4. EFFECT OF INDORSEMENT BY ONE NOT A PAYEE. — One who indorses a note made payable to the order of the drawer, cannot be charged as a maker, and can only be charged as an indorser when the contract is perfected by the indorsement of the drawer's name as payee. *First Nat. Bank v. Payne*, 520.
5. A NEGOTIABLE INSTRUMENT PURPORTING TO BE PAYABLE TO THE MAKER, AND BY HIM INDORSED to a third person and by the latter indorsed to another, is binding upon the maker as a principal debtor, and he is liable to pay the debt in preference to and in exclusion of all the other parties to the paper, and they, in some form or other, are entitled to have final recourse against him. *Madison Square Bank v. Pierce*, 751.
6. CORPORATIONS — ASSIGNMENT OF BOOK ACCOUNTS — WHEN SUBJECT TO DEFENSES. — When an insolvent corporation buys some of its capital stock, giving its note secured by an assignment of its book accounts in payment therefor, and the payee of the note transfers it as well as the book accounts to an innocent purchaser for value before the maturity of the note, such purchaser takes the note free of all defenses, but he takes the accounts subject to all defenses, and therefore subject to the claim by the creditors of the corporation that such assignment is based upon an illegal consideration. *Commercial Nat. Bank v. Burch*, 331.
7. MORTGAGE SECURING DIFFERENT NOTES — PRIORITY. — When a mortgage is given to secure several notes maturing at different dates, the notes are entitled to priority of payment from the proceeds of the property embraced in the mortgage, in the order in which they respectively become due. *Schultz v. Plunkinton Bank*, 290.
8. INDORSER, PAYMENT BY, WHEN DOES NOT DISCHARGE THE MAKER. — If a negotiable instrument payable to the order of the maker is indorsed by

him to a third person, who, in turn, indorses it to another, a payment made by such third person in partial discharge of his liability as indorser does not diminish the liability of the original maker to any extent, and the holder is still entitled to recover judgment against the maker for the full amount of the paper, though to the extent of the payment made by the indorser, the recovery must be held in trust for him. *Madison Square Bank v. Pierce*, 751.

9. **NEGOTIABLE INSTRUMENTS — COLLATERAL SECURITY AS AFFECTING.** — The giving of collateral security with a note does not destroy its negotiability. *Valley Nat. Bank v. Crowell*, 824.
10. **COLLATERAL AS AFFECTING.** — Although a note states on its face that it is accompanied by collateral security, its negotiability is not thereby destroyed. *Valley Nat. Bank v. Crowell*, 824.
11. **PRINCIPAL AND AGENT — CORPORATE LIABILITY ON NOTE.** — When nothing appears in the body of a note to indicate the maker, and it is signed by a corporate name, under which name appears the name of an officer of the corporation with his corporate official title affixed, the note is taken conclusively to be that of the corporation, although it is in form "we promise to pay." *Reeve v. First Nat. Bank*, 675.
12. **PRINCIPAL AND AGENT — LIABILITY ON CORPORATE NOTE — PRESUMPTION — EVIDENCE.** — When nothing appears in the body of a note to indicate the maker, and it is signed by the name of an officer of a corporation to which name is affixed his official corporate title, the note is *prima facie* that of the person signing and not of the corporation; but this is a rebuttable presumption, and upon the ground of an existing ambiguity concerning the maker, evidence is admissible to show that it was intended or was not intended to be the note of the corporation. *Reeve v. First Nat. Bank*, 675.

**See BANKS, 7-12; COMPOUNDING FELONIES; MORTGAGES, 1, 5, 6; TRUSTS, 8; WITNESSES, 5.**

#### NEWSPAPERS.

**See TRIAL, 1.**

#### NEW TRIAL.

**See APPEAL, 2.**

#### NEXT FRIEND.

**See INSANE PERSONS, 2.**

#### NONRESIDENTS.

**See MARRIAGE AND DIVORCE, 12; MUNICIPAL CORPORATIONS, 1-6; PARTIES, 3; WITNESSES, 9.**

#### NONSUIT.

**See ASSAULT, 3; TRIAL, 7, 14.**

#### NOTICE.

**See CONTRACTS, 1; CORPORATIONS, 6, 7; ESTOPPEL; EXECUTION, 4; GUARDIAN AND WARD, 3; INSURANCE, 4; LICENSE, 2; MECHANIC'S LIEN, 10; REAL PROPERTY, 2, 3; TRUSTS, 13.**

## NUISANCE.

See HIGHWAY, 1-4; LANDLORD AND TENANT, 4, 5, 7; MASTER AND SERVANT, 16.

## OFFICERS.

See CREDITORS, 1; ELECTIONS, 11; EVIDENCE, 2; JUDGMENTS, 3, 4; LIMITATIONS OF ACTIONS, 2; MUNICIPAL CORPORATIONS, 8.

## OPTIONS.

See SALES, 8.

## ORDINANCES.

See INTERSTATE COMMERCE; MUNICIPAL CORPORATIONS, 1, 4-6; RAILROADS, 45.

## PARENT AND CHILD.

See DEEDS, 1, 3; RAPE.

## PARTIES.

1. PLEADING AND PRACTICE — INCONSISTENT DEFENSES. — Parties litigant are not allowed to assume inconsistent positions in court. Hence where a married woman has assumed the role of being a proper and necessary party defendant in an action of ejectment, she cannot, after being cast in the suit, change front, and insist that error occurred in making her a party defendant. *Bensieck v. Cook*, 422.
  2. PARTIES, IMPROPER JOINDER OF, OBJECTION TO, HOW TAKEN. — If a married woman is improperly joined as party defendant, the Missouri statute requires that the objection to such misjoinder be taken by demurrer, since the defect appears on the face of the petition. If the objection is not taken in this way, it is deemed to have been waived. *Bensieck v. Cook*, 422.
  3. PRIVILEGES OF SUITORS. — A NONRESIDENT ATTENDING A COURT AS A WITNESS in a suit to which he is a party is not exempt from the service of process in another suit. *Capwell v. Sipe*, 890.
- See APPEAL, 9; JUDGMENTS, 1, 2; PARTITION, 4; PLEADING, 4; QUO WARRANTO; SPECIFIC PERFORMANCE, 8.

## PARTITION.

1. WHO MAY SUE FOR. — One tenant in common cannot maintain an action for partition against his cotenant where he has been disseised; but where it appears that the defendant holds possession by virtue of an instrument transferring the rights of parties acquired under conveyances of certain undivided portions of the lands, and under a lease which grants the sole and perpetual right and privilege to enter upon said lands for the purpose of mining, etc., all the iron ore which may be upon or in said lands, and contains the proviso that such parts of the lands as do not contain iron ore, and such as shall not be needed for the use of the lessees in carrying on their business, shall "remain in the joint possession and for the mutual use, etc., of all the aforesaid parties to the deed, according to their respective interests therein," the possession is not antagonistic or adverse to, but consistent with, the interests of



the other parties to the conveyance and the deed of lease. *Haeussler v. Missouri Iron Co.*, 431.

2. **RIGHTS OF ONE PURCHASING FROM A COTENANT AND MAKING IMPROVEMENTS.** — Where a cotenant, having received a conveyance of the interests of the other cotenants, sells a portion of the land to a *bona fide* purchaser, who erects valuable improvements thereon, and the heirs of one of the original cotenants subsequently obtain a judgment setting aside the conveyance of their ancestor's interest, such purchaser will be entitled in a suit for partition of the land brought by his vendor, to have the parcel which he has improved allotted to him, if the partition may be so made without prejudice to the other cotenants. *Ferris v. Montgomery Land etc. Co.*, 146.
3. **WHERE IMPROVEMENTS HAVE BEEN MADE BY A COTENANT,** partition should be so ordered that he may receive, as his share, the parcel upon which those improvements have been made, provided that by such a division full justice can be done to the claims of the other cotenants. *Ferris v. Montgomery Land etc. Co.*, 146.
4. **PARTIES.** — In a suit for partition it is indispensable that all cotenants not uniting in the bill should be made parties defendant, and therefore since the United States cannot be made a party without its consent, a plea of one of the defendants which avers that the interest claimed by another defendant belongs to the United States, will, if sustained by the proof, render a final partition impossible, unless the United States consents to become a party to the cause. *Ferris v. Montgomery Land etc. Co.*, 146.
5. **AN ADVERSE POSSESSION BY A COTENANT** for a period less than the time prescribed by law to bar a possessory action is not a good defense to a suit for partition, if the statutes of the state in which the suit is pending authorize the litigation therein of all questions of title which arise upon the pleadings between the tenants in common and their privies who may be parties to the action. The fact that one section of the statute declares that a suit for partition may be brought where two or more persons hold and are in possession of the real property as tenants in common does not inhibit an action by a cotenant out of possession, if he has a present right of possession. *Weston v. Stoddard*, 697.

See DEEDS, 5.

#### PARTNERSHIP.

1. **PARTNERSHIP DEFINED.** — A partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. *Goldsmith v. Eichold*, 97.
2. **FIDUCIARY RELATIONS BETWEEN PARTNERS — RIGHTS ARISING FROM.** — A partnership is a relation of trust, and each partner has the right to have this trust worked out: 1. By having the partnership debts paid with partnership effects, and; 2. By having the surplus remaining after paying the partnership set apart for distribution among the several partners. *Goldsmith v. Eichold*, 97.
3. **PARTNERSHIP ASSETS — APPLICATION OF.** — When courts are called upon to wind up the affairs of a partnership, dissolved by death, respect will always be had to the fiduciary relations between the partners, and, in the

absence of special circumstances to vary the rule, the partnership effects will be primarily applied to partnership debts. The insolvency of a deceased member is not a ground for varying this rule. *Goldsmith v. Eichold*, 97.

4. **WAIVER OF PARTNER'S RIGHT TO HAVE FIRM ASSETS APPLIED TO FIRM DEBTS.** — The right of a partner to have the partnership assets applied to the payment of partnership debts is not surrendered nor waived by a will in which he bequeaths all his estate and effects to the other member of the firm. *Goldsmith v. Eichold*, 97.
5. **THE APPLICATION OF PARTNERSHIP ASSETS TO THE PAYMENT OF PARTNERSHIP DEBTS**, after the firm has been dissolved by the death of one of its members, is made not because of any lien or right which the creditors of the firm can assert, but because it is the debtor's right to have the assets so applied. *Goldsmith v. Eichold*, 97.
6. **CREDITOR'S SUIT AGAINST SURVIVOR — ELECTION OF REMEDIES.** — A partnership creditor who sues and obtains judgment against the surviving member of a firm as an individual is not to be regarded as having elected to treat his claim as an individual demand, and as being thereby debarred from asserting it afterwards to be a partnership debt; nor are his rights affected by the circumstance that he has joined a demand for an individual debt of the surviving partner in the same suit. *Goldsmith v. Eichold*, 97.
7. **PARTNERSHIP CREDITORS — WHEN ESTOPPED TO HAVE THE FIRM ASSETS APPLIED TO THE FIRM DEBTS.** — The benefit of the rule requiring the application of the partnership assets to partnership debts accrues to the firm creditors, but, as such preferred payment is the result of the co-partner's lien, and not of the creditors', it follows that, if the partner has done any act by which he surrenders his lien or estops himself from asserting it, the creditor is equally estopped. *Goldsmith v. Eichold*, 97.

See LIMITATIONS OF ACTIONS, 3.

## PAYMENTS.

1. **MECHANICS' LIENS — EVIDENCE AS TO KIND OF PAYMENT — PRACTICE.** — In an action to recover on a mechanic's lien filed by a builder of a house under a contract that he shall receive his pay in lime, the defendant should be allowed to prove such contract, and a willingness to fulfill it; so that the jury may find the facts specially, and the court may control the execution, so that upon a refusal to pay in lime, it may issue for money. *Pierce v. Marple*, 809.
  2. **VOLUNTARY PAYMENTS — RIGHT TO RECOVER.** — When a person without mistake of fact or fraud, duress, coercion, or extortion, pays money on a demand which is not enforceable against him, the payment is deemed voluntary, and cannot be recalled. This rule applies to one who pays a greater sum for a license than is demandable of right. *City of Camden v. Green*, 686.
  3. **VOLUNTARY PAYMENTS — LICENSE FEE — RIGHT TO RECOVER BACK.** — When a municipality in good faith, but under a misapprehension of law, demands a greater sum than it is legally entitled to for a license to carry on a particular business, a person who, with knowledge of the facts, pays the sum demanded, cannot recover the excess. *City of Camden v. Green*, 686.
- See DEBTOR AND CREDITOR; EJECTMENT, 2; JUDGMENTS, 15; LIMITATIONS OF ACTIONS; MECHANICS' LIENS, 2; MORTGAGES, 5-7.

## PEDDLERS.

See INTERSTATE COMMERCE; MUNICIPAL CORPORATIONS, 4-6.

## PENALTIES.

See DAMAGES, 1; INTEREST, 1.

## PERSONAL PROPERTY.

See SALES.

## PLEADING.

1. **DENYING THE EXECUTION OF AN INSTRUMENT BY A CORPORATION.** — If an instrument sued upon purports to be signed by a corporation by its president, his authority to execute it cannot be put in issue under the statute of Illinois except by a plea, verified by an affidavit denying the execution of such instrument. *Richelieu Hotel Co. v. International etc. Encampment Co.*, 234.
2. **EVIDENCE.** — ALLEGATIONS IN AN ANSWER NOT RESPONSIVE to the bill are not evidence in favor of the defendant, but to be available as a defense must be proved. *Harding v. Hawkins*, 347.
3. **DILATORY PLEAS** are regarded with disfavor, and therefore the matter pleaded must be stated with the highest degree of certainty attainable in a plea, namely, with that degree which is known in law as "certainty to a certain intent in every particular," and must anticipate and exclude all such supposable matter as would, if alleged on the opposite side, defeat the plea. *Capwell v. Sipe*, 890.
4. **PRIVILEGE OF WITNESSES.** — A dilatory plea alleging that the defendants in the action were served with process while they were in attendance upon the court as witnesses in the suit of *A v. B* is not sufficient if it fails to state that they were not parties to such suit as well as witnesses therein. *Capwell v. Sipe*, 890.
5. **IF THE GENERAL ISSUE IS PLEADED**, and a stipulation entered into and an order of the court thereon made to the effect that the defendant shall have the right to prove any matter which would be admissible if specially pleaded, the defendant cannot be prejudiced by the sustaining of a demurrer to a special plea interposed by him. *Richelieu Hotel Co. v. International etc. Encampment Co.*, 234.

See MARRIAGE AND DIVORCE, 4, 10; NEGLIGENCE, 1; TRIAL, 3.

## PLEDGE.

**EFFECT OF REDUCING TO JUDGMENT.** — A creditor who holds the note of a third person indorsed to him by his debtor as collateral security for his debt may, after maturity, reduce the collateral to judgment. The judgment will then take the place of the collateral and stand as security for the payment of the debt, but satisfaction of the debt is also a satisfaction of the judgment, upon which no action can thereafter be maintained. *Harding v. Hawkins*, 347.

## POLICE POWER.

See MUNICIPAL CORPORATIONS, 1-3, 7.

POSSESSION.

**See** CHATTEL MORTGAGES; CORPORATIONS, 7; FRAUDULENT CONVEYANCES; LANDLORD AND TENANT, 1; LARCENY; NEGOTIABLE INSTRUMENTS, 1; PARTITION, 1, 5.

POWERS.

**See** USURY, 4.

PRE-EMPTION.

**See** MORTGAGES, 3; PUBLIC LANDS.

PRESUMPTION.

**See** ASSAULT, 1; CARRIERS, 1; CRIMINAL LAW; DAMAGES, 1; DEEDS, 3; EVIDENCE, 4-8; HUSBAND AND WIFE, 1-3; INSURANCE, 1, 14; NEGOTIABLE INSTRUMENTS, 12; RAILROADS, 37; SALES, 4; TRIAL, 4; WILLS, 8.

PRINCIPAL AND AGENT.

**See** AGENCY.

PRIVATE WAYS.

**See** EASEMENTS.

PRIVILEGE.

**See** EXECUTION, 1; PARTIES, 3; WITNESSES, 9.

PRIVITY.

**See** CONTRACTS, 4.

PROCESS.

**SUMMONS** — CONTRADICTION OF RETURN. — An officer's return on a summons, showing that he has personally served a copy thereof on the defendant, may be contradicted by the latter, but unless it clearly appears from the evidence that the return is false, it will be sustained by the court. *Wilson v. Shipman*, 660.

**See** CORPORATIONS, 39, 40; JUDGMENTS, 13, 14; MARRIAGE AND DIVORCE, 12; PARTIES; PLEADING, 4; WITNESSES, 9.

PROOFS OF LOSS.

**See** INSURANCE, 1-7.

PUBLICATION.

**See** LIBEL.

PUBLIC LANDS.

**MORTGAGE OF PRE-EMPTION CLAIM** — VALIDITY OF. — An ordinary mortgage of his claim by a pre-emptor of public land prior to the time of making his final proofs is valid and is not a grant or conveyance within the prohibitory clause of section 2262, Revised Statutes of the United States, providing that any grant or conveyance which such pre-emptor may have made, except in the hands of *bona fide* purchasers for value, shall be null and void. *Norris v. Heald*, 581.

**See** MORTGAGES, 3.



## PUBLIC POLICY.

See CONTRACTS, 5, 8.

## QUALIFICATIONS.

See TRIAL, 1.

## QUO WARRANTO.

1. **THE MAKING OF A CORPORATION A PARTY DEFENDANT** in a proceeding by *quo warranto* under the allegation that it is a corporation *de facto*, accompanied by allegations from which it appears that it is not a corporation *de jure*, does not admit the corporate capacity of such defendant, nor preclude the plaintiff from inquiring into its right to be a corporation. The corporation *de facto* is not only a proper, but is also a necessary party defendant. *People v. Montecito Water Co.*, 172.
2. **VILLAGE ORGANIZATION — ATTACK BY QUO WARRANTO ON PETITION FOR ORGANIZATION.** — In *quo warranto* proceedings to determine the validity of a village incorporation under the Illinois statute, parol evidence is admissible to contradict the petition for incorporation, and to show that at the time of filing it the territory did not have the required population, notwithstanding the recitals in such petition to the contrary. *Kamp v. People*, 270.
3. **VILLAGE ORGANIZATION — ATTACK BY QUO WARRANTO.** — Under the Illinois statute, the duties imposed upon a county judge in respect to the petition for incorporation and the steps to be taken thereunder, are purely ministerial, and not judicial, and his action in calling an election for village trustees is not conclusive of the validity of the incorporation, which may be attacked by *quo warranto*, and the recitals in the petition for organization may be contradicted by parol evidence in such proceeding. *Kamp v. People*, 270.
4. **VILLAGE ORGANIZATION — JUSTIFICATION ON QUO WARRANTO — SUFFICIENCY OF ANSWER.** — When the validity of the incorporation of a village under the Illinois statute is attacked by *quo warranto*, the incorporators must justify, and in doing so, must allege in their answer and prove the jurisdictional facts necessary to the validity of such incorporation, and their failure to allege such facts will not excuse them from proving them, as their existence is essential to such justification. *Kamp v. People*, 270.
5. **VILLAGE ORGANIZATION — QUO WARRANTO — ESTOPPEL.** — When the validity of the incorporation of a village is attacked on *quo warranto* by the state, its introduction, in evidence, of the petition for incorporation, merely for the purpose of identifying the records to be used in the examination of witnesses to contradict its recitals, will not estop it from introducing evidence to contradict such recitals. *Kamp v. People*, 270.
6. **VILLAGE ORGANIZATION — LACHES AS DEFENSE.** — When the validity of the incorporation of a village is attacked by *quo warranto*, and the statute of limitations, or laches in prosecuting the action, is not set up in the answer, no such defense will be presumed or considered. *Kamp v. People*, 270.

See CORPORATIONS,

## RACE DISTINCTION.

See CIVIL RIGHTS.

RAILROADS.

1. **EMINENT DOMAIN — PUBLIC USE — TAKING PROPERTY FOR RAILROAD IS.** Railroads are *quasi* public corporations, and the taking or damaging of private property for their construction or maintenance is a public use for which just compensation must be made. *Penn etc. Ins. Co. v. Heiss*, 273.
2. **EMINENT DOMAIN — INVITATION TO LOCATE RAILROAD — ESTOPPEL TO CLAIM DAMAGES.** — When the owner of property urges or induces a railroad company to locate its road on an adjacent street he will, after the invitation has been acted upon, be estopped from claiming damages or enjoining the operation of the road, but to create such estoppel there must be some affirmative act by such owner, in reliance upon which the railroad company has acted to its prejudice. The fact that such owner requested an alderman to vote for an ordinance granting the right to the company to locate its road on the street, when it does not appear that such vote was necessary to the passage of the ordinance, does not estop him from recovering for damages to his business arising from the location and operation of the road. *Penn etc. Ins. Co. v. Heiss*, 273.
3. **EMINENT DOMAIN — LAND INJURED BY CONSTRUCTION OF RAILROAD. — MEASURE OF DAMAGES** to land arising from the location and construction of a railroad, is the difference between the market value of the property immediately before and immediately after the construction of the road. *Beck v. Pennsylvania etc. R. R. Co.*, 822.
4. **EMINENT DOMAIN — DAMAGES FOR LAND TAKEN BY RAILROAD — EVIDENCE OF VALUE.** — Evidence of the price paid on sales of other land in the neighborhood, is competent on an inquiry as to the value of land taken for railroad purposes only when there is a substantial similarity between the properties. The rule does not apply when the conditions are so dissimilar as not easily to admit of reasonable comparison, and much must be left to the discretion of the trial court in the determination of the preliminary question as to whether the conditions are fairly comparable or not. *Laing v. United New Jersey R. R. etc. Co.*, 682.
5. **EMINENT DOMAIN — DAMAGE TO PRIVATE PROPERTY — RIGHT OF ACTION — MEASURE OF DAMAGES.** — In case of damage to private property from the location and construction of a railroad, a right of action accrues upon the completion of the road to recover not only present but prospective damages, but the injured party may bring his action at any time within five years from the accruing of the right. He may wait until his permanent damages have become susceptible of absolute proof before bringing his action, if brought within the five years, and then recover his permanent damages instead of sooner bringing the action and resorting to proof of prospective damages arising from the operation of the road. *Penn etc. Ins. Co. v. Heiss*, 273.
6. **EMINENT DOMAIN — DAMAGE TO PRIVATE PROPERTY — MEASURE OF DAMAGES TO TENANT.** — When the business of a tenant is injured by the location and operation of a railroad in front of the leased premises, the measure of damages which may be recovered by the tenant is limited to the loss of probable profits in his business as shown by the evidence from the time of the construction of the road and its operation to such time as the tenant might, by the exercise of ordinary diligence, have procured another place of business equally eligible for the transaction of his business, including a reasonable time for removal. *Penn etc. Ins. Co. v. Heiss*, 273.

7. **EMINENT DOMAIN — DAMAGE TO PRIVATE PROPERTY — JUDGMENT FOR, WHETHER BINDING ON MORTGAGEES OF RAILROAD.** — A judgment by default against a railroad for damages to adjoining property, arising from the construction and operation of the road, is not binding as to amount on a mortgagee of the company not a party thereto, and in a contest between such mortgagees and the owner of the property damaged as to priority of payment out of the proceeds of a sale of the road and property under foreclosure, the court may reopen such judgment and require a reassessment of the damages. *Penn etc. Ins. Co. v. Heiss*, 273.
8. **EMINENT DOMAIN — PROPERTY TAKEN OR DAMAGED BY RAILROAD — RECOVERY AGAINST MORTGAGEES — PRIORITY OF LIEN.** — When a mortgagee of the bonds and property of a railroad, is notified by the face of the bonds that they are issued upon a projected and unfinished road, he takes with notice that the right of way must be acquired in some of the recognized modes known to the law, and that when the road is built through cities, damages may thereby be caused for which compensation must be made, and when such damages have accrued and have been reduced to judgment, the fact that the bonds and the mortgage were executed prior to the recovery of such judgment, will not give the mortgage any priority; on the contrary, upon a foreclosure thereof, the judgment for damages must be first satisfied out of the proceeds of the foreclosure sale of the railroad property. *Penn etc. Ins. Co. v. Heiss*, 273.
9. **EMINENT DOMAIN — MEASURE OF DAMAGE TO PRIVATE PROPERTY — STATUTE OF LIMITATIONS.** — Whenever a right of action for damages for injury to private property from the location, construction, and operation of a railroad has accrued, and the action has been brought within the period of the statute of limitations, proof may be made of the permanent damages to the property, and the recovery being once for all, may include all damages flowing from the location and ordinarily skillful operation of the road. *Penn etc. Ins. Co. v. Heiss*, 273.
10. **EMINENT DOMAIN — DAMAGE TO PRIVATE PROPERTY — SURVIVAL OF ACTION.** — When a cause of action has accrued for damages to private property from the construction of a railroad, and suit has been instituted therefor in the lifetime of the party damaged, the right of action will survive and pass to his personal representative upon his death and not to his heir or devisee. *Penn etc. Ins. Co. v. Heiss*, 273.
11. **EMINENT DOMAIN — TOWN LOTS — ELEMENTS OF DAMAGE.** — When part of several contiguous town lots used and treated by the owner as one tract is appropriated by a railroad company for a right of way, the measure of his damages is the value of the strip actually appropriated, and the diminution in the value of the portion remaining resulting from the proper construction and careful operation of the road. He is not limited in his recovery to the land described in the petition of the company, nor the award of the commissioners, but may show the direct effect upon all of his land accompanying or flowing from such appropriation. *Atchison etc. R. R. Co. v. Boerner*, 637.
12. **EMINENT DOMAIN — USE OF STREETS BY RAILROAD — DAMAGES.** — When a railroad acquires the right to lay its tracks in the streets of a city, it is not required to institute condemnation proceedings in respect to damages which may accrue to owners of property abutting thereon; and when no part of such property is taken for such public use, the owner is not entitled to have proceedings instituted under the eminent domain law to ascertain what damages his property may sustain in

consequence of the construction and operation of the railroad. He is remitted to his action at law to recover his damages, which must all be recovered in one action. *Penn etc. Ins. Co. v. Heiss*, 273.

13. **STREETS — USE OF, BY RAILROAD — DAMAGES.** — A railroad company is liable for all direct physical damage accruing to a contiguous or abutting landowner from the construction and operation of such railroad in the street, although no land is actually taken; and in such case, the damages, past, present, and future, to which the landowner is entitled, must be recovered in one action. *Penn etc. Ins. Co. v. Heiss*, 273.
14. **EMINENT DOMAIN — STREET OCCUPIED BY RAILROAD — ELEMENTS OF DAMAGE.** — In estimating damages arising to an adjoining owner from the occupation of a street by a railroad, not only the narrowing of the street, but the greater risk of fire, and the increased noise, dust, and smoke occasioned by the nearer approach of passing trains, are matters to be considered in view both of the use then made of the property, and its probable future uses. *Laing v. United New Jersey R. R. etc. Co.*, 682.
15. **STREETS — USE OF BY RAILROAD — INJUNCTION — DAMAGES.** — An injunction will not lie at the suit of an abutting property owner, when the entry upon a street by a railroad is under the authority of the municipal agency invested with the control of such street. In such case, the abutting property owner has an adequate remedy at law in an action to recover his damages, and there is no ground for the interference of a court of equity. *Penn etc. Ins. Co. v. Heiss*, 273.
16. **EMINENT DOMAIN — INJURY TO EASEMENT IN STREET — DAMAGES TO ADJOINING OWNER.** — An abutting lot owner may, by action at law, recover damages for the interference with his easement in the street by a railroad company, when part of his property has been taken for the right of way; provided such damages are not included in those awarded for such taking, and the part taken is so far distant as to make the interference with the easement in the street a separate and distinct injury. *Atchison etc. R. R. Co. v. Boerner*, 637.
17. **STREETS — USE OF BY RAILROAD — DAMAGES AS AGAINST ENCUMBRANCERS OR ALIENEES.** — When the property of an abutting owner is taken or damaged by the construction or operation of a railroad in a street, he is entitled to compensation for the injury received, as against the encumbrancers, alienees, or successors of such railroad, and its franchises and property, unless he has done some act amounting to a waiver of his right, or by which he is estopped from asserting it. *Penn etc. Ins. Co. v. Heiss*, 273.
18. **STREETS — USE OF BY RAILROAD — DAMAGES AS AGAINST ALIENEE OR ENCUMBRANCERS.** — When the property of an abutting owner is damaged by the construction of a railroad in the street, he may be without means of redress until by appropriate proceedings he has had the extent and amount of his damage ascertained; but when the damages are ascertained in the mode provided by law the right of such owner to the payment of the same as compensation out of the railroad property is absolute as a condition to the continued appropriation of the street to such public use whereby the injury is inflicted, and it is not in the power of the railroad company by alienation or encumbrance of its property to defeat this right, and the alienee, encumbrancer, or successor, will take with notice of the provisions of law restricting the power to take or damage private property for a public use, and subject to the burden cast upon the rail-



road company by, through, or under which such interest is acquired. *Penn etc. Ins. Co. v. Heiss*, 273.

19. **LIABILITY FOR THE LOSS OF A DOG THROUGH THE ACTS OF A CONDUCTOR AND BAGGAGE MASTER.** — If a passenger's dog is removed, by the order of the conductor, from a passenger car and received for transportation by the baggage master, these acts are done apparently within the course of the employment of those officials. Hence, if the baggage master accepts the dog for carriage, without drawing the attention of the passenger to a rule of the company which requires the payment of a fee for the carriage of dogs, and afterward refuses to deliver the dog to the passenger at the station which he had announced to be his destination, unless that fee is paid, whereupon the animal is taken on to another station and there lost, the company is liable for that loss. The fact that a special rule regarding the carriage of dogs had been promulgated is no defense in such a case, where the evidence shows that the attention of the passenger was not called to the rule, and that he had no knowledge or notice of it. *Kansas City etc. R. R. Co. v. Higdon*, 119.
20. **PASSENGER, LIABILITY FOR WRONGFULLY EJECTING.** — THAT A CONDUCTOR WAS HONESTLY MISTAKEN in believing that a passenger had not paid his fare does not constitute any defense to an action by the latter to recover damages for his wrongful expulsion from the car. *Gorman v. Southern Pac. Co.*, 157.
21. **MEASURE OF DAMAGES FOR WRONGFUL EXPULSION** of a passenger in ordinary case, without needless violence or insult, and from which no bodily injury results, is the cost of a ticket from the point of expulsion to the passenger's destination, together with an allowance for such damages as actually result from loss of time. *Gorman v. Southern Pac. Co.*, 157.
22. **IN ALLOWING DAMAGES FOR THE WRONGFUL EXPULSION OF A PASSENGER** from a railway car, accompanied with undue violence, and by abuse and insult, the jury is entitled to consider the ignominy endured, his mental sufferings, and humiliation and wounded pride which one in his condition of life and standing in the community would experience. *Gorman v. Southern Pac. Co.*, 157.
23. **AN ACTION OF TORT** will lie to recover damages for the wrongful expulsion of a passenger from a railway car, and though the complaint alleges a contract for carriage, the action is not for breach of the contract, but for tort by breach of duty. *Gorman v. Southern Pac. Co.*, 157.
24. **EXEMPLARY DAMAGES** may be allowed by a jury in an action for the wrongful expulsion of a passenger from a railway car, if in such expulsion the defendant was guilty of oppression, fraud, or violence, actual or presumed. *Gorman v. Southern Pac. Co.*, 157.
25. **DAMAGES FOR EXPELLING PASSENGERS, WHEN NOT EXCESSIVE.** — If the evidence tends to prove that after a passenger had surrendered his ticket, the conductor denied that fact, and demanded the payment of additional fare, and being refused, grabbed the passenger suddenly by the coat collar, shoved him out of the door, pulled him to the platform, and shoved him down the steps, a verdict awarding five hundred dollars damages cannot be regarded as excessive, nor as indicating that the jury acted under the influence of passion or prejudice. *Gorman v. Southern Pac. Co.*, 157.

26. NEGLIGENCE OF RAILROAD — EVIDENCE OF FAILURE TO GIVE WARNING. — When one lawfully upon the premises of a railroad company is injured by the sudden backing of a car, evidence that no signal of warning was given is admissible on the issue of negligence as part of the *res gestæ*. *Spotts v. Wabash etc. R'y Co.*, 531.
27. NEGLIGENCE OF RAILROAD — EVIDENCE. — When one lawfully upon the premises of a railroad company is injured by the sudden backing of a car, evidence that the company had prior notice of his employment and presence about its tracks is admissible on the issue of negligence. *Spotts v. Wabash etc. R'y Co.*, 531.
28. RAILROADS — DUTY TO PERSONS LAWFULLY UPON PREMISES. — A railroad company must exercise at least ordinary care and reasonable diligence to prevent injury to a person lawfully upon its premises. *Spotts v. Wabash etc. R'y Co.*, 531.
29. NEGLIGENCE OF RAILROAD TO SERVANT OF ANOTHER COMPANY. — When a person employed by an elevator company to unload freight cars belonging to a railroad company, and standing on one track, is killed without any signal of warning, and while in the exercise of ordinary care, by the sudden backing of other cars upon an adjacent track, where he is standing while an unloaded car is being weighed, the railroad company, having prior notice of his employment and presence about the tracks, is guilty of negligence and liable in statutory damages. *Spotts v. Wabash etc. R'y Co.*, 531.
30. ASSUMPTION OF RISKS BY EMPLOYEES. — An employee, when he enters upon his service, assumes the ordinary risks incident thereto, and also the extraordinary risks of which he has notice or of which, in the usual exercise of his faculties, he ought to have notice. *Boss v. Northern Pac. R. R. Co.*, 756.
31. DUTY TO FURNISH SAFE APPLIANCES FOR EMPLOYEES. — An employee, upon entering the service of a railroad company, has the right to assume that the railroad and its appurtenances are so constructed as to render him safe in the performance of his duties, and that he will not heedlessly be exposed to any extraordinary risk of which he has no notice. *Boss v. Northern Pac. R. R. Co.*, 756.
32. DANGEROUS APPLIANCES. — An employee does not assume the risk arising from the erection of a high switch stand and signal so near the track that, at best, it clears the cars but a few inches, particularly when he knows that the rules of the company forbid the erection of any such structure in such position; and the mere fact that he has passed it several times while riding to and from his work upon one of the defendant company's trains is not sufficient to charge him with knowledge of the danger to which its position exposes him. *Boss v. Northern Pac. R. R. Co.*, 756.
33. A RAILROAD USING THE CARS OF A CONNECTING LINE IS LIABLE to the same extent as if they were its own, if such cars, when received and used, are in a condition dangerous to its employees. *Reynolds v. Boston etc. R. R. Co.*, 908.
34. IF CARS ARE BROUGHT UPON A ROAD WITH COUPLINGS OF A MORE DANGEROUS CHARACTER than those which a brakeman has been in the habit of using, and he is ignorant of their different couplings and of their dangers and the mode of avoiding them, it is negligence on the part of a railway corporation and its agents to permit such brakeman to work

with cars having such couplings without giving him warning of the danger to which he is exposed and instructing him how to avoid such danger. *Reynolds v. Boston etc. R. R. Co.*, 908.

35. **NEGLIGENCE—NATURAL AND PROBABLE CONSEQUENCE.**—When a railroad employee, in boarding the train which is to take him back to the depot near which he is working, goes with several other employees to the front end of a car, at which, unknown to him, there is a locked door which prevents ingress to the car, and being unable, on account of the immediate starting of the train, to seek an entrance by the other door, remains on the platform, and while in that position, is struck by a high switch stand which stands dangerously near the track, the injury so received is a natural and probable consequence of the negligent retention of the switch stand in such a position. *Boss v. Northern Pac. R. R. Co.*, 756.
36. **NEGLIGENCE—PROXIMATE AND REMOTE CAUSE.**—The action of the fellow-workmen of a railroad employee in crowding him so close to the side of the platform of a car that he is struck by a high switch stand which, owing to the negligence of the railroad company, has been erected dangerously near the track, does not break the direct causal connection between the negligence and the injury. *Boss v. Northern Pac. R. R. Co.*, 756.
37. **INJURIES TO EMPLOYEES—CONTRIBUTORY NEGLIGENCE.**—An employee who fails to take the place upon a car which the defendant company has provided for him, and occupies a more dangerous position, is presumed to be guilty of such contributory negligence as will defeat a recovery for injuries received by him while in that position, and to overcome that presumption he must show that he occupied the more dangerous position through no fault or negligence of his own, and not from choice. *Boss v. Northern Pac. R. R. Co.*, 756.
38. **NEGLIGENCE, CONTRIBUTORY, WHEN A QUESTION FOR THE JURY.**—Whether a brakeman was guilty of contributory negligence in attempting to couple cars in the manner which he did is a question for the jury, if he was inexperienced, and ignorant of the perils to which he was exposed, and his employer had not given him proper instructions to aid him in avoiding such dangers. *Reynolds v. Boston etc. R. R. Co.*, 908.
39. **MASTER AND SERVANT—VICE PRINCIPAL—TRACK FOREMAN IS NOT.**—A railroad track foreman who has control of a gang of track repairers, is not a vice principal as to the men under him, and the railroad company is not liable for his negligence resulting in an injury to one of them. *Spancake v. Philadelphia etc. R. R. Co.*, 821.
40. **CONTRIBUTORY NEGLIGENCE, QUESTION OF, SHOULD BE SUBMITTED TO JURY, WHEN.**—The proof of contributory negligence must be clear and decisive, not leaving room for impartial and unbiased minds to arrive at any other conclusion, in order to warrant any absolute direction to the jury on that ground. When, therefore, plaintiff's intestate is killed at a crossing by a locomotive of the defendant under the following circumstances, the question of the contributory negligence of the deceased should be submitted to the jury, and it is error to direct a verdict for the defendant. The locomotive with only a tender and snow pilot attached was running north at a high rate of speed; there was no regular train due at the time; the deceased, having just unhitched his horses from a sled, at a point about thirty feet east of the crossing, was driving them westward across the track, his view to the south being greatly if



not entirely obstructed by piles of logs and other obstructions, until he came within fifteen feet of the track, when the forefeet of his near horse were over the rail. The day was cold, windy, and blustery; it was snowing some and the snow was drifting, the wind blowing from the north-east; the locomotive approached with much less noise than an ordinary train would make, and those in charge of it gave no signal by bell or whistle; the deceased, when eight or nine feet from the track, saw the locomotive one hundred and sixty-four feet away, but had no time for deliberation or to observe its unusually high rate of speed, and was struck by it before he could get across the track. *Valin v. Milwaukee etc. R. R. Co.*, 17.

41. NEGLIGENCE OF DEFENDANT QUESTION FOR JURY, THOUGH CONTRIBUTORY NEGLIGENCE ON PLAINTIFF'S PART, WHEN. — In an action against a railroad company to recover damages for the death of the plaintiff's intestate, the negligence of the deceased will not enable the company to escape liability if the act which caused the injury was done by the defendant after it discovered his negligence, and it could have avoided the injury by the exercise of reasonable care and prudence; and if the deceased was not a trespasser, such supervening negligence need not be gross in order to authorize a recovery. When, therefore, the engineer of a locomotive by which the plaintiff's intestate was killed at a railroad crossing testifies that, when five hundred and forty feet from the crossing he saw the deceased and his team, the heads of the horses being then within eight or nine feet of the track; that they were headed as if they were going to cross, but he did not think they would cross; that they were then standing still, but when he got within a few yards of them the deceased made a dive to go across; that when he saw them he did not think it prudent to sound the whistle for fear it would frighten the horses onto the right of way; that after striking them he reversed the engine and stopped the locomotive within three hundred and fifty feet; and another intelligent witness, who was at the time standing near the scene of the accident, testifies that the deceased and his horses did not stop at any time after they started from a point about thirty feet from the track until they were struck by the locomotive, — the case should be submitted to the jury, and it is error to direct a verdict for the defendant. *Valin v. Milwaukee etc. R. R. Co.*, 17.
42. RAILROAD CROSSING, DUTY OF PERSON APPROACHING. — The rule that a person suddenly put in a position of great peril by the negligence of another is not responsible for an unwise choice of a mode of escape, is not applicable to the case of a traveler approaching a railroad track where he knows trains are frequent, and where his view is unobstructed. He is bound to the exercise of ordinary care, and if he fails in this, and is injured in consequence thereof, he cannot recover. It is, therefore, error to instruct the jury that when a person approaches a railway track, and sees a train coming, he may attempt to cross in advance of it or not, as he pleases, and is not chargeable with negligence, however rash his act, because he acted on his judgment. *Liermann v. Chicago etc. R'y Co.*, 37.
43. STREET RAILWAYS. — THE FAILURE TO RING A BELL AT A STREET CROSSING as required by a reasonable municipal ordinance is negligence and renders the company answerable to a person injured by an accident of which such failure was the proximate cause. *Driscoll v. Market St. etc. R'y Co.*, 203.



44. **STREET RAILWAYS, CARE REQUIRED OF PEDESTRIANS AT CROSSINGS.**—The care exacted of persons crossing ordinary steam railways running through the country at comparatively long intervals of time is greater and more strict than that exacted of persons crossing the streets of a crowded city over which street railways are operated. *Driscoll v. Market St. etc. R'y Co.*, 203.
45. **STREET RAILWAYS CANNOT BE EXCUSED FROM RINGING A BELL** at the crossing as required by a municipal ordinance because the hands of the gripman were necessarily otherwise engaged. *Driscoll v. Market St. etc. R'y Co.*, 203.
46. **STREET RAILWAYS** when exercising due care are not responsible to a person who in a careless, reckless, absent-minded way runs suddenly in front of a moving car and is injured before there is time to stop it. *Driscoll v. Market Street etc. R'y Co.*, 203.
47. **STREET RAILWAYS.**—A PERSON IN CHARGE OF A STREET CAR HAS THE RIGHT TO ASSUME that people will not suddenly undertake to cross in front of it. *Driscoll v. Market Street etc. R'y Co.*, 203.
48. **NEGLIGENCE CONTRIBUTORY, WHEN A QUESTION FOR THE JURY.**—If a street railway car ran over a pedestrian at a street crossing, and there was a failure to ring the bell as required by a reasonable municipal ordinance, and the night was dark and foggy, the question whether the person injured was guilty of contributory negligence in attempting to cross in front of the car cannot be decided by the court as a matter of law, but should be submitted to the jury. *Driscoll v. Market Street etc. R'y Co.*, 203.

See EMINENT DOMAIN; HIGHWAYS, 6; WITNESSES, 2, 3.

## RAPE.

**EVIDENCE.**—A FATHER MAY BE CONVICTED of the rape of his daughter under fourteen years of age on her uncorroborated and contradicted testimony, and although no force was used and she failed to complain of the wrong done her. *State v. Wilcox*, 551.

## RATIFICATION.

See CORPORATIONS, 16; FRAUD, 2.

## REAL PROPERTY.

1. **LATERAL SUPPORT.**—A landowner who exercises his right to remove the earth from his own premises, adjacent to another's building, must use ordinary care to cause no unnecessary damage to his neighbor's property. *Larson v. Metropolitan etc. R'y Co.*, 439.
2. **LATERAL SUPPORT—NOTICE—ALTERATION OF PLAN OF EXCAVATION.**—Where a landowner has actual notice of the fact that an excavation is being made adjacent to his house, but is also assured by the authorized agent of the person for whom it is made that the earth will be taken out in a manner which the evidence of experts shows to be customary and reasonably safe, he has a right to assume that the course foretold will be followed, at least until he had notice to the contrary and a proper opportunity thereafter to act upon such later notice; and if an injury to his house results from this change in the plan, before he has had sufficient time to take measures for its protection, the party for whom the work is done will be liable for damages. *Larson v. Metropolitan etc. R'y Co.*, 439.

- 3. LATERAL SUPPORT — EXCAVATION, CHANGE IN MODE OF.** — The fact that an additional outlay would be necessary to carry out the work of excavation in "sections" is immaterial when the person excavating has expressly promised to pursue that method, and thus led the owner of the adjacent premises to act upon that hypothesis and refrain from taking steps which would otherwise have been reasonably necessary and prudent to insure the safety of his property. Under such circumstances the proposed method must be continued, or timely notice of a change of plan given to the adjacent proprietor. *Larson v. Metropolitan etc. Ry Co.*, 439.

See **LICENSE; MASTER AND SERVANT, 12; SPECIFIC PERFORMANCE, 1; VENDOR AND PURCHASER.**

#### REBUTTAL.

See **TRIAL, 4-6; WITNESSES, 5.**

#### RECEIPTS.

See **CARRIERS, 1, 2; WAREHOUSEMEN.**

#### RECEIVERS.

- 1. ORDER APPOINTING — COLLATERAL ATTACK.** — When the court appointing a receiver for an insolvent corporation has jurisdiction of the subject-matter and of the parties, its order appointing the receiver, no matter how erroneous, cannot be collaterally attacked. *Commercial Nat. Bank v. Burch*, 331.
- 2. RECEIVERS, JURISDICTION OF OTHER COURTS OVER.** — No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized even by the court granting the receiver, and is not open to revision by it, if the court had jurisdiction of the subject-matter and the parties. Such a judgment, however, merely establishes the existence and extent of the claim; the manner in which it shall be paid is under the control of the court which appointed the receiver. *Gay v. Brierfield Coal etc. Co.*, 122.

See **LIS PENDENS.**

#### RECONCILIATION.

See **MARRIAGE AND DIVORCE, 14.**

#### RECORDS.

See **APPEAL; CERTIORARI; EVIDENCE, 6; JUDGMENTS, 1, 2, 5, 9, 10, 15; LANDLORD AND TENANT, 2.**

#### REDEMPTION.

See **MORTGAGES, 4.**

#### RELATIVES.

See **SERVICES.**

#### REMOVAL OF CAUSES.

See **JURISDICTION, 4.**

## RENTS.

See COVENANCY, 3; LANDLORD AND TENANT, 2, 3; *LES PENDRE*.

## RESCISSION.

See BONDS, 4; CONTRACTS, 3.

## RES GESTÆ.

See EVIDENCE, 9, 14; RAILROADS, 23.

## RES JUDICATA.

See JUDGMENTS, 4.

## RESTRAINT OF TRADE.

See CONTRACTS, 5-8.

## REVOCATION.

See LICENSE.

## RIGHT OF WAY.

See EASEMENTS, 3; RAILROADS, 8, 11, 16.

## RIPARIAN RIGHTS.

See WATERCOURSES.

## ROYALTIES.

See BONDS, 4.

## SALES.

1. **WHEN COMPLETED.** — A sale of personal property passes the title as between the vendor and vendee when such property has been designated and set apart by the former, if such is the intent of the parties, though the vendor is not to make delivery of the goods until afterwards. *Commonwealth v. Hess*, 810.
2. **WHEN TITLE PASSES — INTENT.** — The passing of title upon a sale of personal property depends upon the intention of the parties to be derived from the contract and its circumstances. Actual delivery, weighing, and setting aside are only circumstances from which such intention may be inferred. *Commonwealth v. Hess*, 810.
3. **WHEN AND WHERE COMPLETED.** — When a person doing business in one county receives an order there for goods from a customer in another county, and in pursuance of such order sets the goods ordered apart, and charges them to such purchaser, afterwards delivering them by wagon, common carrier, or otherwise, the sale, though made on credit, is completed and the title passes, as between the vendor and vendee, when the goods are set apart and charged to the latter. *Commonwealth v. Hess*, 810.
4. **WAIVER OF RIGHT TO DISAFFIRM.** — Delivery of goods sold upon condition that they shall be paid for on delivery raises a presumption that the sale is absolute, and if payment is not made as agreed upon, the vendor must proceed to recover the goods with all reasonable diligence under the circumstances. Failure to pursue this right while others

buy the goods as the property of the vendee who is clothed with apparent title, will constitute a waiver on the part of the vendor of his right to retake or recover them. *Leatherbury v. Connor*, 672.

6. **NEGLIGENCE — LIABILITY OF THE MANUFACTURER OF A DEFECTIVE ARTICLE TO THIRD PERSONS.** — One who makes and sells a piece of machinery is not liable to persons other than the vendee for injuries caused by its breakage, unless such machinery is of an inherently dangerous character, and he has failed to make known its true nature, or unless he sold it knowing it to be defective without informing the vendee of the defect. The fact that the defendant must be charged with the knowledge that the machinery would be operated by such other persons is not a sufficient reason for holding the vendor liable to them for the consequences of mere negligence on his part in using poor materials or putting them together unskillfully. *Heizer v. Kingsland etc. Mfg. Co.*, 482.
6. **CONTRACT "ON SALE AND RETURN" IS AN AGREEMENT** by which goods are delivered by a wholesale to a retail dealer, to be paid for at a certain rate if sold again by the latter, and if not sold, to be returned within a reasonable time, if no time is specified. What is such reasonable time depends upon the circumstances of each case. *House v. Beak*, 307.
7. **UNDER A CONTRACT "ON SALE AND RETURN,"** if the vendee returns the goods within a reasonable time, no time being specified for their return, the contract of sale is at an end; if he does not, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered. *House v. Beak*, 307.
8. **UNDER A CONTRACT "ON SALE AND RETURN," PROPERTY IN THE GOODS PASSES TO THE PURCHASER,** subject to an option in him to return them within a reasonable time. If the price is fixed at the time of the sale and delivery of the goods, the purchaser deals with them as his own, disposes of them as he pleases, for cash or on credit, is under no obligation to give any account of his disposition of them, and is only liable to pay for them at a price fixed beforehand, without reference to the price at which he sells them. *House v. Beak*, 307.
9. **CONTRACT "ON SALE OR RETURN" — LIABILITY OF PURCHASER.** — Contracts "on sale or return" are subject to a condition subsequent that if the goods are not sold they shall be returned. The property in the goods vests presently in the vendee, defeasible on the performance of the condition; and if the vendee disables himself from performing the condition or fails to perform it within a reasonable time, his liability to pay the price fixed becomes unconditional, and the plaintiff may declare as upon an *indebitatus assumpsit*. *House v. Beak*, 307.
10. **CONTRACT "ON SALE OR RETURN" — LIABILITY OF PURCHASER.** — Purchaser of goods, to be paid for at a given price when sold, and those not sold to be returned, is liable for all the goods at the price agreed upon when none are returned for more than three years, and no offer to return them is made when a statement of the account is rendered. *House v. Beak*, 307.
11. **CONTRACT "ON SALE OR RETURN" — LIABILITY OF PURCHASER.** — Under a contract "on sale or return," the buyer makes himself liable for the price fixed by refusing to return the property upon demand made by the seller; but if the seller does not want the property, and makes no demand for it, the buyer will become liable for the price fixed upon fail-



ing to return the property within a reasonable time. *House v. Beak*, 307.

See CORPORATIONS, 13-16; EXECUTION; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; INTOXICATING LIQUORS; LANDLORD AND TENANT, 3; MECHANIC'S LIEN, 1; TRADE-MARKS, 2; VENDOR AND PURCHASER.

### SATISFACTION.

JUDGMENTS, 9, 15; MORTGAGES, 5-7.

### SCHOOLS.

See USURY, 1.

### SEED-GRAIN STATUTES.

See STATUTES.

### SEPARATE MAINTENANCE.

See MARRIAGE AND DIVORCE, 14, 15.

### SERVICES.

1. **CONTRACTS FOR COMPENSATION FOR SERVICES RENDERED BY RELATIVES — KINDRED, WHO DEEMED TO BE.** — When services are rendered to each other by the members of a family, or by remote kindred, or by those who stand in the place of kindred living together as one household, the law does not imply a promise to pay on the part of the recipient from the mere voluntary rendition and acceptance of such services. In order to recover, the plaintiff must affirmatively show either that an express contract for remuneration existed, or that the circumstances under which the services were rendered were such as indicate a reasonable expectation that there would be compensation. *Disbrow v. Durand*, 678.
2. **RELATIVES — WHO DEEMED TO BE WHEN SERVICES ARE VOLUNTARILY RENDERED.** — A promise to pay for services to each other voluntarily rendered by the members of a family living together as one household is not implied from the mere rendition and acceptance of such services, even though such parties are only remote kindred, or though not related by blood they stand in the relation of kindred to each other. *Disbrow v. Durand*, 678.

### SLANDER.

1. **WORDS WHICH IMPUTE A CRIMINAL INTENTION** to another are not actionable. Hence an action cannot be sustained for saying of the plaintiff that he is going to start and maintain a house of ill-fame. *Fanning v. Chace*, 877.
2. **LANGUAGE WHICH AMOUNTS TO A MERE ASSERTION OR OPINION AS TO WHAT WILL BE THE FUTURE CONDUCT** or character of another is not actionable. *Fanning v. Chace*, 877.
3. **SLANDER OF TITLE OF LETTERS PATENT** renders the person uttering the slander liable for damages, and therefore a complaint which alleges that the defendant has falsely and maliciously notified persons to whom the plaintiffs were about to sell their device that it infringed the defendant's patent, states a cause of action. *Flint v. Hutchinson etc. Burner Co.*, 476.

See INJUNCTIONS, 3-5.

## SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE** of a contract to convey real property will not be decreed when it is shown that it was entered into through a misapprehension of both parties in believing that the legal title was vested in the vendor, and it appears that this defense can be interposed by the vendor when it is the purchaser who is seeking a decree for specific performance. *Hatch v. Kizer*, 258.
2. **CONTRACT OBTAINED BY DECEIT.** — One who asks specific performance of a contract in the procurement of which he has practiced deceit is always an unwelcome suitor in a court of equity and will generally be denied relief. *Brown v. Pitcairn*, 834.
3. **GROUND FOR REFUSING.** — Omission or mistake in a contract for the sale of land, or that it is unconscientious or unreasonable; or that there has been concealment, misrepresentation, or unfairness, are some of the causes which will induce a court of equity to refuse specific performance. *Brown v. Pitcairn*, 834.
4. **WHEN WILL BE REFUSED.** — Though a contract is valid at law, equity will not enforce it specifically unless the transaction is free from fraud or surprise. *Brown v. Pitcairn*, 834.
5. **WHEN REFUSED — DEGREE OF PROOF.** — A much less degree of proof is required to induce a court of equity to refuse specific performance of a contract for the sale of land than is required to reform it or to set it aside. *Brown v. Pitcairn*, 834.
6. **WHEN REFUSED — CONTRACT OBTAINED BY DECEIT.** — When a contract for the sale of land is obtained by deceitful representations made by and on behalf of the vendee that he intends to use the property for the erection of dwelling houses when in fact he intends to use it for a blacksmith shop, specific performance of the contract will be refused. *Brown v. Pitcairn*, 834.
7. **LACHES.** — Great delay in complying with a contract for the purchase of real estate or in filing a bill to enforce the rights of a party to such contract, amounts to an abandonment of it on his part, and forbids the interference of equity in his behalf; hence the specific performance of a contract for the purchase of realty will not be ordered if the complainant has delayed for eight years after the time he was entitled to a conveyance by the terms of his contract before he filed his bill for specific performance. *Hatch v. Kizer*, 258.
8. **PARTIES.** — A decree for specific performance which includes the wife of the defendant who is not a party to the proceeding is erroneous and will be reversed. *Brown v. Pitcairn*, 834.

## STATES.

See **ELECTIONS**, 1; **INTERSTATE COMMERCE**; **JUDGMENTS**, 3, 4; **MUNICIPAL CORPORATIONS**, 1, 2; **NEGLIGENCE**, 4.

## STATUTE OF FRAUDS.

See **TRUSTS**, 5.

## STATUTE OF LIMITATIONS.

See **LIMITATIONS OF ACTIONS**.

## STATUTES.

1. **SEED-GRAIN STATUTES, NATURE OF THE OBLIGATION INCURRED BY ACCEPTING AID UNDER.** — The obligation which rests upon a person who has received temporary aid from a county, in accordance with the provisions of the seed-grain statutes, to repay to the county the value of the seed grain lent, is not a tax in any sense of the word, but a debt pure and simple, and no legislative fiat can alter its true character. *Yeatman v. King*, 797.
  2. **CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — SEED-GRAIN STATUTES, PRIORITY OF LIENS ON LAND CREATED BY.** — A provision in a seed-grain statute which declares that the debt for grain furnished to indigent farmers in accordance therewith shall be "a first lien upon the real estate of the person assisted," is within the constitutional inhibition against the impairment by a state of the obligation of contracts, in so far as it attempts to make such lien paramount to those to which the land was subject when the statute was passed. *Yeatman v. King*, 797.
- See CORPORATIONS, 4; ELECTIONS; ESTATES; EVIDENCE, 4; GUARDIAN AND WARD, 3; INTEREST, 2; INTERSTATE COMMERCE; MARRIAGE AND DIVORCE, 6; MASTER AND SERVANT, 16; PARTITION, 5; PUBLIC LANDS; WAREHOUSEMEN, 3.**

## STOCK.

**See CORPORATIONS, 12, 13, 17-22.**

## STOCKHOLDERS.

**See CORPORATIONS, 12, 14, 15, 21-26, 31.**

## STREET RAILROADS.

**See RAILROADS, 43-48.**

## STREETS.

**See RAILROADS, 2, 12-18.**

## SUBCONTRACTORS.

**See MECHANIC'S LIENS, 8-10.**

## SUBSCRIPTION.

**See CORPORATIONS, 5-8.**

## SUFFRAGE.

**See ELECTIONS.**

## SUICIDE.

**See EVIDENCE, 7; INSURANCE, 13, 14.**

## SUMMONS.

**See PROCESS.**

## SURETYSHIP.

**See BANKS, 2; COMPOUNDING FELONIES; JUDGMENTS, 8.**

## SURVIVAL OF ACTIONS.

See RAILROADS, 10.

## TAXES.

See STATUTES.

## TELEGRAPH POLES.

See MUNICIPAL CORPORATIONS, 7.

## TENANTS IN COMMON.

See COTENANCY; PARTITION.

## THEATRES.

See CIVIL RIGHTS.

## TORTS.

See AGENCY, 3; CONTRACTS, 4; RAILROADS, 22.

## TOWNSHIPS.

See HIGHWAYS, 5.

## TRACTION ENGINES.

See HIGHWAYS, 3-5.

## TRADE-MARKS.

1. **PICTURE OF FISH USED IN TRADE-MARK, MEANING OF.** — The picture of a fish used in a trade-mark before the words, "Brothers" "Brothers and Co.," or "Wagon," is to be regarded as simply another way of designating the surname "Fish" as the founder and originator of the particular make of wagons manufactured and sold by him. *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 72.
2. **TRADE-MARK, RIGHT OF ASSIGNEE OR PURCHASER TO USE.** — When a manufactory of wagons in which the names of the founders of the business and a rebus to represent their surname have been used as trade-marks, is sold and assigned to a corporation, the corporation acquires by the sale and assignment the good will of the original business, and the right to use such names and rebus as trade-marks, although they were not specifically mentioned in any of the transfers of the business to the corporation. But if there has been no agreement to give to the corporation, the exclusive right to use such names and rebus as trade-marks, a new firm composed of such original founders of the business transferred to the corporation may use the same names and rebus in advertising wagons made by them, provided they do not use them in a way calculated to induce persons to buy the same as and for those manufactured by the corporation. The new firm, however, has no right to represent that their business is the same as that originally conducted by them. *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 72.

## TRESPASS.

See JUDGMENTS, 2.



## TRESPASSERS.

See LANDLORD AND TENANT, 9.

## TRIAL.

1. **JURORS — QUALIFICATIONS OF — OPINION FROM READING NEWSPAPER.** — A juror who states upon his examination that he has formed and expressed an opinion about the case from what he has read in newspapers and from hearsay which it would take evidence to remove, but who states that he does not know the accused, has no bias or prejudice against him, and can fairly and impartially try the case according to the law and the evidence, and a true verdict render, is competent to act as a juror under subdivision 11 of section 287, criminal practice act of Montana touching the qualifications of jurors. *State v. Sheerin*, 600.
2. **EVIDENCE IMPROPERLY PROCURED.** — When papers are offered in evidence, the court can take no notice of how they were obtained, whether legally or illegally, properly or improperly, nor will it form a collateral issue to try that question. Hence if a prisoner writes a letter to his wife and intrusts it to his daughter for delivery, and another daughter secures possession of it and produces it at his trial, it is admissible in evidence against him. *State v. Mathers*, 922.
3. **UNDER A PLEA THAT THE DEFENDANT DID NOT SEAL, EXECUTE, NOR DELIVER THE BOND** as set forth, he may show that it was executed in blank before a justice of the peace who was authorized to insert certain agreements in the blanks, and, disregarding his instructions, inserted an entirely different agreement. *Richards v. Day*, 704.
4. **EVIDENCE, ERROR IN RECEIVING WHEN MAY BE DISREGARDED.** — If testimony only tends to establish what in its absence is a legal presumption, it may be irrelevant, but cannot work any injury when no evidence is offered tending to rebut such presumption. *Robinson v. Brewster*, 265.
5. **MERE PROOF OF FAILURE TO COLLECT MONEYS NOT PROOF OF THEIR LOSS.** Mere proof of the failure to collect moneys due to a corporation is not proof that they were lost to it. *North Hudson Mut. Building etc. Ass'n v. Childs*, 57.
6. **EVIDENCE IN REBUTTAL.** — If witnesses for defendant testified that it was impossible for plaintiff's hand to have been drawn under a certain framework in the manner testified by him, it is proper in rebuttal to receive evidence of other witnesses to the effect that they knew it was possible and that they had seen similar occurrences take place. *Chicago etc. Brick Co. v. Reinneiger*, 249.
7. **DEMURRER TO EVIDENCE.** — When the trial court has forced the plaintiff to a nonsuit by an instruction in the nature of a demurrer to the evidence, he is entitled to the most favorable view of his case that the evidence warrants, and to every reasonable inference therefrom. *Larson v. Metropolitan etc. Ry Co.*, 439.
8. **LIMITATION OF NUMBER OF WITNESSES IN DISCRETION OF COURT, WHEN.** A reasonable limitation of the number of witnesses upon a single fact is within the discretion of the trial court, and an objection or exception to such a limitation should be made, when the court first rules upon the matter. *Meier v. Morgan*, 39.
9. **READING LAW REPORTS IN THE PRESENCE OF THE JURY.** — When the defendant's attorney, in discussing the legal questions involved in a criminal case, reads to the court certain portions of the opinions in previous decisions of the supreme court, it is not error to allow the prosecuting

- attorney to read to the court, in the presence of the jury, the reported facts upon which those decisions were based, provided the jury are instructed not to consider those facts. *Askew v. State*, 83.
10. **FURTHER INSTRUCTIONS TO JURY, PRESENCE OF COUNSEL NOT NECESSARY WHEN GIVEN.** — Although it is the better practice to procure the attendance of counsel for both parties when the jury return into court for further instructions, there is no rule which requires the court in a civil case to do so, and its failure to do so in the absence of anything to show that the party complaining was prejudiced, is not error. *Meier v. Morgan*, 39.
  11. **INSTRUCTIONS AS TO GRADES OF OFFENSE.** — Where, under the evidence given, the defendant must either be guilty of a certain offense or entitled to an acquittal, the jury need not be instructed as to other offenses, to which the evidence in the case has no relation. *State v. Ma Foo*, 414.
  12. **EXCEPTION TO ORAL INSTRUCTIONS, WHEN SHOULD BE TAKEN.** — Although the statute requires the instructions to be in writing, the error of giving oral instructions will be deemed to have been waived if counsel sit by and make no objection at the time. *Boss v. Northern Pac. R. R. Co.*, 756.
  13. **AMBIGUOUS FINDING IN SPECIAL VERDICT DISREGARDED.** — An affirmative answer in a special verdict to an alternative question, where such answer is ambiguous and hopelessly uncertain, will be disregarded. *Gunther v. Ulrich*, 32.
  14. **IF THERE IS NO EVIDENCE UPON AN ISSUE** before a jury, and the weight of evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit or to direct a verdict, as the case may require. *Linkauf v. Lombard*, 743.
  15. **JUDGES ARE NO LONGER REQUIRED TO SUBMIT A QUESTION** merely because some evidence has been introduced by a party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. *Linkauf v. Lombard*, 743.

See APPEAL, 2, 3, 6, 7.

#### TRUST DEEDS.

See INSANE PERSONS, 3; MORTGAGES, 7; TRUSTS, 9.

#### TRUSTS.

1. **IMPERFECT GIFTS.** — If the intention to give absolutely is evidenced by a writing which does not take effect because of its nondelivery, the court cannot give effect to the intended gift by construing it to be a declaration of trust and therefore valid without delivery. *Wadd v. Hazellon*, 707.
2. **GIFTS.** — NEITHER A GIFT NOR A DECLARATION OF TRUST in favor of the donee is established by proof that the testator expressed an intention to give her an amount then specified; that he afterwards directed an assignment to be drawn of a bond and mortgage to the donee; that when the draft of such assignment was presented to him he did not then execute it, but retained it among his papers; that afterwards, while in his last illness, he gave the assignment, then signed, and other papers to the person who had drafted it with directions to deposit it and them in

- the bank, and that they were so deposited and there remained until after the testator's death. *Wadd v. Hazelton*, 707.
2. **TRUSTS, CONSTRUCTIVE.** — If land is purchased in the name of one person but the consideration is paid by another, such land, though conveyed to the former, will be held by him in trust for the latter. *Riley v. Martinnelli*, 209.
  4. **A TRUST EX MALEFICIO ARISES WHENEVER** a person acquires the legal title to property by means of an intentional false or fraudulent verbal promise to hold the same for a certain specific purpose, as, for example, to convey it to another or to reconvey it to the grantor, and having thus obtained the title, retains and claims the property as his own. *Larmon v. Knight*, 229.
  5. **TRUSTS NOT WITHIN THE STATUTE OF FRAUDS.** — If a husband prevails upon his wife, who is then fatally ill, to convey certain of her property to him by promising that if she will do so he will procure a loan thereon, and with the proceeds will redeem the property from a previous judicial sale thereof, and will then hold it for the benefit of her children, the trust thereby created is not an express trust which must be evidenced by a writing to be enforceable. A court will regard the failure or refusal to hold the property for and to convey it to the children as a fraud, and will therefore decree that it is held in trust for and shall be conveyed to them. *Larmon v. Knight*, 229.
  6. **RIGHTS TO BECOME INTERESTED IN TRUST PROPERTY.** — When one person has the power to dispose of the property of another without the consent of the latter, he is not allowed to become personally interested in it himself, without regard to any question of fairness in the transaction, as he is not allowed to occupy a position where self-interest will tempt a betrayal of duty. *Chicago etc. Cab Co. v. Yerkes*, 315.
  7. **TRUSTEES — PURCHASE BY AT THEIR OWN SALE.** — A trustee is disqualified to act by the intervention of a personal interest in the performance of his duties as trustee, and he cannot obtain title to property when he has a duty to perform inconsistent with the character of a purchaser on his own account. *Chicago etc. Cab Co. v. Yerkes*, 315.
  8. **PARTIES — RIGHT OF TRUSTEE TO SUE.** — When a note is made payable to a party as trustee he may sue thereon in his own name after the death of the beneficiary and when no administrator has been appointed. *Beck v. Haas*, 516.
  9. **TRUST DEEDS — RIGHTS OF TRUSTOR TO PURCHASE AT TRUSTEE'S SALE.** Where premises, subject to the lien of a deed of trust executed to secure a debt, are conveyed to one who assumes the payment of the debt, and are afterwards sold in pursuance of the power contained in the deed of trust, the trustor is fully authorized and competent to bid at the sale, and may, as incident to this right, pay the customary amount of earnest money on the bid, and deduct the sum out of the amount paid by the person to whom he transfers the rights acquired by his bid, and to whom the trustee's deed is finally made. *Bensieck v. Cook*, 422.
  10. **WHERE A TRUSTEE HAS CONVERTED A TRUST FUND INTO MONEY, AND HAS MINGLED** it with his other moneys so that it cannot be separated from the latter, the beneficial owner occupies the position of a general creditor of the estate, and cannot follow the funds into the hands of an assignee for the benefit of creditors. *Wetherell v. O'Brien*, 221.

11. **TRUST FUNDS — CONVERSION — RIGHT OF BENEFICIAL OWNER TO FOLLOW INTO HANDS OF ASSIGNEE.** — When a trustee has converted trust funds into money, and mingled it with his other money, so that it cannot be separated therefrom, the beneficial owner occupies the position of a general creditor of the estate, and cannot follow the trust funds into the hands of an assignee for the benefit of creditors. *Mutual Acc. Ass'n v. Jacobs*, 302.
12. **TRUST FUNDS — CONVERSION — RIGHT OF BENEFICIAL OWNER TO RECOVER.** — When a trustee changes the form of trust property, the right of the beneficial owner to reach it and compel its transfer may still exist if the trust property can be identified as a distinct fund, and is not so mingled with other property that it can be no longer separated. If it has lost its identity, the beneficial owner must, and under other circumstances may, resort to the personal liability of the wrongdoing trustee. *Mutual Acc. Ass'n v. Jacobs*, 302.
13. **A VOLUNTARY COMPLETED TRUST IS VALID** and may be enforced in equity though the beneficiary did not assent to nor have notice of it. *Connecticut River Sav. Bank v. Albee*, 946.
14. **IF A FATHER DEPOSITS MONEY IN A SAVINGS BANK IN THE NAME OF HIS SON**, designates himself as trustee, and takes a deposit book in the name of such son and himself as trustee, this transaction creates a voluntary trust in favor of the son, though the father retains possession of the book, depositing other moneys thereon and drawing out various sums as trustee. *Connecticut River Sav. Bank v. Albee*, 946.
15. **VOLUNTARY TRUSTS — EVIDENCE.** — If a father deposits money in bank in the name of his son designating himself as trustee, his subsequent declarations are not admissible for the purpose of showing that he did not intend to create a trust in favor of his son. *Connecticut River Sav. Bank v. Albee*, 946.

See BANKS, 1; CORPORATIONS, 12.

#### ULTRA VIRES.

See CORPORATIONS, 9.

#### UNDUE INFLUENCE.

See WILLS, 9.

#### UNITED STATES.

See PARTITION, 4.

#### USAGE.

See INSURANCE, 3.

#### USURY.

1. **EFFECT OF CONTRACT FOR.** — While a contract calling for usurious interest is not void, still the creditor forfeits the whole interest, and the legal interest is collectible from the debtor and goes into the school fund. *Ferguson v. Soden*, 512.
2. **RIGHT TO RECOVER.** — One who voluntarily pays unlawful interest upon an usurious contract cannot recover it by suit. *Ferguson v. Soden*, 512.
3. **DEFENSE OF TO MORTGAGE WHEN LOST.** — So long as a mortgage providing for usurious interest remains executory, the mortgagor may avail himself of the usury as a defense; but when the mortgage con-



tract is executed by foreclosure or otherwise, and when others have in good faith acquired an interest in the property, the defense of usury is no longer available to the mortgagor, and this is especially the case when he has been guilty of laches. *Ferguson v. Soden*, 512.

4. **EFFECT ON MORTGAGE—RESTRAINING SALE.**—When usury does not invalidate a mortgage, a sale under the power contained therein will not be enjoined by reason of it, unless the debtor brings into court the principal and legal interest due. *Ferguson v. Soden*, 512.

See **INTEREST**, 2.

#### VARIANCE.

See **APPEAL**, 4.

#### VENDOR AND PURCHASER.

1. **VENDEE OF LAND IGNORANT OF ITS LOCATION MAY RELY ON REPRESENTATIONS OF VENDOR.**—Where an intending purchaser of land is ignorant of its true location, he has the right to rely upon a positive statement made by the vendor in that respect, and hold him responsible if it proves untrue, even though there was no intentional misrepresentation. *Gunther v. Ulrich*, 32.
2. **MISREPRESENTATION BY VENDOR OF LAND AS TO ITS LOCATION, LIABILITY FOR.**—Where the agent of the vendors of land makes a false statement as to its location and thereby induces the vendee to purchase it, both the vendors and the agent will be liable to the vendee for the difference in value between the land which he believed he was getting and that which he was actually purchasing, although neither the agent nor the vendors by any artifice prevented or dissuaded him from making inquiry in reference to the true location which he had present means of ascertaining. *Gunther v. Ulrich*, 32.

See **BROKERS**; **ESTOPPEL**, 1; **EVIDENCE**, 10; **NEGOTIABLE INSTRUMENTS**, 1; **SALES**.

#### VERDICT.

See **APPEAL**, 5; **RAILROADS**, 25; **TRIAL**, 13.

#### VICE PRINCIPAL.

See **MASTER AND SERVANT**, 17; **RAILROADS**, 39.

#### VILLAGES.

See **QUO WARRANTO**, 2-6.

#### WAIVER.

See **ELECTIONS**, 13; **ESTOPPEL**, 1; **INSURANCE**, 2-5, 7, 8; **JURISDICTION**, 4; **MECHANIC'S LIEN**, 13; **PARTIES**, 2; **PARTNERSHIP**, 4; **RAILROADS**, 17; **SALES**, 4; **TRIAL**, 12.

#### WAREHOUSEMEN.

1. **WAREHOUSE RECEIPTS—WARRANTY IMPLIED BY AS TO NATURE OF ARTICLES.**—If a warehouseman issues a receipt purporting to be for a specified number of barrels of Portland cement, all that he asserts thereby is that he has received merchandise in barrels bearing the same outward appearance as do barrels in which are packed merchandise of the character described in the receipt, and that there is nothing unusual or out of the

ordinary way of business in the marks, appearance, signs, labels, or character of the barrels from that in which the goods of the character described in the receipt are usually transported, and that they have been represented to him and that he believes them to be as described. *Dean v. Driggs*, 721.

2. **WAREHOUSE RECEIPTS.** — REPRESENTATIONS OF A WAREHOUSE RECEIPT OR BILL OF LADING WHICH SHOULD BE HELD TO BE WARRANTIES, should be confined usually to those which the warehouseman or carrier may ordinarily be assumed to have knowledge of or which he or his agents ought to know. *Dean v. Driggs*, 721.
3. **LIABILITY OF.** — A statute prohibiting a warehouseman from issuing receipts for any goods unless actually received in his store or upon his premises, does not transform him from a mere depositary to an insurer of the kind and quality of goods deposited with him; nor does it make him answerable for packages receipted for as containing a certain article and found upon examination to be spurious. *Dean v. Driggs*, 721.

### WARRANTY.

See WAREHOUSEMEN, 2.

### WATERCOURSES.

1. **A WATERCOURSE** is a channel or canal for the conveyance of water, particularly in draining lands; and may be natural or artificial. It consists of bed, banks, and water, though the water need not flow continuously. There must be a distinct channel with well-defined banks cut through the turf and into the soil by the flow of the water, presenting on a casual glance to every eye the unmistakable evidence of the frequent action of running water, and not a mere depression. *Hawley v. Sheldon*, 942.
2. **TERMINATION OF.** — If a watercourse runs to a point and there spreads over the adjacent land without running in any different channel, it ceases to be a watercourse, and one who by dams and other obstructions prevents it from running over his land is not guilty of obstructing a watercourse. *Hawley v. Sheldon*, 942.
3. **WATER RIGHTS OF PRIOR APPROPRIATOR.** — A PRIOR APPROPRIATOR of the water of a stream has a right to insist as against the junior appropriator that all the water remain in the stream in order to carry the flow down to his point of diversion, although a large portion of it is lost by evaporation and percolation, only so long as any useful quantity thereof would reach his point of diversion if allowed to remain. *Raymond v. Winsette*, 604.
4. **WATER RIGHTS AS BETWEEN SENIOR AND JUNIOR APPROPRIATORS.** — A prior appropriator of the waters of a stream may insist as against the junior appropriator that all the water be allowed to remain in the stream only so long as some useful quantity thereof will reach such prior appropriator's point of diversion, and when it is shown that the water diverted by the junior appropriator for a useful purpose would, if not so diverted, sink and disappear before reaching the prior appropriator's point of diversion, the latter is not entitled to an injunction to compel the former to allow all the water to remain in the stream. *Raymond v. Winsette*, 604.
5. **WATER RIGHTS — PRIOR APPROPRIATION — DIVERSION — INJUNCTION.** An upper owner and prior appropriator of the water of a stream for irrigation purposes is not entitled to enjoin a lower owner from divert-  
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ing a portion of it during the irrigating season, on the ground that if such water was not diverted it might, in the event of an unusual flow in the stream, reach the land of such lower owner, when it appears that in the natural and usual flow of such stream no water reaches his land, for the reason that it sinks and the channel of the stream becomes entirely dry between the lands of such owners during the irrigating season. *Raymond v. Wimslette*, 604.

6. **WATER RIGHTS—DIVERSION—INJUNCTION.**—An upper proprietor and junior appropriator will not be enjoined from diverting a certain amount of the waters of a creek for irrigation purposes, when it appears that such creek is not a running stream during the irrigating season, and that during such season none of the waters flowing in such creek at his point of diversion can in the course of its natural flow reach plaintiff's ranch fifteen miles below, because the waters of such creek during the irrigating season of each year sink into the ground at a point three miles below the defendant's ranch, and from there to a point one mile below plaintiff's ranch the channel of the creek is entirely dry in places. *Raymond v. Wimslette*, 604.

### WILLS.

1. **A WILL SHOULD POSSESS FOUR REQUISITES.**—It should be: 1. In writing signed by the testator or attested with his mark; 2. Attested by two credible witnesses who sign it as such in the presence of the testator and by his request; 3. Proved by the oath of such witnesses or of one of them to have been subscribed by the testator and by them; and, 4. The testator should be of sound mind when he executed the will. *Robinson v. Brewster*, 265.
2. **WHAT IS.**—A writing duly signed by the person executing it and attested by witnesses which declares that he, in consideration of one dollar, as well as his affection, assigns and sets over to his daughter all his property, real and personal, to have the same after his death, is a will. *Robinson v. Brewster*, 265.
3. **THAT A TESTATOR INTENDED AN INSTRUMENT EXECUTED BY HIM TO BE HIS WILL** is sufficiently manifested by his telling a third person that he was making his will and requesting such third person to witness it and signing it a few moments afterwards. *Robinson v. Brewster*, 265.
4. **SIGNATURE BY MARK.**—A statute authorizing the execution of a will by a mark can only mean such a mark as is made with intent to execute the will thereby. *Plate's Estate*, 805.
5. **THE MARK OF A TESTATOR** to his will is just as effective as when he signs his name. *Robinson v. Brewster*, 265.
6. **SIGNING OF—SUFFICIENCY—INTENT MUST EXIST.**—The testator's signature to his will by initials only may be a valid execution thereof, provided an intent to execute is apparent; but in the absence of any sudden incapacity to complete the signature by reason of the extremity of last sickness, it is an indispensable element to the validity of the signature actually made that it shall be full and complete according to the intent and understanding of the testator. *Plate's Estate*, 805.
7. **SIGNING OF—SUFFICIENCY.**—When it is shown that a testator started to write his name as his signature to his will, but after making a stroke with a pen, stopped and said: "I can't sign it now," and such stroke bears no resemblance to the form of a mark ordinarily used for a signature, while two witnesses profess to recognize it as the first part of the initial of his first name, an intention on the part of the testator

to execute the will either by attaching a mark or his signature is affirmatively disproved. *Plate's Estate*, 805.

8. A TESTATOR IS PRESUMED TO HAVE KNOWN THE CONTENTS of a will when his execution of it is proved in such manner as the statute requires. *Robinson v. Brewster*, 265.
9. EVIDENCE tending to prove that the testator undertook to devise property which did not belong to him, is admissible as bearing upon the issues of testamentary capacity and of undue influence. *Re Buckman's Will*, 931.
10. PAROL DECLARATIONS OF A TESTATOR made before or after the execution of a will cannot be admitted in evidence for the purpose of invalidating it, but may be received for the purpose of showing his knowledge of its contents when it is claimed that he was imposed upon by not being informed thereof. *Robinson v. Brewster*, 265.
11. WITNESSES TO A WILL NEED NOT SUBSCRIBE ANY FORMAL CLAUSES OF ATTESTATION. *Robinson v. Brewster*, 265.  
See WITNESSES, 6.

#### WITNESSES.

1. EXPERT WHO IS. — To render the opinion of a witness admissible as expert evidence, he must appear to have special knowledge of the subject under inquiry. *Laing v. United New Jersey R. R. etc. Co.*, 682.
2. EXPERT EVIDENCE — VALUE OF TITLE AND DAMAGES TO LAND. — An ordinary real estate agent is not competent to give his opinion as an expert as to the value of the private title in a strip of land forming part of the public highway, nor as to the amount of damage done to an abutting owner by appropriating such strip of land to railroad purposes in the absence of any showing that he has special knowledge on these particular subjects. *Laing v. United New Jersey R. R. etc. Co.*, 682.
3. EXPERT EVIDENCE — DAMAGES FROM CONSTRUCTION OF RAILROAD. — In an action to recover for damages to property arising from the location and construction of a railroad, a witness who has knowledge of the property, is competent to testify as to whether or not its value has been increased or diminished by the construction of the road, and if diminished thereby, he is competent to testify as to the amount. *Beck v. Pennsylvania etc. R. R. Co.*, 822.
4. COMPETENCY — DEATH OF CONTRACTING AGENT. — The rule that the death of the contracting agent of a surviving party to a contract in suit excludes the evidence of the other contracting party does not extend further than to transactions had by such party with the deceased agent of the other party acting in behalf of his principal. *First Nat. Bank v. Payne*, 520.
5. COMPETENCY — DEATH OF CONTRACTING PARTY. — In an action by a bank seeking to charge certain indorsers as makers of a note executed by a maker since deceased and payable to his own order, the cashier of the bank who acted as its contracting agent in the matter being also dead, the bookkeeper of the bank is competent to testify that the note had not been indorsed by such maker at the time it was indorsed by the parties sought to be charged as makers, and they are competent to testify in rebuttal that it had been so indorsed. *First Nat. Bank v. Payne*, 520.



6. **THE CONTESTANT OF A WILL WHO IS ALSO A LEGATEE THEREUNDER** is competent as a witness in proceedings respecting its admission to probate. *Re Buckman's Will*, 931.
7. **A HUSBAND, AFTER THE DEATH OF HIS WIFE, IS A COMPETENT WITNESS** with respect to matters of a nonconfidential nature, not affecting her character. *Re Buckman's Will*, 931.
8. **HUSBAND AND WIFE.** — **A HUSBAND, AFTER THE DEATH OF HIS WIFE,** is a competent witness to prove an agreement made between him and her in the presence of a third person, relative to their respective interests in real property. Such an agreement is a business transaction, and not a confidential communication. *Re Buckman's Will*, 931.
9. **PRIVILEGE OF WITNESSES.** — **A NONRESIDENT IN ATTENDANCE IN COURT AS WITNESS** in a suit to which he is not a party is exempt from the service of process in another suit. *Capwell v. Sipe*, 890.

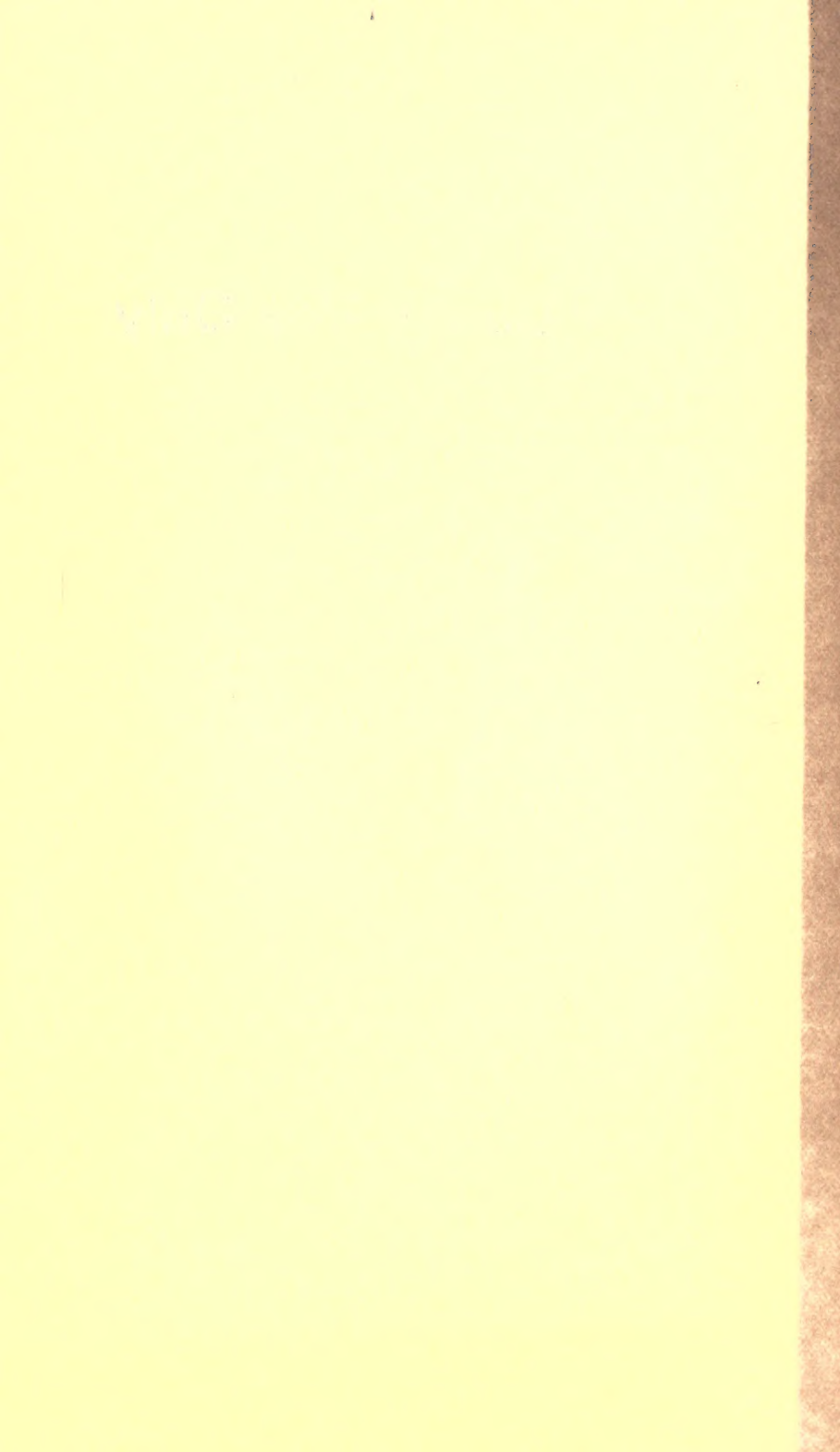
See PARTIES, 3; PLEADING, 4; TRIAL, 6-8.

### WORDS AND PHRASES.

See DEFINITIONS.









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